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45 Cal.2d 276

F. Lohr BAUER and Elizabeth Bauer,
Plaintiffs and Appellants,

v.

COUNTY OF VENTURA, Saticoy Storm Drain Maintenance District of the County of Ventura, Board of Supervisors of the County of Ventura, Edward S. Pierce, Robert W. Lefever, R. E. Barrett, L. A. Price, Edwin L. Carty, John Doe, Jane Doe, and John Doe Company, Defendants and Respondents.

L. A. 23362.

Supreme Court of California.
In Bank.

Oct. 21, 1955.

Rehearing Denied Nov. 16, 1955.

Action for damages from inundation of plaintiffs' land by waters overflowing from defendants' storm drain ditch. From a judgment of the Superior Court, Ventura County, Ernest D. Wagner, J., dismissing the action, plaintiffs appealed. The Supreme Court, Shenk, P. J., held that the complaint stated a cause of action against defendant county, storm drain maintenance district, and county board of supervisors under constitutional provision that private property shall not be taken or damaged for public use without just compensation and Government Code section declaring local agency liable for injuries resulting from dangerous or defective condition of public property, but stated no cause of action against individual members of county board.

Judgment reversed in part with directions, and affirmed in part.

Opinion, Cal.App., 272 P.2d 916, vacated.

289 P.2d—1

Cal.Rep. 289-290 P.2d—1

1. Eminent Domain ⇨1

Taking of private property by state for public use is an attribute of sovereignty. West's Ann.Const. art. 1, § 14.

2. Eminent Domain ⇨75

Generally, the state, in taking private property for public use, must follow constitutional procedure requiring payment of compensation to owner before dispossessing him of property. West's Ann.Const. art. 1, § 14.

3. Eminent Domain ⇨271

When constitutional requirement that compensation for taking of private property be paid to owner before dispossessing him is not fully satisfied, action will lie against state to recover value of property taken. West's Ann.Const. art. 1, § 14.

4. Eminent Domain ⇨271

The constitutional provision that private property shall not be taken or damaged for public use without just compensation is designed, not to create new causes of action, but only to give private property owner a remedy he would not otherwise have against state for unlawful dispossession or destruction of or damage to his property, so that state is not liable thereunder for property damage which is *damnum absque injuria*. West's Ann.Const. art. 1, § 14.

5. Eminent Domain ⇨270

An owner of private property taken or damaged by state for public use has no claim against state for compensation under Constitution, if he would have no cause of action against a private citizen on same facts. West's Ann.Const. art. 1, § 14.

6. Eminent Domain ¶70

The effect of constitutional provision that private property shall not be taken or damaged for public use without just compensation is to waive state's immunity from liability for taking or damaging of property for public purposes. West's Ann.Const. art. 1, § 14.

7. Eminent Domain ¶270

To bring complaint within constitutional provision that private property shall not be taken or damaged for public use without just compensation, plaintiff must show, not only taking or damaging of his property for public use, but also that it is actionable under general law. West's Ann.Const. art. 1, § 14.

8. Waters and Water Courses ¶84

Diversion of water from its natural course, resulting in damage to adjacent property, is actionable.

9. Waters and Water Courses ¶79

Mere improvement within existing watercourse, which accelerates rather than diverts flow of water, does not give rise to cause of action for damage resulting from overflow.

10. Waters and Water Courses ¶79, 119(3)

Straightening, widening or deepening channel of stream to improve drainage or collecting surface waters for discharge into their natural stream entails no diversion in event of resulting overflow, but to escape liability for damage to inundated adjacent property, such improvements must follow natural drainage of country or natural stream.

11. Eminent Domain ¶13

"Public use" within constitutional provision that private property shall not be taken or damaged for public use without just compensation is a use concerning whole community or promoting general interest in its relation to any legitimate object of government. West's Ann.Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

12. Eminent Domain ¶13

To constitute "public use" within constitutional provision that private property

shall not be taken or damaged for public use without just compensation, a duty must fall on person or corporation holding property appropriated by eminent domain to furnish public with use intended and public must be entitled to use or enjoy property. West's Ann.Const. art. 1, § 14.

13. Eminent Domain ¶31

Ordinary taking of private property for purpose of constructing storm drainage systems is taking for "public use" within constitutional provision that private property shall not be taken for public use without just compensation. West's Ann.Const. art. 1, § 14.

14. Eminent Domain ¶17

Taking or damaging of private property for maintenance of existing public improvement involving a deliberate act for direct or indirect accomplishment of purpose of improvement as whole constitutes taking or damaging of property for "public use," so as to entitle owner thereof to compensation under Constitution. West's Ann. Const. art. 1, § 14.

15. Eminent Domain ¶2(3)

Damage resulting from negligent maintenance, rather than original construction, of public improvement, such as storm drainage system, to adjacent property, is not beyond purview of constitutional provision that private property shall not be taken or damaged for public use without just compensation. West's Ann.Const. art. 1, § 14.

16. Eminent Domain ¶2(3)

Application of constitutional provision that private property shall not be taken or damaged for public use without just compensation to negligent maintenance of public improvement, as in raising storm drain ditch bank so as to cause overflow of water onto adjacent property, is not precluded as subjecting state to general tort liability to property owner for negligent acts in routine operation of ditch, such act being deliberate one for purpose of fulfilling public objects of project as whole, whereas damage resulting from negligence in routine operation of improvement has no relation to function of project as conceived. West's Ann.Const. art. 1, § 14.

17. Eminent Domain ⇨293(1)

In action for damages from inundation of plaintiffs' land by waters from defendants' storm drain ditch, allegations of complaint that collection of debris and stumps in ditch and placing of pipe across it, thereby obstructing flow of water, were parts of construction of ditch and constituted taking of plaintiffs' land for public use properly characterized obstructions as part of plan for maintenance or construction of ditch, not mere negligent operation thereof, so as to render county and storm drain maintenance district liable to plaintiffs for compensation. West's Ann.Const. art. 1, § 14.

18. Eminent Domain ⇨293(1)

In action for damages from inundation of plaintiffs' land by water from storm drain ditch built and maintained by defendants county and storm drain maintenance district, complaint was not demurrable as failing to state cause of action under constitutional provision that private property shall not be taken or damaged for public use without just compensation. West's Ann. Const. art. 1, § 14.

19. Drains ⇨63

Allegations of complaint that storm drain ditch was constructed and maintained by defendants county and storm drain maintenance district in defective condition, as proximate result of which plaintiffs' land was damaged by inundation of water overflowing ditch, and that defendants failed to remedy such condition within reasonable time after learning thereof, were sufficient to state cause of action under statute declaring local agency liable for injuries resulting from defective condition of public property, if board or person authorized to remedy condition fails to do so within reasonable time after acquiring knowledge or receiving notice thereof. West's Ann. Gov.Code, § 53051.

20. Drains ⇨63

In action against county and storm drain maintenance district for damages from inundation of plaintiffs' land by water from defendants' storm drain ditch, complaint was not defective because of failure to allege that ditch, claimed by plaintiffs to

have been kept in dangerous and defective condition, was property owned by county, as drainage system and ditch were "public works" and hence "public property" within statute defining such property as public street, highway, building, park, grounds, works, or property. West's Ann.Gov.Code, §§ 53050, 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Property" and "Public Works".

21. Drains ⇨63

The Government Code section waiving immunity of local agency defined therein as including city, county, or school district, from suit for injuries resulting from dangerous or defective condition of public property, applies to county storm drain maintenance district, which is not a governmental agency separate and distinct from county and is not given power to sue and be sued by act creating it. West's Ann. Gov.Code, §§ 53050, 53051; Storm Drain Maintenance District Act, §§ 1, 5, 7, West's Ann. Water Code, Appendix.

22. Drains ⇨63

A county storm drain maintenance district was improperly joined as party defendant in action against county and board of supervisors thereof for damages from inundation of plaintiffs' land by waters from defendants' storm drain ditch, as neither legislative intention, nor stated purpose of Storm Drain Maintenance District Act requires districts created pursuant thereto to enjoy legal personality separate from county. Storm Drain Maintenance District Act, § 1 et seq., West's Ann. Water Code, Appendix.

23. Counties ⇨59

In action for damages from inundation of plaintiffs' land by waters from defendants' storm drain ditch, complaint failing to allege that defendant members of defendant county board of supervisors individually had authority, duty and ability to remedy defective condition of ditch at defendant county's expense, had available funds for such purpose, and failed to give adequate warning of condition or exercise due care to avoid damage to plaintiffs' prop-

erty, stated no cause of action against such members, though action was for injury arising out of construction and maintenance of public improvement under board's direct supervision. West's Ann.Gov.Code, § 1953 (a-e).

24. Pleading Ⓒ225(1)

In action against storm drain maintenance district, county board of supervisors and individual members thereof for damages from inundation of plaintiffs' land by waters from defendants' storm drain ditch, trial court properly sustained board members' demurrer to complaint for failure to allege that they individually had authority and duty to remedy defective condition of ditch at county's expense, without leave to amend, as plaintiffs could not allege such fact because no board member, acting individually, has such duty or authority. West's Ann.Gov.Code, § 1953(c); Storm Drain Maintenance District Act, § 1 et seq., West's Ann. Water Code, Appendix.

25. Pleading Ⓒ18

The essence of requirement that complaint be certain, unambiguous and intelligible is fairness in pleading to give defendant such notice by complaint that he may prepare his case.

26. Pleading Ⓒ192(2)

In action for damages from inundation of plaintiffs' land by waters from defendants' storm drain ditch, complaint was not demurrable as uncertain, ambiguous and unintelligible because it referred in one instance to a pipe as obstruction in ditch and in other instances to "obstructions" without precise specification.

William T. Selby, Ventura, for appellants.

Roy A. Gustafson, Dist. Atty., Bruce A. Thompson, Deputy Dist. Atty., Ventura, and Harry E. Sackett, Los Angeles, for respondents.

SHENK, Presiding Justice.

This is an appeal from a judgment of dismissal in an action to recover damages resulting from the alleged wrongful inunda-

tion of the property of the plaintiffs, Mr. and Mrs. Bauer. They own real property located in the vicinity of a watercourse and storm drainage system controlled by the defendants in Ventura County. On March 15, 1952 the waters contained in the defendants' storm drain ditch overflowed upon and damaged plaintiffs' land. Principally upon the theories of inverse condemnation and the tort liability of the defendants, the plaintiffs commenced this action to recover the resulting damages.

The trial court's judgment of dismissal was based upon its orders sustaining demurrers of each defendant to the amended complaint. General and special demurrers of the County were sustained with leave to amend within ten days. The plaintiffs having failed to amend within that time, the action was dismissed as against the County. General demurrers of the Saticoy Storm Drain Maintenance District and the individual members of the County Board of Supervisors were sustained without leave to amend.

The plaintiffs allege that in 1939 the County and District built a system of ditches and levees diverting the waters of the Franklin Barranca, a natural watercourse, away from their natural stream. In its natural course the stream flowed in a direction away from the plaintiffs' land at an approximate distance of one quarter of a mile. The plaintiffs' land and the intervening tract between it and the barranca sloped downward. Because the barranca in its natural state was lower than the plaintiffs' land, the natural overflow, if any, would flow away from and never towards the plaintiffs' land. This was also the case with the ditches. Since, from the viewpoint of the plaintiffs' tract, the far side of the ditch was lower than the level of the plaintiffs' land, any overflow from the ditch would flow downward and away. Then, from 1950 to March 15, 1952, the lower bank at the far side of the ditch was raised by the defendants who placed thereon a quantity of debris and soil which had accumulated in the bottom of the ditch. A pipe was placed across the ditch in such a way that the water flow was obstructed. With the lower bank of the ditch

thus raised, its highest points were above the level of the plaintiffs' land. No bank or levee was constructed upon the bank nearest the plaintiffs which would keep the waters in the ditch or continue to permit them to overflow only in a direction away from the plaintiffs' land.

The complaint alleges that as the proximate result of this dangerous and defective condition, the negligent construction, the maintenance and condition of the ditch, the obstructions therein and the acts of the defendants in constructing the ditch, banks and levees, water overflowed onto and damaged plaintiffs' property. Plaintiffs' claim filed with the County was denied. They have received no compensation for the taking and damaging of their property for such public use. They further allege that the work described was done by and under the control of the defendants County and District, and from 1950 to 1952 the work was at all times under the direct supervision of the defendant members of the Board of Supervisors.

The plaintiffs contend that these allegations, assumed to be true for the purpose of considering the demurrers, state a cause of action.

[1-3] California Constitution Article 1, section 14 provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *." The taking of private property by the state for a public use is universally recognized as one of the indisputable attributes of sovereignty. *Moran v. Ross*, 79 Cal. 159, 21 P. 547; *Gilmer v. Lime Point*, 18 Cal. 229. But the state must, except under special circumstances not here present, follow the constitutional procedure which requires the payment of compensation before the private owner is dispossessed of his property. When this requirement is not fully satisfied, an action will lie against the state to recover the value of the property so taken. *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *Rose v. California*, 19 Cal.2d 713, 123 P.2d 505. Based upon section 14, the appropriate action is

sometimes designated a proceeding in inverse condemnation.

[4-7] Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14. *Clement v. State Reclamation Board*, 35 Cal.2d 628, 220 P.2d 897; *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950; *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1; *San Gabriel Valley Country Club v. County of Los Angeles*, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, 14 P. 625. The effect of section 14 is to waive the immunity of the state where property is taken or damaged for public purposes. To bring his complaint within the provision, the plaintiff must show not only a taking or damaging for a public use but also that it is actionable under the general law.

[8-10] It is well established that the diversion of water from its natural course resulting in damage to adjacent property is actionable. *Clement v. State Reclamation Board*, supra, 35 Cal.2d 628, 220 P.2d 897; *House v. Los Angeles County Flood Control District*, supra, 25 Cal.2d 384, 153 P.2d 950; *Pacific Seaside Home for Children v. Newport Protection District*, 190 Cal. 544, 213 P. 967; *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 P. 899; *Smith v. City of Los Angeles*, 66 Cal.App.2d 562, 153 P.2d 69; see *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717; *Massetti v. Madera Canal & Irr. Co.*, 20 Cal.App.2d 708, 68 P.2d 260; *Tormey v. Anderson-Cottonwood Irr. Dist.*, 53 Cal.App. 559, 200 P. 814. Mere improvement within an existing watercourse which accelerates rather than diverts the flow does not give rise to a cause of action when damage results from an

overflow. Straightening, widening or deepening the channel of a stream to improve the drainage or the collection of surface waters for discharge into their natural stream entails no diversion in the event of a resulting overflow. But to escape liability the improvements thus described must follow the natural drainage of the country or the natural stream. *Archer v. City of Los Angeles*, supra; *San Gabriel Valley Country Club v. County of Los Angeles*, supra. In the present case, the plaintiffs' allegations show that the waters of the barranca were diverted away from their natural stream into a ditch running close to the plaintiffs' land, and then permitted to overflow and back up in a direction exactly opposite from their natural flow.

The defendants contend that the damage resulting from negligent maintenance rather than the original construction of a public improvement is beyond the scope of protection offered by section 14. They point to the plaintiffs' allegations that the County and District negligently and carelessly permitted the bank of the ditch to be raised on the far side, permitted obstructions to be placed in the ditch, and allowed debris and stumps to collect and be placed therein. This, it is argued, is negligent maintenance and a consequential property loss is not an express taking or damaging for a public use.

[11-13] "Public use" within the meaning of section 14 is defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government. *Gilmer v. Lime Point*, supra, 18 Cal. 229. To make a use public in character, a duty must fall on the person or corporation holding the property appropriated by eminent domain to furnish the public with the use intended and the public must be entitled to use or enjoy the property taken. *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal.App. 556, 178 P. 150; see *Thayer v. California Development Co.*, 164 Cal. 117, 128 P. 21. Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The

reasons for such a taking are obviously to provide adequate normal drainage, to control flood waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes.

The drainage system in the present case was constructed pursuant to the Storm Drain Maintenance District Act, Stats. 1937, Ch. 265, p. 566, amended by Stats. 1949, Ch. 496, p. 854; Stats. 1953, Ch. 546, § 1, p. 1805; Water Code, Uncodified Acts, Act 2208, p. 179, which enables County Boards of Supervisors to create and govern a storm drainage maintenance district whenever the maintenance of storm drainage improvements or other watercourses or drainage channels within a territory is not otherwise provided for by law. The act provides that "* * * Such maintenance may include any or all of the following work: the cleaning, repairing, renewal, replacement, widening or straightening of existing storm drain structures, watercourses or drainage channels, and the installation of appurtenant structures when necessary for the adequate functioning of such drainage facilities. Said district may also construct additional storm drain channels or structures and maintain the same whenever necessary to provide proper and adequate drainage of the surface waters in the district." Storm Drain Maintenance District Act, supra, § 1. The proper maintenance of existing drainage systems thus became a matter of public policy and the subject of an independent statute.

[14] The consequences of faulty maintenance may assume public importance equal in some instances to the original construction. The ultimate objects of construction and maintenance are similar if not coextensive. In some instances, where the original construction artificially diverts a stream from its natural course, more risk of damage to surrounding property may be created from improper maintenance than would exist had the stream been permitted to remain in its natural state. If the original construction had as its function the expeditious drainage of surface waters, then that public purpose is served equally

by the proper maintenance of the improvement once it is made. It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation.

[15] The precise purpose of the defendants' raising the bank on the far side of the ditch is not made clear in the complaint. But it falls within that category of drainage maintenance described in the statute. The rather obscure line between the concepts of "construction" and "maintenance" is disclosed by any attempt to define them in mutually exclusive terms and to characterize the raising of a bank of an existing ditch as one or the other. If the "maintenance" consists of an alteration of the ditch by raising one of the banks, then in a material sense "maintenance" becomes a specie of "construction." Had the bank been raised during the original construction it would have been part of the overall project and hence within the rule of *Clement v. State Reclamation Board*, supra, 35 Cal.2d 628, 220 P.2d 897, and *House v. Los Angeles County Flood Control District*, supra, 25 Cal.2d 384, 153 P.2d 950. The defendants' argument that damage from maintenance is beyond the purview of section 14 invites an artificial distinction which would turn simply upon the passage of time between the original construction and the subsequent alteration and must therefore be rejected.

[16] Nor does this application of section 14 subject the state to general tort liability under the theory of eminent domain. The defendants contend that the imposition of a duty to compensate for improper maintenance of a public improvement would impose liability for the act of negligently forgetting to close a sluice gate or other negligent acts committed during the routine day to day operation of the public improvement. But the raising of a ditch bank appears on its face to be a deliberate act carrying with it the purpose of ful-

filling one or another of the public objects of the project as a whole. Here the raising of the bank is not an accident or an act in itself resulting from carelessness. It is deliberate. The damage to property in this instance resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property. Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case. See *Miller v. City of Palo Alto*, 208 Cal. 74, 280 P. 108; *McNeil v. City of Montague*, 124 Cal.App.2d 326, 268 P.2d 497; *Western Assurance Co. v. Sacramento & S. J. Drainage District*, 72 Cal. App. 68, 237 P. 59; Annotation, 2 A.L.R.2d 677.

[17, 18] The plaintiffs, as stated, also allege that the collection of debris and stumps in the ditch raised an obstruction which caused the water to back up on their land. If this was due to the mere negligent operation of the ditch system, it is not within the scope of liability as a taking or damaging for a public use under section 14. If, on the other hand, the obstruction of the ditch was in some way part of the plan of maintenance or construction, then liability would attach because the means of carrying out the plan of construction and maintenance are immaterial. See *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717; *Commonwealth v. Kelley*, 314 Ky. 581, 236 S.W.2d 695; *Letcher County v. Hogg*, 209 Ky. 182, 272 S.W. 423; *Stith v. Louisville & N. R. Co.*, 109 Ky. 168, 58 S.W. 600. The allegations in the complaint in the present case make the plaintiffs' theory clear. They allege that the collection of debris and stumps was part of the construction and that the taking was for a public use. The presence of debris and stumps was therefore properly characterized to bring it within the scope of section 14. This analysis would also apply to plaintiffs' allegation that a pipe placed across the ditch similarly obstructed the flow of water. It follows that the demur-

rers should not have been sustained on the ground that the complaint fails to state a cause of action under section 14.

[19] Plaintiffs next contend that the complaint states a cause of action in tort, independent of the eminent domain theory, as against the defendant County. Section 53051 of the Government Code waives the immunity of the County from suit in the following terms: "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition." Complying with these requirements, the complaint alleges, as indicated, that on March 15, 1952 the ditch was constructed and maintained in a dangerous and defective condition; that as the proximate result thereof plaintiffs' property was damaged; that each of the defendants had knowledge thereof and failed to remedy said condition within a reasonable time after such knowledge. These are sufficient allegations to state a cause of action under Government Code, § 53051. See *Silva v. Fresno County*, 63 Cal.App.2d 253, 146 P.2d 520.

[20] The defendant County asserts that the complaint is defective for not alleging that the property claimed to be kept in a dangerous and defective condition is property owned by the County. There is no merit in this contention for it ignores the definition of the language of section 53051 found in the Code itself. Section 53050 defines "public property" as meaning "* * * public street, highway, building, park, grounds, works, or property." The drainage system and ditch involved in this case are clearly "public works" and therefore "public property" within the meaning of the Code. *Young v. County of Ventura*, 39 Cal.App.2d 732, 104 P.2d 102. Hence the complaint states a cause of action against the county under Government Code, § 53051.

[21] The defendant District contends that the trial court's order sustaining its demurrer was proper because the District's immunity from suit as a state instrumentality has not been waived under section 53051. The District argues that that section waives immunity only with respect to "local agencies" which are defined in section 53050 to include "* * * city, county, or school district", and the Storm Drain Maintenance District is not such a local agency. This argument, however, rests upon the incorrect assumption that the District is a governmental agency separate and distinct from the County.

A reading of the Storm Drain Maintenance District Act supports the conclusion that the District is a unit created for purposes of taxes and administration. The operational powers of the District are vested in the County Board of Supervisors and other county officers. The Board creates and governs the District, § 1, and has power to enter into contracts for the District, make rules and regulations and do all things necessary to accomplish the purposes of the act, § 5. The Board of Supervisors is given power to acquire and dispose of property for the District but only in the name of the County, § 5. Taxes are levied by the Board of Supervisors but they must be levied and collected at the same time and manner as general county taxes; and when collected are paid into the county treasury to the credit of the District and may be used only for District purposes, § 7. Storm Drain Maintenance Districts created pursuant to the Act are not given the power to sue and be sued; nor are they created as independent public corporations.

[22] In other acts dealing with water control problems, the Legislature made clear provision for the creation of state instrumentalities with separate legal personalities. (See Acts collected in 1 Water Code, Uncodified Acts.) The Ventura County Flood Control Act, 1 Water Code, Uncodified Acts, No. 8955, p. 899 et seq., for example, provides that the "Ventura County Flood Control District is hereby declared to be a body corporate and politic", and the District's powers include: perpetual succession, the power to sue and

be sued, to take title to real and personal property, to incur indebtedness and issue bonds, to levy taxes, to make contracts and to employ labor, § 7. The Storm Drain Maintenance District Act, on the other hand, vests the defendant District's much less extensive powers in the County Board of Supervisors rather than in the District itself. Neither the legislative intention nor the stated purposes of the Storm Drain Maintenance District Act requires the Districts created pursuant thereto to enjoy a legal personality separate from the County. See *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 P. 809; *Mortimer v. Acquisition & Imp. Dist. No. 36*, 105 Cal.App.2d 298, 233 P.2d 113; *Mortimer v. Acquisition & Imp. Dist. No. 36*, 79 Cal. App.2d 404, 180 P.2d 355. It therefore seems clear that the Saticoy Storm Drain Maintenance District was improperly joined as a party defendant.

[23] As against the individual members of the Board of Supervisors, it appears from the allegations of the complaint that in 1939 the system of ditches and levees designed to divert the waters of the Franklin Barranca in a southwesterly direction was wholly under the control of the County of Ventura and the Saticoy Storm Drain Maintenance District; that in "the doing of said work the direction and control thereof was at all times in the years 1950, 1951, and 1952 under the direct supervision of the defendants," the individual members of the Board of Supervisors, naming them; that in March, 1952 the drainage ditch "was constructed and maintained in a dangerous and defective condition. That the Board of Supervisors of the County of Ventura and each of the members thereof and each and all of the defendants failed and neglected to remedy said condition within a reasonable time after such notice or knowledge."

The plaintiffs concede that there is no liability as against the individual members of the Board under the law of eminent domain. Nor is there any allegation that the individual members of the Board exceeded their authority under the Storm Drain Maintenance District Act. Hence the only

appropriate theory under which the plaintiffs could proceed against the board members personally was in accordance with the provisions of Government Code, § 1953. That section provides: "No officer of the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous condition of any public property, unless all of the following first appear: (a) The injury sustained was the direct and proximate result of such defective or dangerous condition. (b) The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner. (c) He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him. (d) Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition. (e) The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition."

It may be assumed that the complaint alleges facts which are sufficient to put in issue the requirements enumerated in subdivisions (a) and (b). But it is not alleged in accordance with subdivision (c) that the supervisors individually had the authority and the duty to remedy the condition at the expense of the county and that funds for that purpose were immediately available to them individually. All that the plaintiffs allege in accordance with subdivision (d) is that the defendants "failed and neglected to remedy said condition within a reasonable time after such notice or knowledge." It is not alleged in accordance with that subdivision that the defendants were able to remedy the defective or dangerous condition or that they failed, as an alternative to remedying the condition, to take reasonable steps to give adequate warning of such condition. Nor is it al-

leged in accordance with subdivision (e) that the plaintiffs were exercising due care to avoid the damage to their property resulting from the defective or dangerous condition. The plaintiffs contend that allegations in accordance with subdivisions (c), (d) and (e) are unnecessary because the present case involves an injury arising out of construction and maintenance of the public improvement under the direct supervision of the Board. They argue that the requirements of those subdivisions must be alleged only where the injury arises out of a defective or dangerous condition due to the negligence of persons not under the defendants' supervision or from accidental or natural causes existing subsequent to the original construction or maintenance, citing *Moore v. Burton*, 75 Cal.App. 395, 242 P. 902. But there is no language in the statute which supports that construction. Section 1953 provides that no liability shall attach unless "all" of the enumerated conditions are shown to exist. The requirements of the individual defendant officers' authority and duty under the law to remedy the defective or dangerous condition, the availability of funds in their hands individually for that purpose, their ability to remedy the condition and failure to do so within a reasonable time or to give adequate warning, and the plaintiffs' exercise of due care in the premises are all material allegations. Anything inferred to the contrary from *Moore v. Burton*, 75 Cal.App. 395, 242 P. 902, is disapproved. Having failed to allege fully the matters contained in subdivisions (c), (d) and (e), the plaintiffs have not stated a cause of action against the individual members of the Board.

[24] Nor have the plaintiffs shown that the trial court abused its discretion in sustaining the individual board members' demurrer without leave to amend. It does not appear that the plaintiffs could allege the substance of subdivision (c) of section 1953 even if they were given another opportunity to amend their complaint, because no board member, acting individually, has the duty and authority to remedy a defec-

tive or dangerous condition at the County's expense. The Storm Drain Maintenance District Act, which authorized the County to undertake the improvement work involved in the present case, empowers only the County Board of Supervisors acting as a body to carry out the improvement and maintenance purposes of the act and to order payment therefor from available public funds. An individual member of the Board of Supervisors has authority neither to undertake improvement work nor to order warrants to be drawn against the District's funds which are paid into the county treasury for the purposes set forth in the act. Hence the trial court properly sustained the board members' demurrer without leave to amend.

[25, 26] Finally, the plaintiffs correctly contend that the trial court should not have sustained the County's special demurrer on the ground that the complaint was uncertain, ambiguous, and unintelligible. The County argues that the complaint was defective because in one instance it refers to a "pipe" as an obstruction in the ditch and in other instances to "obstructions" without precise specification. In this respect the County is insisting upon undue refinement in pleading. This court stated in *Leet v. Union Pacific R. R. Co.*, 25 Cal.2d 605, at page 619, 155 P.2d 42, 49, 158 A.L.R. 1008, that "* * * The essence of the matter is fairness in pleading to give the defendant such notice by the complaint that he may prepare his case." Thus considered, the allegations of the complaint are neither uncertain, ambiguous nor unintelligible.

The judgment in favor of the County of Ventura is reversed with directions to overrule its demurrers. As to the Saticoy Storm Drain Maintenance District and the individual members of the Ventura County Board of Supervisors, the judgment is affirmed, the County of Ventura to bear the costs of appeal.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

45 Cal.2d 317

PEOPLE of the State of California,
Petitioner,
v.

COUNTY OF TULARE, Rodgers L. Moore,
Harry W. Perry, Halver J. Haddock, J.
Malcolm Crawford, John R. Longley, as
Members of the Board of Supervisors of
the County of Tulare; and T. H. Halstead,
as Auditor of the County of Tulare, Re-
spondents.

No. 6640.

Supreme Court of California.
In Bank.

Oct. 27, 1955.

Rehearing Denied Nov. 23, 1955.

Mandamus proceeding brought to com-
pel compliance with order of State Board
of Equalization. The Supreme Court, Mc-
Comb, J. pro tem., held that where county
had previously applied to Superior Court
for relief against Equalization Board's
order directing increased assessments and
that court had assumed jurisdiction and
issued an alternative writ of mandate,
Supreme Court would not take jurisdic-
tion in matter.

Order accordingly.

Gibson, C. J., and Traynor and Spence,
JJ., dissented.

1. Taxation ⇨450(4)

Order of State Board of Equalization
directing that assessed value of taxable
property in county be increased was re-
viewable in superior court under Civil Pro-
cedure Code section providing appropriate
method for reviewing acts of statewide
administrative and quasi-judicial agencies.
West's Ann.Code Civ.Proc. § 1094.5;
West's Ann.Rules on Appeal, rule 56(a)
(1).

2. Courts ⇨209(2)

Where county had previously applied
to superior court for relief against Equal-
ization Board's order directing increased
assessments and that court had assumed
jurisdiction and issued an alternative writ
of mandate, Supreme Court would not take
original jurisdiction in matter at behest of
petitioners seeking issuance of writ of

mandate to compel compliance with Equal-
ization Board's order. West's Ann.Code
Civ.Proc. § 1094.5; West's Ann.Rules on
Appeal, rule 56(a) (1).

3. Courts ⇨209(1)

Where it appears that there is pending
another action in superior court seeking
same result, involving same parties and
same issues, Supreme Court will generally
not assume jurisdiction.

Edmund G. Brown, Atty. Gen., E. G.
Benard, James E. Sabine and Irving H.
Perluss, Asst. Attys. Gen., and Edward
P. Hollingshead, Deputy Atty. Gen., for
petitioner.

Ralph B. Jordan, Jr., County Counsel,
Calvin E. Baldwin, Asst. County Counsel,
Visalia, Holbrook, Tarr, Carter & O'Neill,
W. Sumner Holbrook, Jr., Francis H.
O'Neill, Los Angeles, and Leroy Mc-
Cormick, Visalia, for respondents.

Hutchinson & Quattrin, San Francisco,
as amicus curiae on behalf of respondents.

McCOMB, Justice pro tem.

Petitioner is seeking the issuance of a
writ of mandate to respondents directing
them to increase the assessed valuation of
all taxable property on the local rolls of
Tulare County in compliance with an or-
der of the State Board of Equalization
dated August 15, 1955.

The order in question was issued by the
State Board of Equalization upon findings
made by said board following a hearing
held by it on July 25, 1955, entitled "In the
Matter of the Equalization of the Local
Roll of Tulare County for the Fiscal Year
1955-1956" and conducted pursuant to the
provisions of Article XIII, Section 9,
Constitution of the State of California
and sections 1831-1834 of the Revenue and
Taxation Code.

The board found that the "average ratio
of assessed value to market value of the
taxable property within the County of Tu-
lare is such that the addition of twenty-
three (23) per centum to the valuation of
said county is required to equalize the as-
sessment of the property contained in said

local assessment roll with the assessment of property in the several counties of the State" and ordered that "the assessed value of all taxable property in the local assessment roll for the fiscal year 1955-56 of the County of Tulare, except such property as is not subject to the laws generally applicable to the assessment and equalization of property by reason of specific constitutional provisions relating thereto, be increased by twenty-three (23) per centum."

Also on August 15, 1955, the State Board of Equalization notified the County Auditor and the Board of Supervisors of the County of Tulare, and the City Council of each city in that county, of its order and directed the County Auditor to increase the assessment of all property affected by its order by making the corresponding changes in the assessment roll.

On August 30, 1955, a proceeding was commenced in the Superior Court of Tulare County by the County of Tulare, as plaintiff, against the State Board of Equalization, the members thereof, and the County Auditor of said county. In said action the County of Tulare challenges the regularity of the proceedings before the State Board of Equalization, the findings of the board and the validity of its order. On the same date an alternative writ of mandate was issued in that action by the superior court, directing the board and its members to set aside their order of August 15, 1955, or show cause as to why they had not done so, directing the County Auditor to omit from the county assessment roll the 23 per cent increase as ordered by said board, commanding the board to show cause why its proceedings, insofar as they related to the County of Tulare, should not be reviewed according to the provisions of section 1094.5 of the Code of Civil Procedure, and ordering that pending the determination of said action the order of the board be stayed.

On September 1, 1955, the Board of Supervisors of Tulare County fixed the 1955 tax rate for said county, pursuant to section 2151 of the Revenue and Taxation Code, computing such rates without the 23 per cent increase ordered by the State Board of Equalization. Similarly, on Au-

gust 31, 1955, the City Council of the City of Woodlake in Tulare County, which city collects its taxes on the county roll under the consolidated system of taxation, fixed its tax rate without including in its computation the 23 per cent increase ordered by the board. Each of these levies was made on the last day on which these entities could levy tax rates for 1955, and was in compliance with the mandate of the superior court.

This court issued an alternative writ of mandate returnable September 30, 1955.

[1] The Legislature, in section 1094.5 of the Code of Civil Procedure, has provided an appropriate method of reviewing acts of a statewide administrative and quasi-judicial agency such as the State Board of Equalization. (*Temescal Water Co. v. Department of Public Works*, 44 Cal. 2d 90, 280 P.2d 1.) The action of the State Board of Equalization is reviewable in the superior court pursuant to the provisions of section 1094.5 of the Code of Civil Procedure. (*Temescal Water Co. v. Department of Public Works*, *supra*; *Eastern-Columbia, Inc., v. County of Los Angeles*, 61 Cal.App.2d 734, 745, 43 P.2d 992.)

[2] Also Rule 56(a) (1), Rules on Original Proceedings in Reviewing Courts, 36 Cal.2d 41, provides: "If the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court." In the instant case, application has in fact been made by respondent to the superior court having jurisdiction and that court having assumed jurisdiction, no valid reason appears why this court should take original jurisdiction in the matter. (Cf. *Roma Macaroni Factory v. Giambastiani*, 219 Cal. 435, 436 [1], 27 P.2d 371; *Brougher v. Board of Public Works*, 205 Cal. 426, 440 [6], 271 P. 487.)

[3] Where, as in the instant case, it appears that there is pending another action in the superior court seeking the same result, involving the same parties and the same issues, this court will generally not assume jurisdiction. (*Irvine v. Gibson*, 19

Cal.2d 14, 16 [3], 118 P.2d 812.) When another court with concurrent jurisdiction has assumed the same in an action seeking the same relief between the same parties, this court ordinarily will not assume jurisdiction. (W. R. Grace & Co. v. California Emp. Comm., 24 Cal.2d 720, 727 [2], 151 P. 2d 215; McMullen v. Glenn-Colusa Irr. Dist., 17 Cal.App.2d 696, 701 [6], 62 P.2d 1083.)

The exceptional facts presented in *Perry v. Jordan*, 34 Cal.2d 87, 207 P.2d 47, are not here present. The cited case involved a statewide election, callable at the governor's discretion, for a special or general election, under conditions as to which he could not act while litigation was pending, and in such case the parties were not the same. Therefore, a plea in abatement would not lie. Such is not the situation in this case. In the present case none of the special factors warranting the original writ in the *Perry* case exist. The dispute involved is solely between the State Board of Equalization and the County of Tulare. No question is involved as to the other 13 counties which have been the subject of similar proceedings before the state board because (a) the hearings were conducted separately and (b) the order in question was limited solely to the single county.

For the foregoing reasons the alternative writ heretofore issued is discharged and the petition denied.

SHENK, CARTER and SCHAUER, JJ., concur.

TRAYNOR, Justice (dissenting).

I dissent.

I would issue the peremptory writ forthwith for the following reasons:

(1) The State Board of Equalization not only had jurisdiction but had the duty under the California Constitution to equalize the valuation of taxable property in the several counties, Const. Art. XIII, § 9; Rev. & Tax. Code, § 1831; *People v. Dunn*, 59 Cal. 328, 330-331; *Baldwin v. Ellis*, 68 Cal. 495, 499-500, 9 P. 652, despite the suspension of Chapter 1466, Statutes of 1949. (Stats.1951, ch. 1554; Stats.1953,

ch. 362; Stats.1955, ch. 256; see, 18 Ops. Cal.Atty.Gen. 66.)

(2) There is a compelling necessity for such equalization: (a) State assessed property (largely public utility property) and locally assessed property are taxed at the same rate. Const. Art. XIII, § 14. To prevent discrimination against either class of property in violation of Article XIII, § 1 of the Constitution, both must be assessed at the same level. Since it is implicit in the Board's order that it assesses utility property in Tulare County at a higher level than the County Assessor assesses property in the county, a prima facie case of discrimination against utility property exists if the assessments are not equalized. (b) The amount of school equalization aid (see, Education Code, §§ 7031-7038; Report of the Senate Committee on State and Local Taxation, Part Six, March 1953, pp. 15-17) distributed by the state to school districts depends in part on the assessed value of property in the district. In the current fiscal year more than \$84,000,000 will be distributed by the state to school districts. To prevent discrimination among school districts in the distribution of this aid, intercounty assessments must be at the same level. (c) Equitable assignment of priorities in the advancement of state funds for school construction and uniformity as to repayment of such advances, Ed. Code, §§ 5044.5, 5053 et seq., 7705, 7725 et seq., uniform application of tax rate and bonded indebtedness limitations (e. g. Ed. Code, §§ 6357, 7431), equitable distribution of taxes of districts embracing areas in more than one county (e. g. Ed. Code, § 6381; Health & Safety Code, §§ 14600-14760), and uniform application of householders' and veterans' exemptions, Const. Art. XIII, §§ 1¼, 10½ and real property ownership qualifications of recipients of welfare aid, Welfare & Institutions Code, §§ 1520, 2164, 3047, require intercounty assessments at the same level. Thus, if the Board's order in this case is valid and is not enforced, Tulare County will enjoy a discriminatory advantage with respect to the matters described under (b) and (c) over the thirteen other counties that have

complied with the Board's orders to increase their assessment rolls. (d) Should a state ad valorem tax be levied (see, Const. Art. IV, § 34(a); Rev. & Tax. Code, §§ 28001-28011), intercounty equalization is essential to insure the same level of assessment throughout the state.

(3) Following equalization by the State Board of Equalization the county officials had no discretion to exercise with respect to the board's order but were under a ministerial duty to obey it. *People's Water Co. v. Boromeo*, 31 Cal.App. 270, 272-273, 160 P. 574. Mandamus is the traditional remedy to enforce that duty. *People v. Dunn*, 59 Cal. 328; *Morton v. Broderick*, 118 Cal. 474, 480-481, 50 P. 644.

(4) Since the time schedule established by statute for the delivery of the roll, fixing the tax rate, and the execution of affidavits is directory and not jurisdictional, Rev. & Tax. Code, § 24;¹ *Universal Consolidated Oil Co. v. Byram*, 25 Cal.2d 353, 362-363, 153 P.2d 746; *Ryan v. Byram*, 4 Cal.2d 596, 603-607, 51 P.2d 872; *Whiting Finance Co. v. Hopkins*, 199 Cal. 428, 436, 249 P. 853; *Buswell v. Board of Supervisors, etc.*, 116 Cal. 351, 353-354, 48 P. 226; see, *Steele v. County of San Luis Obispo*, 152 Cal. 785, 786-788, 93 P. 1020, an order of this court to the county officials

to do now what they should have done will not invalidate the tax levy. Refusal of county officials to perform their ministerial duties within the time prescribed cannot frustrate the equalization demanded by the Constitution or render this court impotent to enforce it. Moreover, the contention that it would be an idle act for this court to issue a writ in this case applies with greater force to an order of the Superior Court under section 1094.5 of the Code of Civil Procedure in view of the delay necessarily involved in getting a final determination of this court following an appeal from such an order. If section 1094.5 affords the appropriate remedy in cases of this kind, and if court orders would be futile if not made within the statutory time schedule for completing the taxing process, county officials need only to proceed under that section in the Superior Court to prevent the constitutional provisions for equalization from ever being carried out, for a final determination could not be reached in such proceeding within the time schedule.²

(5) The fact that proceeding No. 47478 is now pending in the Superior Court in Tulare County does not bar the present proceeding. Compelling reasons for an immediate final determination by this court

1. "No act in all the proceedings for raising revenue by taxation is illegal on account of informality or because not completed within the required time."

In *San Diego & A. Ry. Co. v. California State Board of Equalization*, 164 Cal. 41, 43, 127 P. 153, 154, relied on by respondents, the assessment roll had been delivered "in accordance with law." In the present case the assessment roll has not been delivered in accordance with law. The auditor did not enter the changes ordered by the Board, nor did he certify that he had "corrected it as required by the State Board of Equalization." Rev. & Tax. Code, § 2601.

2. The equalization of the local roll by the Board of Supervisors is not completed until the third Monday in July, Rev. & Tax. Code, § 1603, and no action can be taken by the State Board of Equalization on that roll until after that time. *Koch v. Board of Supervisors*, 138 Cal.App. 343, 348, 32 P.2d 163. The State Board

of Equalization sits from the third Monday in July to and including the third Monday in August, and it is during that time that it is required to equalize the valuation of the taxable property in the several counties of the state. Rev. & Tax. Code, § 1831; Admin. Code, Title 18, Rule 2700. On or before September 1st of each year the County Board of Supervisors fixes the rates of county and district taxes. Government Code, § 29120. The auditor must deliver the secured roll "corrected * * * as required by the State Board of Equalization" on or before October 1st. Rev. & Tax. Code, § 2601. One half the real property taxes on the secured roll and all of the personal property taxes are due November 1st, Rev. & Tax. Code, § 2605, and, if unpaid, are delinquent December 10th. Rev. & Tax. Code, § 2617. The second half of the real property taxes is due January 20th, Rev. & Tax. Code, § 2606, and, if unpaid, is delinquent April 20th. Rev. & Tax. Code, § 2618.

are present here as they were in *Perry v. Jordan*, 34 Cal.2d 87, 90-91, 207 P.2d 47, in which a prior proceeding in mandamus was also pending in the Superior Court. Although completion of the taxing process within the statutory time schedule is not jurisdictional, it is of vital public importance that it be completed as soon as possible to avoid complete disruption of the taxing process.

The entire record is now before this court, and only confusion can result from the refusal to make a final determination now as to the validity of the Board's order, the identical question that would have to be determined by this court following an appeal from an order of the Superior Court. Since the jurisdiction of the State Board of Equalization to equalize the valuation of property in the several counties is derived directly from the Constitution, Const. Art. XIII, § 9, the court does not exercise an independent judgment on the evidence, and the Board's determinations of fact are therefore not subject to re-examination in a trial de novo in the Superior Court. Only questions of law are presented, namely: Did the Board proceed without or in excess of its jurisdiction? Did it commit any prejudicial errors of law or abuse of discretion? Is its order supported by substantial evidence? *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131-132, 173 P.2d 545.

(6) The record discloses that the County of Tulare, after full opportunity afforded by the Board to show cause why the valuations on the local roll of the county should not be increased, not only failed to show that the action of the Board was arbitrary or capricious, but failed to carry its burden of proof or even produce any substantial evidence of the ratio of the assessed value on the local roll to market value, see, Admin. Code, Title 18, Rule 2704; *Howard County v. State Board of Equalization*, 158 Neb. 339, 63 N.W.2d 441, 448, that the State Board of Equalization did not act without or in excess of its jurisdiction, or commit errors of law or abuse its discretion, and that there is ample evidence to support its order. Los

Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 167-170, 121 P. 384, 9 A.L.R. 1277; *Miller & Lux v. Richardson*, 182 Cal. 115, 128, 187 P. 111; *Utah Construction Co. v. Richardson*, 187 Cal. 649, 654-655, 203 P. 401; *Eastern-Columbia, Inc., v. County of Los Angeles*, 61 Cal.App.2d 734, 745-746, 143 P.2d 992.

GIBSON, C. J., and SPENCE, J., concur.

Rehearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.



135 Cal.App.2d 260

In re ESTATE of Eleanor M. BOULD.

No. 20716.

Supreme Court of California.

Oct. 24, 1955.

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Morrison, Simon & McKinsey and T. W. McKinsey, Long Beach, for appellant.

Dally & Saulque and Henry E. Dally, Los Angeles, for respondent.

On petition for hearing by Supreme Court.

For prior opinion see 287 P.2d 8.

Hearing denied by Supreme Court.

CARTER, Justice (dissenting).

This case was tried before a most able and conscientious judge who heard the testimony of the witnesses and observed their demeanor and arrived at the conclusion that the will here involved was the result of the undue influence of the proponent. To my mind there can be no question as to the sufficiency of the evidence to support the finding of the trial court in this case, and the reversal of the judgment denying the admission of the will to probate amounts to nothing less than a redetermination of the factual issues by the District Court of Appeal and a majority of this Court—passing upon the weight of the evidence and the credibility of the witnesses.

I cannot refrain from again repeating that which I have so often stated in recent years that in certain types of cases a majority of this Court has seen fit to usurp the function of the jury and trial judge in determining issues of fact. *Rodabaugh v. Tekus*, 39 Cal.2d 290, 246 P.2d 663; *Better Food Markets v. American Dist. Teleg. Co.*, 40 Cal.2d 179, 253 P.2d 10, 42 A.L.R.2d 580; *Atkinson v. Pacific Fire Extinguisher Co.*, 40 Cal.2d 192, 253 P.2d 18; *Gill v. Hearst Publishing Co.*, 40 Cal.2d 224, 253 P.2d 441; *Goodman v. Harris*, 40 Cal.2d 254, 253 P.2d 447; *Pirkle v. Oakdale Union etc. School Dist.*, 40 Cal.2d 207, 253 P.2d 1; *Burtis v. Universal Pictures Co., Inc.*, 40 Cal.2d 823, 256 P.2d 933; *Kurlan v. Columbia Broadcasting System*, 40 Cal.2d 799, 256 P.2d 962; *Weitzenkorn v. Lesser*, 40 Cal.2d 778, 256 P.2d 947; *Turner v. Mellon*, 41 Cal.2d 45, 257 P.2d 15; *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977; *In re Estate of Lingenfelter*, 38 Cal.2d 571, 241 P.2d 990; *Gray v. Brinkerhoff*, 41 Cal.2d 180, 258 P.2d 834; *In re Estate of Welch*, 43 Cal.2d 173, 272 P.2d 512; *Keiper v. Northwestern Pacific Railroad Co.*, 134 Cal.App.2d 713, 288 P.2d 262.

The types of cases in which this Court has seen fit to pass upon factual issues are those relating to will contests and cases in which damages for personal injuries are sought. In criminal cases, however, a majority of this Court has seen fit to hold that a mere suspicion is sufficient to support a conviction of crime. *Bompensiero v. Superior Court*, 44 Cal.2d 178, 281 P.2d 250.

In my dissenting opinions in *In re Estate of Lingenfelter*, 38 Cal.2d 571, at page 588, 241 P.2d 990 and *In re Estate of Welch*, 43 Cal.2d 173, at page 181, 272 P.2d 512, I endeavored to express my views with respect to the ruthless disregard by a majority of this Court of the constitutional and statutory provisions relating to will contests. What I said there is equally applicable here and I commend the reading of those opinions by those who may be involved in this type of litigation.

I would grant respondents' petition for a hearing and affirm the judgment of the trial court.

GUARDIANSHIP of the Person and Estate of De Witt Clinton COOKINGHAM, an Incompetent Person.

**Ella Marie ORMSBY, as guardian, etc.,
Appellant,**

v.

**De Witt Clinton COOKINGHAM,
Respondent.
L.A. 23447.**

**Supreme Court of California.
In Bank.
Oct. 28, 1955.**

Proceeding brought for judicial approval of the final account of a guardian wherein she took credit for fees of an attorney and a psychiatrist for services rendered in connection with opposition to ward's petition for judicial determination of his restoration to capacity. The Superior Court, Los Angeles County, John Gee Clark, J., disallowed credits taken by guardian, and she appealed. The Supreme Court, Edmonds, J., held that the lower court had erred in refusing to hear evidence bearing upon propriety of guardian's hiring of attorney and psychiatrist.

Reversed.

Opinion, 284 P.2d 51, vacated.

1. Mental Health §231

In passing upon propriety of expenditures by guardian for mentally incompetent person, court is governed by equitable consideration relating to law of trusts. Probate Code, §§ 1400, 1556.

2. Mental Health §169

One who in good faith incurs expenses reasonably necessary to support a petition for restoration to capacity may recover those charges from incompetent's estate.

3. Mental Health §168

Mere fact that ward has been released from detention does not establish his restoration to capacity.

4. Mental Health §233

Expenses of an unsuccessful opposition to petition to establish ward's restora-

tion to capacity may constitute reasonable expenses incurred in execution of guardian's duties. Probate Code, § 1502.

5. Mental Health ☞233

That guardian did not obtain court's approval before retaining attorney and psychiatrist in opposing ward's petition for restoration to capacity did not preclude allowance of guardian's claim for attorney's fees and psychiatrist's fees.

6. Guardian and Ward ☞48

Guardian is without power to bind his ward's estate to a contract unless he is authorized to do so by statute or order of court, and without such authorization liability of guardian is personal with right to be reimbursed from ward's estate for expenditure, if it is proper. Probate Code, §§ 1509, 1556.

7. Guardian and Ward ☞157

Burden is upon guardian to justify items in his account.

8. Trial ☞45(1)

In proceeding on guardian's petition for judicial approval of account in which she took credit for fees of an attorney and psychiatrist for services in connection with her opposition to ward's petition for restoration to capacity, court's announced conclusion that guardian should have obtained order of court authorizing employment of attorney and expert witness dispensed with necessity of offer of proof as to worth of the services.

Bailie, Turner, Lake & Sprague and Richard W. Sprague, Los Angeles, for appellant.

Carl O. Kowol, Montrose, for respondent.

EDMONDS, Justice.

In her seventh and final account, Ella Marie Ormsby, the guardian of the person and estate of De Witt Clinton Cookingham, took credit for the fees of an attorney and a psychiatrist. Her appeal is from the order disallowing the amounts claimed.

Cookingham was committed to Patton State Hospital in 1942, and Mrs. Ormsby,

his daughter, was appointed guardian of his person and estate. He remained in Patton until October, 1953, when he received temporary leave. He was then 79 years old. Through his guardian ad litem and present attorney, he petitioned for a judicial determination of his restoration to capacity. Mrs. Ormsby contested the petition and through attorneys retained by her employed a psychiatrist to examine Cookingham. Without prior authorization from the court, she paid the psychiatrist a fee of \$250 and agreed to pay her attorneys \$750, principally for representing her in that proceeding.

Testimony tending to support the petition was presented by two experts produced by Cookingham and two others appointed by the court. The psychiatrist employed by Mrs. Ormsby gave testimony denying the alleged restoration to capacity. The court granted the petition and approved payment from the ward's estate of fees to the experts who testified in support of the incompetent.

In her final account, the guardian claimed the amounts of the fees of the psychiatrist and the attorneys employed by her. After a hearing, the trial court sustained the exceptions filed by the ward and surcharged the guardian for the psychiatrist's fee and \$625 of the amount paid to her attorneys.

It was found that the "guardian secured no prior approval of the Probate Court authorizing her to employ a psychiatrist to examine said ward, or to employ attorneys to oppose said petition [for restoration]; that petitioner as guardian owed no duty to the ward, or to the Court, to investigate the competency of the ward, or to oppose or take any other action in connection with such proceedings for restoration to capacity and for termination of guardianship; that the acts of employing a psychiatrist and attorneys were unauthorized and not a justifiable charge against the guardianship estate."

Mrs. Ormsby's position is that the trial judge erred in rejecting evidence that the expenses incurred were for the ward's best interest, that he ruled instead, as a

matter of law, that compensation could not be allowed because the opposition to the petition for restoration was unsuccessful and undertaken without prior authorization by the court. Those grounds of themselves, the respondent replies, are a sufficient basis for the order disallowing the expenses, but in any event the record includes substantial evidence justifying a finding that the expenses were not incurred in the ward's best interests.

[1] Section 1556 of the Probate Code provides that a guardian "shall be allowed the amount of his reasonable expenses incurred in the execution of his trust." The statutes do not specify the duties of the guardian, except that he must manage the estate "frugally and without waste, and apply the income, as far as may be necessary, to the comfortable and suitable support, maintenance and education of the ward and his family." Prob.Code, § 1502. In passing upon the propriety of expenditures, the court is governed by equitable considerations relating to the law of trusts. Prob.Code, § 1400; In re Estate of Clanton, 171 Cal. 381, 387, 153 P. 459.

[2] It is generally held that one who in good faith incurs expenses reasonably necessary to the support of a petition for restoration to capacity may recover those charges from the incompetent's estate. See cases cited in annotation 121 A.L.R. 1501, and California follows this rule. *Stone v. Conkle*, 31 Cal.App.2d 348, 351, 88 P.2d 197; In re Estate of Doyle, 126 Cal.App. 646, 648, 14 P.2d 920. The *Stone* and *Doyle* cases treat such services as "necessaries" sufficient to support an implied in law promise on the part of the incompetent to pay for them.

[3,4] In no California case has the question of whether the expenses of an unsuccessful opposition to a petition for restoration may constitute "reasonable expenses incurred in the execution of" the guardian's duties been decided. *McClenahan v. Howard*, 50 Cal.App. 309, 195 P. 68, relied upon by *Cookingham*, decides only that the testimony of a psychiatrist concerning his observations of the asserted incompetent was not among the "neces-

saries" and "benefits" to such person which would imply a contract to pay for them. Other cases relied upon by *Cookingham* are not in point.

In other states, the few decisions discussing this question follow the leading case of *Palmer v. Palmer*, 38 N.H. 418, where the guardian was allowed his reasonable expenses incurred in a good faith opposition to an application for a termination of the guardianship. The court said: "The revocation of the guardianship in such cases is not to be made until the cause for which it is granted is removed. If this is a matter so obvious that no reasonable doubt can be entertained on the subject, it is the duty of the guardian to promote instead of resisting the revocation. But it is equally his duty, when the case is such as to admit of question, to present the facts fully to the judge. The interests of the ward, as well as sound reasons of public policy, require that the investigation should not be an *ex parte* one. The ward is not required or expected to produce evidence tending to show that the cause of guardianship is not removed. If the guardian should refrain from opposition for the reason that he apprehends the result may possibly show that the cause is removed, and he thereby be exposed to loss of the expenses incurred, the consequence will be that in many cases the revocation will be made upon unsatisfactory evidence, and when possibly the interests of the ward require that the guardianship should continue unrevoked. When the guardian * * * proceeds in good faith, and in the exercise of a sound discretion, to try a doubtful question, the recovery of his reasonable expenses incurred in trying it should not be made to depend upon the result." at page 420; *American Nat. Bank v. Bradford*, 28 Tenn. App. 239, 188 S.W.2d 971, 980; cf. In re *Larner*, 39 Misc. 377, 79 N.Y.S. 836, 838.

The reasoning of the *Palmer* case is persuasive. The guardian could not assume merely from his ward's discharge and subsequent petition for restoration that he was capable of taking care of himself. In re Estate of *Kay*, 30 Cal.2d

215, 225, 181 P.2d 1. To discourage the guardian's inquiry as to the ward's status, in effect, would allow the petition for restoration to be considered without the presentation of all of the facts. But the purpose of the law is to protect a ward from being "deceived or imposed upon by artful or designing persons", Prob.Code, § 1460, and courts must scrupulously protect the rights of persons whose competency is in question.

[5] It is contended, however, that even if the guardian in the exercise of his duties may make unsuccessful opposition to a petition for restoration to capacity, he may not be compensated from the ward's estate for expenditures in connection with such opposition without prior authorization by the court. A variation of this contention is that the guardian may protect himself from the possibility of being made personally liable for such expenditures by a petition for instructions under section 1516 of the Probate Code, but failing to do so he opposes the petition for restoration at the peril of being personally liable if the opposition is unsuccessful.

In states other than California, it appears to be the rule that, except for necessities furnished a ward, the guardian may not be compensated from the ward's estate for expenditures made without authorization of the court. See cases collected in *O'Mealey v. Grum*, 186 Okl. 697, 100 P.2d 265, 130 A.L.R. 113. In *Re Estate of Clanton*, 171 Cal. 381, 153 P. 459, it was said: "Under our liberal system, if the expenditures of the guardian have been just and equitable, they will be allowed, regardless of the obtaining or failure to secure orders of the court authorizing them. 'The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance.' (Citation.) We are bound to hold that the expenditures for which the guardian was given credit were equitable and just charges against the estate of the incompetent because the findings of the court were in favor of the account, and there is no contention that the findings are

not supported by the evidence. The court did not err in making allowance for expenditures made without previous authority." 171 Cal. at page 387, 153 P. at page 462.

Cookingham seeks to distinguish the *Clanton* case and decisions following it, upon the ground that they concerned expenditures which generally are held to be necessities. In *re Estate of Schluter*, 209 Cal. 286, 289-290, 286 P. 1008 [support and maintenance of ward]; *Guardianship of Ewing*, 42 Cal.App.2d 629, 630, 109 P.2d 748 [personal needs of the incompetent]. He relies upon *In re Guardianship of Stallings*, 85 Cal.App.2d 443, 193 P.2d 114, in which the court considered the charge for an expenditure not made for a necessity. There it was said: "Some of the items which were disallowed might possibly have been authorized by the court if application therefor had been made preceding the expenditure. An order authorizing expenditures for reasonable amounts and for justifiable purposes would have protected the guardian. Since he did not procure the orders he must be responsible for those the court has disallowed. He is in the position of any other fiduciary who acts without the previous authorization of the court—his obligations are not chargeable to the estate of the beneficiary." 85 Cal.App.2d at pages 447-448, 193 P.2d at pages 116-117.

There is no compelling reason for requiring a guardian personally to bear the cost of an unsuccessful opposition to his ward's application for restoration, conducted in good faith, merely because he failed to obtain prior authorization. Indeed, it may be extremely difficult for the guardian to determine the position he should take without professional advice at the commencement of the proceeding. If it is conducted in good faith, the guardian should be allowed the reasonable expenses incurred in the opposition. If not in good faith, the expense, of course, should not be allowed. But there is ample opportunity to determine that question when the guardian's account is presented for approval. To the extent that it indicates a holding contrary to these conclusions, In re

Guardianship of Stallings, *supra*, is disapproved.

Cookingham contends that the Clanton line of decisions no longer is controlling. He relies upon the 1951 amendment to section 1556 of the Probate Code, as construed by this court in *Clark v. State Bar*, 39 Cal.2d 161, 246 P.2d 1, in which it was pointed out that, "[a]s amended section 1556 is substantially similar to Probate Code, section 904, providing for allowance of commissions to executors and administrators. Under section 904 an executor or administrator is not entitled to his commissions until after court approval." 39 Cal. 2d at page 171, 246 P.2d at page 6, footnote 6.

The point of inquiry of the *Clark* case was whether an attorney who, as guardian, had withdrawn from his ward's estate funds for his own compensation, without authorization, was guilty of unethical practice. The sections referred to by the court require that the court authorize the *compensation* claimed by the guardian or personal representative, but they do not state that prior authorization of the *services* or *expenditures* for which compensation is claimed is necessary for it to be allowed. On the contrary, both sections contemplate that the services and expenditures be completed before the claim for compensation. § 904 ("services rendered up to that time"); § 1556 ("reasonable expenses incurred in the execution of his trust"). And section 1556 specifies that the compensation shall be such as "the court in which his accounts are settled deems just and reasonable."

Sections 1500-1540 of the Probate Code, in chapters dealing with "Powers and Duties" of guardians, Ch. 7, Div. 4, and "Sales, Mortgages, Leases and Conveyances" by guardians, Ch. 8, Div. 4, include provisions specifically requiring authorization by the court of certain activities by the guardian. (Cf. §§ 1500, 1501, 1506, 1509, 1515, 1530a, 1532, 1533, 1534, 1534a, 1537, 1538, 1538.5.) Section 1509, relied upon by Cookingham, provides that "[a] contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void

unless the contract is approved by the court in which the litigation is pending or the court having jurisdiction of the estate of the minor, upon petition of any person in interest. When no such contract is approved, and a judgment is recovered by or on behalf of a minor, the attorney's fees chargeable against the minor shall be fixed by the court rendering the judgment." It is urged by Cookingham that because of this section lack of authorization by the court of the contract between Mrs. Ormsby and her attorney barred her right to an allowance for the attorney's fee.

[6] Section 1509, however, deals with an entirely different problem. It is generally true that a guardian is without power to bind his ward's estate to a contract unless he is authorized to do so by statute or order of the court. Without such authorization, the liability of the guardian is personal with the right to be reimbursed from the ward's estate for the expenditure, if it is proper. (25 Am.Jur. 64, Guardian and Ward, § 98.) For that reason, in California a contract by the guardian for the services of an attorney is not enforceable against the ward's estate unless compliance is had with this section. *Hunt v. Maldonado*, 89 Cal. 636, 637, 27 P. 56; *Morse v. Hinckley*, 124 Cal. 154, 158, 56 P. 896; *McKee v. Hunt*, 142 Cal. 526, 527-528, 77 P. 1103. On the other hand, section 1556 expressly allows the guardian, at any time after the filing of the inventory and appraisal, to "petition the court for an order fixing and allowing his compensation for services rendered to that time and for an order fixing and allowing compensation to his attorney for services rendered to the guardian." The allowance is charged against the estate of the ward.

[7] The burden is upon the guardian to justify the items in his account. In *re* Guardianship and Estate of Vucinich, 3 Cal.2d 235, 241, 44 P.2d 567; cf. *In re Estate of McLaughlin*, 43 Cal.2d 462, 465, 274 P.2d 868. Mrs. Ormsby asserts that she is entitled to the presumption that in opposing her ward's restoration she acted in good faith, and, furthermore, the trial judge refused to consider evidence offered by her

upon that issue. Cookingham takes the position that there is a sufficient factual basis in the record for a finding that the opposition was not made in good faith.

[8] The record fully supports the position of Mrs. Ormsby that the trial judge declined to consider the question of her good faith in opposing the petition for restoration. The proceedings in the hearing on the guardian's account were conducted with extreme informality in the matter of taking evidence, the positions of counsel being presented almost exclusively by their opening statements and argument to the court. Although counsel for Mrs. Ormsby offered to prove the worth of his services, the offer at most only indirectly touched upon the matter of good faith. However, the remarks of the trial judge plainly indicated his belief that good faith was immaterial in the absence of a prior order expressly authorizing the guardian to oppose restoration. Such litigation, said Judge Clarke, the guardian "engages in at his peril. If he had been successful, I think there is no question in this case that he would have been allowed the costs of his attorney and the costs of the psychiatrist. He was unsuccessful. He did not ask the court prior to this litigation if he might employ and pay doctors, if he might employ and pay an attorney, but he proceeded to do so without giving the court the opportunity to determine whether he wanted or needed such assistance." And, the ruling rejecting the offer of proof was made with this statement: "I am still of the opinion that I should refuse compensation for the reasons I have indicated." Upon this record, an offer of proof would have been superfluous. Cf. *In re Estate of Kearns*, 36 Cal.2d 531, 537, 225 P.2d 218; *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 757,

185 P.2d 597; *Lawless v. Calaway*, 24 Cal. 2d 81, 91, 147 P.2d 604.

Cookingham maintains, however, that any refusal to receive evidence upon the question of good faith was not prejudicial. There is a sufficient factual basis in the record, he asserts, for a finding that the opposition was not made in good faith. The facts to which he refers are included in the reports of a probation officer made upon his investigation of the circumstances in connection with Cookingham's release from the state hospital. Cookingham argues that it must be presumed that the trial judge considered such evidence. Cf. *Ward Mfg. Co. v. Miley*, 131 Cal.App.2d 603, 608-609, 281 P.2d 343.

Even if it be assumed that the trial judge considered the probation officer's reports, there is no finding which reasonably may be construed as stating his determination of that issue. The court declared that the fees of the psychiatrist and attorneys incurred by the guardian were "not a justifiable charge against the guardianship estate." But this finding is preceded by others which state that the "guardian secured no prior approval of the Probate Court authorizing her" to do so and that she "as guardian owed no duty to the ward, or to the Court, to investigate the competency of the ward." Rather than presenting a determination of the issue of good faith, these findings follow the views of the trial judge, as stated by him throughout the hearing on the account, that the element of good faith is immaterial.

The order is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

Gertrude B. NEWELL, Plaintiff and Appellant,

v.

Robert M. NEWELL, Defendant and Respondent.*

Civ. 20574.

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 2, 1955.

Rehearing Denied Nov. 22, 1955.

Rehearing Granted Dec. 28, 1955.

Application by wife for issuance of a subpoena to take depositions of witnesses for use in her divorce action pending in Idaho. Husband moved to quash and set aside such subpoena and obtained an order to show cause why wife should not be restrained from taking depositions and from taking any further proceedings in Idaho divorce action. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered a restraining order and injunction, and wife appealed. The District Court of Appeal, McComb, J., held that since husband had already obtained a valid interlocutory decree of divorce from wife in California court having personal jurisdiction over wife, California court properly issued injunction restraining wife from proceeding with her divorce action in Idaho.

Order affirmed.

1. Appeal and Error ⇨419(1)

Notice of appeal from order entered on the "23rd day of June, 1954, and from the whole thereof," was insufficient to take an appeal from, or bring up for review any alleged error in, restraining order entered on June 22, 1954, and file on June 23rd. West's Ann.Rules on Appeal, rule 1(a).

2. Appeal and Error ⇨419(1)

Notice of appeal must point out the particular judgment or order or the specific part thereof from which the appeal is taken. West's Ann.Rules on Appeal, rule 1(a).

3. Appeal and Error ⇨430(1)

In absence of a proper notice of appeal, reviewing court was without jurisdiction to consider any alleged error in order
* Opinion vacated 299 P.2d 849.

of Superior Court. West's Ann.Rules on Appeal, rule 1(a).

4. Equity ⇨36

A state can exercise through its courts jurisdiction to forbid a party, subject to its jurisdiction, from doing an act in another state.

5. Divorce ⇨65

Superior court had personal jurisdiction over wife in action by husband for a divorce by virtue of her residence in the state and her appearance in divorce action, though at the time wife was in another state where she was personally served with copy of summons and complaint.

6. Injunction ⇨33

Where husband had obtained valid interlocutory decree of divorce from wife in California court having personal jurisdiction over wife and wife thereafter applied to California court for issuance of subpoena to take depositions of witnesses for use in her divorce action then pending in another state, California court properly issued injunction restraining wife from proceeding with her divorce action in another state, though as an ancillary matter, wife sought in such action to obtain custody of minor children contrary to California divorce decree. West's Ann.Code Civ.Proc. § 2037.

Ernest W. Pitney and Glenn A. Lane, Los Angeles, for appellant.

Theodore A. Chester, Los Angeles, for respondent.

McCOMB, Justice.

On June 11, 1954, plaintiff applied to the Los Angeles Superior Court for the issuance of a subpoena to take the depositions of certain witnesses residing in Los Angeles County for use in a divorce action then pending in Idaho. Pursuant to the provisions of the Code of Civil Procedure, section 2037, a subpoena was issued by the trial court. Thereafter defendant moved to quash and set aside such subpoena and obtained an order to show cause why plaintiff should not be restrained from taking the depositions or from taking any further pro-

ceedings in her Idaho divorce action, other than to dismiss it with prejudice. The motion and order to show cause were based on the fact that the evidence was immaterial since defendant, on September 28, 1953, had obtained an interlocutory decree of divorce from plaintiff in Los Angeles County Superior Court, which decree was valid and binding in all particulars, and was a complete and final determination of all the issues.

Plaintiff filed affidavits in opposition to the motion to quash and the order to show cause, and after a full hearing the trial court granted the motion to quash and enjoined plaintiff from proceeding with her Idaho action. The minute order of June 18, 1954, entered on June 22, 1954, reads thus: "The motion of defendant to quash subpoenae and subpoenae duces tecum is granted and plaintiff is restrained from taking depositions in this county to be used in the Idaho proceedings."

On June 22, 1954, the court signed a restraining order and injunction, which was filed on June 23, 1954, reading (omitting the title of the court and cause) as follows:

"The order to show cause re restraining order and injunction came on regularly for hearing on Friday, June 18, 1954, in Department 8 of the above entitled court before the Honorable Elmer D. Doyle, Judge presiding, Messrs. Ernest W. Pitney and William H. Brawner appearing as counsel for plaintiff and Theodore A. Chester, Esq. appearing as counsel for defendant.

"It appearing, among other things, that on September 28, 1953 the above entitled court made and entered an interlocutory decree of divorce between the parties hereto in that certain action entitled 'Robert M. Newell, plaintiff v. Gertrude B. Newell, defendant,' Los Angeles County Superior Court case No. Pasadena D-11260; and it further appearing that the above named plaintiff made a general appearance in said California action and further that she was a resident of the State of California on August 17, 1953, the date on which said California action was filed, and on August 24, 1953, the date on which she was per-

sonally served with process in said California action, and that said California judgment is a complete and final determination of all of the issues before the Court in that certain action filed by the above named plaintiff in the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding, entitled 'Gertrude B. Newell, plaintiff v. Robert M. Newell, defendant,' being case No. 6462, and that said California judgment is binding on said Gertrude B. Newell in all particulars;

"It Is Ordered, Adjudged And Decreed:

"That Gertrude B. Newell, the above named plaintiff, and Ernest W. Pitney and William H. Brawner, her attorneys, and any other attorney or attorneys now employed or hereafter employed by her, are hereby restrained and enjoined from:

"(1) Taking the depositions of Mrs. Luis Odriozola, Mrs. Warren Wilson, Mr. and Mrs. Jay B. Latham, Mr. and Mrs. Grace P. Douglas, Mrs. Sarah Fletcher, Esther M. Sheets, the California Bank, a banking corporation, D. T. Hubbard, Personal Loan Supervisor of said bank, and Forrest Denning, Vice President of said bank, for use by said plaintiff in that certain action entitled 'Gertrude B. Newell, plaintiff v. Robert M. Newell, defendant,' heretofore filed by her in the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Gooding, being case No. 6462.

"(2) Taking the depositions of any other witnesses for use in said Idaho action.

"(3) Taking any further action or proceedings whatsoever in said Idaho action.

"(4) Taking any steps whatsoever for divorce in any court in any state, or country, leading to the entry of a divorce between the parties hereto or a determination of the rights of custody of the minor children of the parties hereto, other than in the above entitled court, except to enter a dismissal with prejudice of said Idaho action.

"Dated: June 22, 1954."

On July 8, 1954, plaintiff appealed from the order of June 22, 1954, which was filed

June 23, 1954. So far as material here, the notice of appeal reads:

"You Will Please Take Notice that the plaintiff in the above entitled action is appealing to the Supreme Court of the State of California from that certain order made and entered in the above entitled action on the 23rd day of June, 1954, and from the whole thereof, and plaintiff hereby requests that a Clerk's Transcript and a Reporter's Transcript be prepared of the testimony offered or taken, evidence offered or received, and all rulings, acts or statements of the Court, all objections or exceptions of counsel, and all matters to which the same relate, and hereby designates and specifies such of the pleadings, papers, records, files and exhibits in said cause, as she desires to have incorporated in the record on appeal:
* * *

Questions: First: Did the trial court err in making its order on June 18, 1954, (entered June 22, 1954), granting defendant's motion to quash the subpoena and subpoena duces tecum, theretofore issued and restraining plaintiff from taking depositions in this state to be used in the Idaho divorce action?

[1] This question will not be considered by us for the reason that plaintiff has not appealed from this order of the trial court. It will be noted from reading the notice of appeal that the appeal is only "from that certain order made and entered in the above entitled action on the 23rd day of June, 1954, and from the whole thereof." The only thing done in the case on June 23, 1954 was to file the restraining order and injunction. No notice of appeal was filed from the order of June 18, 1954.

[2] The notice of appeal must point out the particular judgment or order, or the specific part thereof, from which the appeal is taken (Rules on Appeal, 1(a), 36 Cal.2d 1; In re Estate of Roberson, 114 Cal.App. 2d 267, 269 [4], 250 P.2d 179.) Nor is there any merit in the contention that the words "from the whole thereof" appearing in the notice of appeal, are sufficient to bring up for review the order from which an appeal was not taken. The words "from

the whole thereof" in the notice of appeal relate to the order previously mentioned, to wit, the order dated the 23rd day of June, 1954, and from the whole thereof, and not to any other order or judgment. (In re Estate of Bearn, 77 Cal.App.2d 221, 223 [2], 175 P.2d 283.)

[3] In the absence of a proper notice of appeal being filed, this court is without jurisdiction to consider any alleged error in the order entered June 22, 1954. (People v. Brown, 148 Cal. 743, 744 et seq., 84 P. 204; cf. Robins v. Weis, 97 Cal.App.2d 144, 145, 217 P.2d 156.)

Second: *Did the trial court err in restraining plaintiff from proceeding with her divorce action in the State of Idaho?*

[4] No. A state can exercise through its courts jurisdiction to forbid a party, subject to its jurisdiction, from doing an act in another state. (Restatement of Conflict of Laws, (1934) section 96, p. 146; Smith v. Davis, 90 Cal. 25, 32, 27 P. 26; Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 199 et seq., 152 P. 542.)

The record discloses that plaintiff and defendant were married in Pasadena, California in 1942, and resided in Los Angeles County all of their married life except for the times that defendant was stationed elsewhere during World War II or completing his education. On June 30, 1953, plaintiff, accompanied by the three children of the parties, her father and the family housekeeper left to visit relatives of plaintiff in Montana. She stated it was her intention to remain in Montana for a few weeks and then with the children return to California in the middle of August, 1953. On July 16, 1953, in a telephone conversation with defendant she advised him that she had been unable to find satisfactory accommodations in Montana, but had found a place at McCall, Idaho. On August 13, 1953, she told defendant that she intended to get a divorce while in Idaho and he would not be permitted to visit with the children under any circumstances unless and until he settled their domestic difficulties on terms to be dictated by her.

Upon being so advised, defendant filed shortly thereafter an action for divorce against plaintiff in the Los Angeles Superior Court, being known as Pasadena D-11260.

On August 15, 1953, plaintiff filed an action for divorce in the Fourth Judicial District in and for the County of Gooding, Idaho, against defendant herein. On September 25, 1953, the superior court of Los Angeles County enjoined plaintiff from proceeding with her Idaho divorce action. On September 28, 1953, the Los Angeles Superior Court granted defendant herein an interlocutory decree of divorce in the Pasadena action D-11260, in which it was found, among other things, that defendant (plaintiff herein) "has been a resident of the State of California, County of Los Angeles, for at least six years continuously prior to the filing of this action and was a resident of the State of California, County of Los Angeles, on August 17, 1953, the date this action was filed, and on August 24, 1953, the date defendant was personally served with a copy of the summons and complaint in the State of Idaho."

[5] It is therefore evident that the trial court had personal jurisdiction over plaintiff by virtue of her appearance in the divorce action and her residence in the State of California. Having personal jurisdiction over her, the California court made a complete disposition of the community property of the parties, awarded custody of the minor children to defendant and restrained plaintiff herein from proceeding with her divorce action in Idaho. Having determined the California interlocutory decree to be valid and binding upon plaintiff, the court, acting within its discretion, en-

tered the injunction and restraining order now under consideration.

[6] In view of the fact that plaintiff was continuing an action which would render the California divorce judgment ineffectual; would create a multiplicity of actions relating to the same subject matter; would cause defendant unnecessary expense and inconvenience, and in addition was threatening to perpetrate fraud upon the courts of the State of Idaho in representing to them that she was a bona fide resident of that state, the trial court acted properly in issuing the injunction.

Stout v. Pate, 120 Cal.App.2d 699, 261 P.2d 788, 790, is not here in point. In such case the court held in an action for the support of a child that " * * * When a child is within California the courts are independent of all judgments of sister states to investigate and determine what are the best interests of the child. (Foster v. Foster, 8 Cal.2d 719, 726 (68 P.2d 719).) And such order of a California court cannot be challenged upon the ground that a prior decree of another jurisdiction providing for the custody and support of the child was res judicata. There is no permanent finality to a custodial award."

The situation in the instant case is not analogous. In the case at bar plaintiff was not seeking a judgment for support of the children in Idaho. She was seeking a divorce, and as an ancillary matter sought to obtain custody of the children contrary to the terms of the California decree which she had flagrantly violated.

The order from which the appeal is taken is affirmed.

MOORE, P. J., and FOX, J., concur.

136 Cal.App.2d 673

SMITH & WESSON, Inc., a corporation,
Petitioner and Appellant,
v.

MUNICIPAL COURT, SANTA ANA OR-
ANGE JUDICIAL DISTRICT, COUNTY
OF ORANGE, State of California, Re-
spondent,

Robert B. Palmer and Mary D. Palmer, Re-
spondents and Real Parties in
Interest.
Civ. 5054.

District Court of Appeal, Fourth District,
California.

Oct. 31, 1955.

Petition by foreign corporation for a writ of prohibition to restrain municipal court from proceeding in an action against petitioner for injuries allegedly resulting from negligence of petitioner in manufacture of a pistol. The Superior Court, Orange County, Raymond Thompson, J., entered order and judgment denying a writ of prohibition, and petitioner appealed and the appeals were consolidated. The District Court of Appeal, Griffin, J., held that the evidence was insufficient to establish that petitioner was doing business within the state such as to render it amenable to service of process therein under West's Ann.Corp.Code, §§ 6501, 6502.

Order and judgment reversed with direction to issue writ of prohibition.

1. Corporations Ⓒ673

In order to establish that a foreign corporation is amenable to service of process in the state, it must first be shown by competent evidence that corporation is doing business within the state, as contemplated by law, and balance of conveniences and justice is not the ultimate question. West's Ann.Corp.Code, §§ 6403, 6501, 6502.

2. Corporations Ⓒ673

Where allegations of complaint in action against a foreign corporation that such corporation was doing business within the state and affidavit in support of such allegations were contradicted by motion to quash service of summons and complaint and af-

fidavit in support thereof, plaintiffs had the burden of proving that foreign corporation was in fact doing business within the state at time of the service. West's Ann.Corp.Code, §§ 6403, 6501, 6502.

3. Principal and Agent Ⓒ22(1)

Declarations of an agent, not made under oath or in the presence of principal, and not communicated to, or acquiesced in, by principal, are not admissible to prove the fact of agency.

4. Corporations Ⓒ673

Even if firearms manufactured in another state by foreign corporation, which had not qualified to do business in California, were sold to retailers in California through a distributor residing and having an office in the state, evidence was insufficient to establish that corporation was doing business within the state such as to render it amenable to service of process in California in action for injuries allegedly resulting from negligence in manufacture of a pistol purchased by plaintiffs. West's Ann.Corp.Code, §§ 6403, 6501, 6502.

—◆—
Forgy, Reinhaus, Miller & Kogler, Santa Ana, for appellant.

R. M. Crookshank, Santa Ana, for respondents.

GRIFFIN, Justice.

An action was commenced in the Municipal Court of Orange County by respondents here, Robert B. Palmer and Mary D. Palmer, against appellant Smith & Wesson, Inc., a corporation, et al., for claimed injuries to Mary D. Palmer by the discharge of a loaded pistol claimed to be the result of certain alleged negligence and carelessness of appellant in reference to the manufacture by it and its failure to properly test a certain S & W 38-caliber gun which plaintiffs in that action purchased from a sporting goods shop in Orange County on September 28, 1953.

It was alleged that appellant Smith & Wesson was a Massachusetts corporation and was at all times mentioned and had been doing intrastate business in California

but had not complied with the requirements of section 6403 of the Corporations Code; that Walter Lookabaugh, whose place of business was in San Francisco, California, and who is a resident of California, is the sole distributor of firearms furnished by appellant corporation for the State of California, and that goods manufactured by it arrived in the hands of retailers in this state through him as appellant's distributor. The only evidence supporting these allegations is an affidavit of an investigator, employed by plaintiffs in which he stated that on February 18, 1954, he personally contacted Lookabaugh at his residence in Los Angeles and that he stated to affiant that the firm of Smith & Wesson was a foreign corporation with its principal place of business in Springfield, Massachusetts; that the corporation had no corporate officers in California and no one of authority therein; that there was no appointed agent in this state designated for the service of process; and that Lookabaugh told him "he is the sales representative of said corporation and that he has an office situate at 420 Market Street, San Francisco, California."

The Municipal Court made a finding in conformance with the allegations of the complaint and signed an order that service of process be made upon the corporation under the provisions of sections 6501 and 6502 of the Corporations Code.

Appellant corporation specially appeared in the Municipal Court and objected to its jurisdiction to entertain said action by moving to quash the service of summons and complaint, and filed an affidavit of Carl Hellstrom, president of the corporation, reciting that it is and was a Massachusetts corporation with its principal place of business in Springfield; that it has not qualified under the law to do business in the State of California; that it has had no place of business there; that it has no employees or salesmen in that state, and that the only business it does in California is the filling of orders which are sent to it in Massachusetts, from which point all orders are filled, and that it has no property and maintains no inventory in that

state. Upon the showing made the Municipal Court denied the motion.

Petitioner and appellant sought a writ of prohibition in the Superior Court directed against the Municipal Court restraining it from proceeding in that action against appellant, claiming lack of jurisdiction, inconvenience of witnesses, and that there was no speedy and adequate remedy by appeal. An alternative writ was issued by the Superior Court. Respondent Municipal Court and the interested parties answered and submitted the verified complaint and affidavit of the investigator used in the Municipal Court and denied generally the allegations of appellant's petition, and further alleged that qualified experts in the manufacture of firearms were residing in California as well as in Massachusetts and no inconvenience of witnesses was shown. Upon the showing there made, as indicated, the Superior Court denied the writ and petitioners appealed from that order. Subsequently, findings were signed and a similar judgment was entered from which petitioners also appealed. By stipulation the two appeals were consolidated and one record presented.

The trial court found generally that it was not true that petitioner was not engaged in intra-state business in this state; and not true that it has no place of business here; that it is true its place of business in California is in San Francisco, and that it markets all of its firearms in California through Lookabaugh, he being the sole distributor in California for such corporation; that all arms manufactured by it that arrive in the hands of retailers in this state are sold through that agency; that he is a sales representative of petitioner in California; that it is true that he "is an independent contractor and handles all of the firearms manufactured by petitioner and sold in the State of California, in his capacity as an independent contractor and as sales representative of petitioner", and that it is true that both plaintiffs in the action and all other witnesses reside in Orange County. It was then concluded that service of summons upon the petitioner corporation was duly and regularly ef-

fectured by service upon the Secretary of State, as indicated.

It is appellant's contention upon this appeal that respondents here failed to meet the burden cast upon them to show, either as a matter of law or fact, that at the time of the purported service of summons the appellant corporation was doing business within the State of California, citing *Jameson v. Simonds Saw Co.*, 2 Cal.App. 582, 586, 84 P. 289; *West Publishing Co. v. Superior Court*, 20 Cal.2d 720, 128 P.2d 777; and *Martin Bros. Electric Co. v. Superior Court*, 121 Cal.App.2d 790, 264 P. 2d 183.

It is further contended that since all of the evidence that was produced was that here indicated, only a question of law arose and accordingly the findings of fact, based upon that showing, were but erroneous conclusions of law, citing *Wheeler v. Board of Medical Examiners*, 98 Cal.App. 267, 276 P. 1119; and *San Diego Trust & Savings Bank v. County of San Diego*, 16 Cal. 2d 142, 105 P.2d 94, 133 A.L.R. 416. It is further argued that if findings were in order such findings were not supported by the evidence.

We are, in general, in accord with these contentions. The historical background of this subject is related in *West Publishing Co. v. Superior Court*, supra, 20 Cal.2d at page 727, 128 P.2d at page 780, where it is pointed out that formerly the theory upon which the courts of a state assumed jurisdiction of a foreign corporation carrying on business within its borders was that of implied consent to such jurisdiction. And quoting from Mr. Justice Brandeis, it is said:

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent."

It then said that "The determination of this jurisdictional question 'is often

a matter of great difficulty and extreme nicety. No all-embracing rule as to what is doing business has been laid down"; that whatever the form of a particular statute authorizing service of process upon the agent of a foreign corporation which has not complied with the qualifying laws of a state, it is a fundamental requisite under the federal Constitution that the corporation shall be "doing business" in the jurisdiction where the service is made to sustain its validity. (Citing cases.)

The case of *Fielding v. Superior Court*, 111 Cal.App.2d 490, 244 P.2d 968, relied upon by respondents, involved two foreign corporations which manufactured and distributed pharmaceutical goods. Plaintiff in that action claimed to have been injured by such goods after purchase of them at a retail store in California. They were distributed through a California distributor and wholesaler with whom the corporations had a contract. There, title to the goods was to remain in the corporations until the goods were sold, and the distributor was to warehouse the goods and carry insurance on them in his own name. The corporations set the price and required a report of stock on hand each month. The corporations agreed to insure the distributing agent against any action on behalf of the federal Government under the Food, Drug and Cosmetic Act, 21 U.S.C.A. § 301 et seq. Their contract provided that the distributor was considered by the parties to be an independent contractor. Considerable other evidence was produced at the hearing and the appellate court held that there was sufficient evidence to show that the corporations were doing business in the State of California within the meaning of the Corporations Code. Some additional consideration was given to the fact that it was a tort action and it would be a burden for the plaintiff to go to New York to sue the corporations.

[1,2] Subsequently, a similar question was considered in *Martin Bros. Electric Co. v. Superior Court*, 121 Cal.App.2d 790, 264 P.2d 183. It involved a claimed injury by an electric hair-dryer manufac-

tured by an Ohio Corporation. The complaint in that action, as here, alleged that at all times mentioned, the defendant corporation was doing business within the State of California; that the distributor corporation was a dealer and distributor of beauty shop equipment including electric drying machines manufactured by petitioner corporation. Plaintiff in the action relied upon her verified complaint and the deposition of the president and salesman of the distributing corporation, which showed that it sold dryers manufactured by petitioner as alleged; that other groups in the state also sold them; that its only place of business was in San Francisco; that it had no written contract with petitioner and purchased the dryers from petitioner in Ohio when it wanted them; that it did not control the price for retail sales; that no dryers were shipped on consignment; that petitioner had no salesman in California; and that if repairs were needed on the machines they were made by any independent dealer available; that petitioner maintained no office, warehouse or stock of material in California; that all persons in California handling petitioner's products were independent of and had no financial interest in petitioner and petitioner had no control over them; that no goods were shipped to any of them on consignment or other basis whereby ownership would remain in the petitioner; that all shipments to California from the factory were made at the factory to agents or carriers specified by the buyers and petitioner had no bank account, and no real or personal property in California. It was there held, under these facts, notwithstanding an order of the Superior Court in effect finding that the corporation was doing business in California, that the evidence was insufficient to support the finding and ordered the trial court to desist from further proceedings and vacate the order denying petitioner's motion to quash. In so doing it analyzed the several cases here relied upon, including the Fielding case, *supra*, and held that while a foreign corporation may be doing business within the state where products manufactured by it are distributed and sold in the state, even though the

distributors are independent, these facts alone are insufficient to make the corporation amenable to process in this state. It analyzed the holding in the Fielding case, *supra*, and distinguished it in this, that there the corporations had agreed to insure the distributor against action on behalf of the federal Government. The corporations set the retail sales prices and required from the distributor a report of stock on hand each month, and it may be added that in that case title to the goods was to remain in the corporations until the goods were sold, and the goods were stored in a warehouse in California. The Martin case specifically held that the allegations of the complaint that petitioner was doing business in this state through the independent dealer, was a conclusion of law and that there was not sufficient evidence of any single activity or combination of activities to indicate that petitioner enjoyed the advantages there indicated. As indicated in that case the question of balance of conveniences and justice is not the ultimate question to determine but it must be first supported by competent evidence that the corporation is doing business within the state, as contemplated by law. When the allegations of the complaint and affidavit in support of them are contradicted, as they were in the instant case, the burden of proof was upon the plaintiffs. *Jameson v. Simonds Saw Company*, *supra*.

[3] The main fact relied upon by respondents to show the agency of Lookabaugh is one of his claimed statements to the investigator that he was the sales representative of the corporation and he had an office in San Francisco. It is a rule of long standing in California that the declarations of an agent, not made under oath or in the presence of the principal, and not communicated to, nor acquiesced in, by him, are not admissible to prove the fact of his agency. 1 Cal.Jur., p. 698, sec. 8; see also *Jameson v. Simonds Saw Co.*, *supra*, 2 Cal. App. at page 588, 84 P. 289.

[4] While it might have been shown by additional evidence that petitioner corporation, at the time, may have been doing business in this state within the meaning

of the statute, we must conclude that respondents have not met the burden of proof. The facts adduced at the hearing of the motion in this case are not sufficient to make petitioner amenable to the process of the courts of this state.

Order and judgment reversed and the trial court is directed to grant the petition and let the writ issue as prayed.

BARNARD, P. J., and MUSSELL, J.,
concur.



136 Cal.App.2d 613

Elaine E. SEABERT, Plaintiff and
Respondent,

v.

Salvatore AIELLO and Esther Aiello,
Defendants and Appellants.

Civ. 16386.

District Court of Appeal, First District,
Division 2, California.

Oct. 31, 1955.

Rehearing Denied Nov. 30, 1955.

Hearing Denied Dec. 28, 1955.

Action by tavern customer, who had sat at one of tables with clear view of floor and walls of aisle being scrubbed, but who allegedly did not see or know of wet condition of floor, for injuries sustained when she left table to go to restroom and fell on wet floor. From a judgment of the Superior Court, City and County of San Francisco, Thomas M. Foley, J., the defendants appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding that customer was not guilty of contributory negligence.

Affirmed.

1. Negligence $\S$ 32(2.8)

One who during business hours lawfully entered tavern to purchase and consume a bottle of beer was an invitee.

2. Negligence $\S$ 135(1)

In action by tavern customer, who had sat at one of tables with clear view of floor and walls of aisle being scrubbed, but who allegedly did not see or know of wet condition of floor, for injuries sustained when she left table to go to restroom and fell on wet floor, evidence sustained finding that customer was not guilty of contributory negligence.

3. Appeal and Error $\S$ 1010(1)

Where finding of trial court sitting without jury has some support in evidence, the finding cannot be disturbed on appeal.

Edward J. Rice, Jr., Oakland, for appellants.

Edmund J. Holl, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for injuries incurred when she fell upon a wet floor in the defendants' place of business. The cause was tried to the court without a jury and resulted in findings and a judgment for plaintiff. The appeal rests on the inquiry whether respondent was a licensee or an invitee at the time of her fall, and whether she was guilty of contributory negligence.

[1] One who during business hours lawfully enters a store to purchase goods does so as an invitee of the proprietor. *Locke v. Red River Lumber Co.*, 65 Cal. App.2d 322, 326, 150 P.2d 506; *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 606, 184 P.2d 708. The evidence here clearly brings this case within this rule.

The pertinent argument of appellants is that respondent had knowledge of the condition of the floor before she started to walk upon the wet portion and hence was guilty of contributory negligence.

[2] The plaintiff entered the tavern operated by defendants at about 11:00 a. m. She purchased a bottle of beer and sat at a table to consume it. When she left the table to go to the rest room she walked over a portion of the aisle which had recently been watered and scrubbed. Disregarding

the warning of one of the proprietors to avoid the wet portion of the floor, she continued over that portion until she fell and suffered injuries to her knee. Typical of cases of this character the plaintiff was persuaded to testify that she did not know that the portion of the floor was wet before she walked on it, but after she fell she "saw the man watering the walls and floor with a hose." She was manifestly well coached in this part of her testimony as her counsel had her repeat it over and over until the trial judge must have concluded that there was some truth in it. The uncontradicted testimony that she sat at one of the tables with a clear view of the floor and the walls, but did not see the janitor hosing the floor, *or the walls* would have supported a finding that she was guilty of contributory negligence in knowingly walking upon the wet floor after one of the defendants warned her to take the dry side of the aisle.

There is an old doctrine that he who looks and does not see the obvious is just as negligent as one who does not look at all. But this is a doctrine which is seldom applied in modern decisions. The prevalent doctrine is more favorable to a recovery by the injured party without too meticulous care for the truth of his testimony.

[3] However since there is this evidence that the respondent did not see or know of the wet condition of the floor the finding of the trial court finds some support, and that ends the case on appeal, *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 429, 45 P.2d 183.

Judgment affirmed.

DOOLING, Justice.

I concur in the judgment, but not in that part of the opinion which reweighs the evidence and implies that the plaintiff was coached into giving false testimony and the trial judge deceived into believing it. The plaintiff testified that she entered the tavern which was not well lighted, bought a bottle of beer and consumed a part of it, went to a table to speak to a friend and then started for the dressing room. She did not notice that the floor was wet until after she slipped on it and heard no warning not to

walk on it. She was contradicted by defendants' evidence in several particulars, but not impeached or shaken on cross-examination. The trial judge believed the plaintiff. It is his function to weigh the testimony. It is not ours. I can find nothing in the record to justify any criticism of the plaintiff, her counsel or the trial judge.

KAUFMAN, J., concurs in the judgment.



136 Cal.App.2d 682

Henry C. RIDLEY, Plaintiff and Respondent,

v.

GRIFALL TRUCKING COMPANY, Ralph Sween, et al., Defendants and Appellants.

Civ. 5036.

District Court of Appeal, Fourth District, California.

Nov. 1, 1955.

Action for injuries sustained by steel plant worker whose leg was hit by rock when tire exploded while defendants' loaded semi-trailer was being spotted in plant. The Superior Court, San Bernardino County, R. Bruce Findlay, J., rendered judgment on verdict for plaintiff and defendants appealed. The District Court of Appeal, Griffin, J., held that evidence raised questions for jury as to whether defendants were negligent in that they knew or should have known that tire was worn to fabric and was overinflated and was driven over large jagged rocks on hard pavement so that it might blow out.

Affirmed.

I. Appeal and Error §930(1)

Where evidence was in conflict as to conditions of tire that blew out and threw rock upon plaintiff and injured him, upon

appeal it was presumed that jury resolved the conflict favorably to plaintiff who obtained verdict and judgment.

2. Automobiles ⇨245(38)

In action for injuries sustained by steel plant worker whose leg was hit by rock when tire exploded while defendants' loaded semi-trailer was being spotted in plant, evidence raised questions for jury as to whether defendants were negligent in that they knew or should have known that tire was worn to fabric and was over-inflated and was driven over large jagged rocks on hard pavement so that it might blow out.

3. Negligence ⇨10

The mere fact that a particular kind of accident has not happened before does not, under all circumstances, show that such accident is one which might not reasonably have been anticipated.

4. Damages ⇨163(1)

Loss of earning power is an element of general damages which can be inferred from nature of injury, without proof of actual earnings or income either before or after injury and even though there is no evidence that plaintiff was ever gainfully employed, and damages in this respect are awarded for loss of ability thereafter to earn money.

5. Damages ⇨186

Evidence of actual earnings before or after injury merely assists the jury as persons of ordinary intelligence and experience in arriving at the amount of the award which it is in their power to determine from the nature of the injury.

6. Appeal and Error ⇨1094(3)

Conclusion of trial court who considered question of excessive damages in denying new trial was persuasive in determining whether verdict was based on passion or prejudice.

7. Damages ⇨134(3)

Award of \$20,000 was not excessive where plaintiff, who was 53 years of age at time of return to work and who then had 20 year life expectancy, suffered comminuted fracture of right leg, spent over

three months in full cast from armpit to right foot during hot weather, required three years' physical therapy, was able to walk no more than one half block at time of return to work, was occupationally disabled, and had wages which grossed \$84 per week at time of injury.

William W. Shaw, Riverside, for appellants.

Margolis, McTernan & Branton, Richard M. Anderson, San Bernardino, for respondent.

GRIFFIN, Justice.

In this action plaintiff and respondent, a workman at the Kaiser Steel plant, brought this action against defendants and appellants Grifall Trucking Company and Ralph Sween, the driver of a large tractor-semi-trailer, to which was attached a big four-wheel trailer. It was owned by defendant company. On June 20, 1950, defendant driver left Salinas with the truck and trailers loaded to capacity with dolomite. The gross weight was 76,000 pounds. About 19,000 pounds were on the semi-trailer and it was estimated that there was about 9,000 pounds on each wheel of it. On each of the dual wheels of the semi-trailer were two pneumatic tires, size 11-00x22. The loaded truck was driven into the hearth department of the mill where 30 to 40 employees, including plaintiff, were working. In the course of spotting the load of dolomite it became necessary for the driver to detach the full trailer on the open hearth floor and then to maneuver the truck out on the high line in order to turn it around. That area was "littered with rocks". While the truck was being maneuvered in the rocky area and moving slowly, a rear tire on the semi-trailer blew out with an enormous blast sounding like a charge of dynamite or TNT. It shook the entire building. Dust was raised by the explosion and a jagged rock larger than one's fist was thrown through the air and struck plaintiff's leg, resulting in considerable damage and loss of wages and earning capacity. He was about fifty feet distant to the rear of the semi-trailer at

the time. A trial by jury resulted in a verdict of \$20,000 for the plaintiff.

Plaintiff's theory of negligence on the part of defendants is: (1) The defective condition of the tire caused by its having been worn through to the fabric; (2) Driving the truck over rocks large enough to cause blowouts; and (3) Maintaining and operating the tire with excessive air pressure, all under the circumstances related. Defendants' claim on appeal is that the evidence is insufficient to support these claims or the verdict, and that the judgment is excessive.

[1] As to the defective condition of the tire, there was testimony of plaintiff's witnesses that they inspected the tire after the explosion and it was "thread-bare * * * mostly all canvas showing the whole surface of the tire, the road surface"; that the side walls were "cracked", "scuffed" and "gouged"; and that the blowout occurred on the road surface of the tire. This testimony, to some extent, was contradicted by defendants. The tire was removed at an oil station near-by and was discarded by defendants. Accordingly, it was not available as evidence at the trial. Upon the appeal it will be presumed that the jury resolved the conflict favorably to the plaintiff in respect to the condition of the tire. *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 106 P.2d 886.

As to the driving of such a tire over rocks, under the conditions indicated, plaintiff's witnesses testified that the area over which the driver drove this truck was paved and littered with rocks and some were quite "jagged", and that although it was at night time, the place was illuminated. The driver admitted that he saw rocks in that area and that he ran over a rock with the back axle of the semi-trailer and it blew out the left outside tire on the semi-trailer. He stated that he had been driving similar trucks for nine years and knew that blowouts were "caused with some frequency" as a result of driving equipment over rocks of that size and shape, and that the customary precaution was to see that no rocks were in the way. He said he tried to drive where the least

of these rocks were but made no request of anyone at the plant to have them removed.

Defendant Grifall testified that any tire may blow out if it hits a rock even when brand new; that if a tire has been recapped it is more likely to blow out; that his practice was to recap them as much as four or five times depending on the advice of the recapper; and that the more times a tire is recapped the greater the chances are that it will blow out. He said he could not say from the company record, or his recollection, whether the tire in question was recapped, and that he gave specific instructions to his drivers to avoid "driving over a rocky place" and that if they "can't watch it, to have somebody watch for" them. As to maintaining and operating a tire with excessive air pressure the evidence is that 11.00x22 truck tires are rated by the manufacturer for a maximum load of 4,750 pounds and a maximum pressure of 70 pounds; that the tire was inflated to 80 pounds at the start of the trip but defendants claimed that it was recommended more economical to inflate them to 80 pounds. There was evidence that the effect of the travel on such a tire for the distance here indicated, with the load weight shown, would be to build up the air pressure from five to eight pounds.

Considerable evidence was taken in reference to the explosive force of a truck tire of the size here involved under an air pressure of 70 pounds. The cubic capacity of such a tire was computed at 7400 cubic inches and it was stated that 70 pounds of air pressure in a tire means 70 pounds of pressure per square inch of the internal surface of the tire, and this pressure approximates that released by the explosion of $\frac{2}{3}$ of a pound of TNT, a very high explosive.

It is defendants' claim that even in view of this testimony there was no proof that the driver of the truck could or did foresee, from the facts related, that an injury of some sort might be anticipated or that the probability of such an injury was reasonably foreseeable; that the fact that the tire was inflated to 80 pounds was not

unusual or negligence in itself because the testimony shows that an operator of a truck can run it over or below that pressure and no blowout would result; that the tire did not blow out from over-inflation but because it came in contact with a rock; that although the driver did drive into an area where rocks were strewn on the pavement, this would not necessarily charge him with knowledge that a blowout might occur and that the injury indicated would result; that neither defendant ever heard of a blowout throwing a rock and causing such an injury; that neither had any knowledge of *physics* and did not know the foot pounds of energy in that size tire; and that since Grifall inspected the tires before they left on the trip and found no tread showing, ordinary care was used in the management of defendants' property, citing such authority as *Johnson v. Union Furniture Co.*, 31 Cal.App.2d 234, 87 P.2d 917; 19 Cal.Jur. p. 562, sec. 13; and *Prosser on Torts*, chap. VI, p. 220, which states:

"The idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow. A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.' The standard must be one of conduct, rather than of consequences."

[2,3] From the evidence produced the jury might well have believed that all three of the claimed acts of negligence were established and that defendants knew, or as reasonable men should have known, that the faulty condition of the tire, operated with excessive air pressure and being driven over large jagged rocks on a hard pavement, loaded as it was, might, under these conditions, blow out. While a blowout on the road under these conditions might not be dangerous to others, yet when one drives such a truck, under the condi-

tions described, in and about a mill where workmen are employed, a different result may obtain. The element of danger and possibility of injury to others should become more apparent to such driver. Full instructions on the question of foreseeability of an injury were given to the jury by both plaintiff and defendants. *Osborn v. City of Whittier*, 103 Cal.App.2d 609, 230 P.2d 132. The mere fact that a particular kind of an accident has not happened before does not, under all circumstances, show that such accident is one which might not reasonably have been anticipated. *Cox v. Central California Traction Co.*, 85 Cal.App. 596, 259 P. 987; *Sander v. Los Angeles Ry. Corp.*, 38 Cal. App. 222, 175 P. 901.

The only other question is the claim that the judgment was excessive and not supported by the evidence. The medical testimony shows (1) Comminuted fracture of the right femur; (2) Surgery and plating to reduce the fracture and secure the required alignment of the bone; (3) Encasement in a full spica cast from armpits to the right foot and left knee with his legs held apart by a bar fixed into the cast. Plaintiff spent over three months in this cast during the "terribly hot" season at Fontana, plagued by hives, hair cuttings and perspiration, all inside the cast. This confinement produced "melancholy" by day and nightmares by night. He required frequent and regular sedation for his nerves. (4) Following release from his cast plaintiff underwent a course of physical therapy lasting from October, 1950, to about the middle of 1953. From the time the cast was removed he had constant pain in his leg which required the use of analgesics until about six months before trial in December, 1953. (5) Defendant was able to get around only on crutches for a period of over three months after the cast was removed and thereafter he required a walking stick for some time. As late as January 9, 1951, when he returned to work, he was able to walk no more than one half a block, and this left him "all petered out"; (6) His permanent injuries are stated to be shortening of the right leg by two cen-

timeters; weakening of the right leg to approximately half the strength of the left; fifty per cent loss of flexion in the right knee; complete loss of dorsiflexion in the right ankle; claudication of the soft tissue of the right leg; incurable pain in the right calf, thigh and the low back whenever he stands or walks for as much as half a block; and (7) Loss of earnings of \$1,885. In addition, one doctor testified he was not fitted to stand or walk for substantial periods of time without having disabling pain, and that he was between 25 per cent and 33 $\frac{1}{3}$ per cent occupationally disabled. He was 53 years old when he returned to work and had a life expectancy of 20 years. He grossed about \$84 per week.

It is defendants' contention that on plaintiff's return to work he suffered no actual loss of earnings at the plant and accordingly suffered no loss of earning power. They rely upon the testimony of the same doctor who testified for plaintiff when, on cross-examination, he said that in his opinion, as to the extent of plaintiff's occupational disability, he was "wrong" if Ridley "did some type of work for a year and no allowances were made for him". It appears that plaintiff went to work at the same rate of pay and received general wage increases thereafter, but when he was hurt he was classified as an "ingot stocker", which required considerable walking in connection with his work. On his return the management allowed him to keep his same classification but confined his services to weighing at the scales where he did not have to walk or lift anything as before. Other duties previously performed by him were assigned to other employees, and the data required by him was brought to him by them. It is apparent that he was unable to do the same type of work that he had been doing prior to the injury.

He held the same job mainly because his inability to perform the required job operations was tolerated by his employer. Apparently, his occupational disability otherwise remains unaffected. Defendants offered no contrary medical testimony.

[4, 5] Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury. Damages in this respect are awarded for the loss of ability thereafter to earn money. *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 93, 66 P. 72. This principle applies where there is no evidence at all that the plaintiff was ever gainfully employed. *Lang v. Barry*, 71 Cal.App.2d 121, 126, 161 P.2d 949. Evidence of actual earnings before or after injury merely assists the jury, as persons of ordinary intelligence and experience, in arriving at the amount of the award which it is in their power to determine from the nature of the injury. *Lang v. Barry*, *supra*; *Ostertag v. Bethlehem Shipbuilding Corp.*, 65 Cal.App.2d 795, 805, 151 P.2d 647.

[6] In addition to the finding of the jury in this respect the trial court also considered this question on a motion for new trial and denied it. Its conclusion in this regard is persuasive in determining whether the verdict was based on passion or prejudice. *Roedder v. Lindsley*, 28 Cal.2d 820, 823, 172 P.2d 353; *Hellman v. Los Angeles Ry. Corp.*, 135 Cal.App. 627, 643, 27 P.2d 946, 28 P.2d 384.

[7] We conclude that the damages awarded are within reasonable and permissible limits.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

138 Cal.App.2d 645

Mary M. BENNETT, Plaintiff and Appellant,
v.

Melvin H. PHELPS, Charlotte June Phelps,
William Patrick Waterous, et al.,
Defendants.

Melvin H. Phelps and Charlotte June
Phelps, Respondents.
Civ. 20968.

District Court of Appeal, Second District,
Division 1, California.
Oct. 31, 1955.

Action by mother for death of daughter who was guest in automobile involved in collision that occurred when defendant-driver who was driving automobile in which daughter was riding, attempted to pass eastbound truck on middle lane of three lane highway and met westbound truck on middle lane and then to avoid westbound truck swerved off highway into tree. From a judgment of the Superior Court, Los Angeles County, Arthur Crum, J., for defendants, the plaintiff appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to show that defendant-driver was not negligent.

Judgment affirmed.

1. Automobiles ⇨242(2)

In automobile case, assuming that doctrine of *res ipsa loquitur* applies to the facts of the action, where the record contains evidence regarding the cause of the accident and the acts of the defendant as well as the reasons for those acts the inference of negligence arising from the doctrine of *res ipsa loquitur* is merely additional conflicting evidence.

2. Appeal and Error ⇨931(1, 5), 989

The appellate court does not reweigh the evidence or resolve its conflicts but rather the court must assume that the trial court has considered all the evidence before it, determined which witnesses are to be believed, explained all discrepancies and inaccuracies to its own satisfaction, and that the findings express the facts.

3. Automobiles ⇨244(20)

In mother's action for death of daughter that occurred when defendant who was driving automobile in which daughter was riding, and who while attempting to pass eastbound truck on middle lane of three lane highway, met westbound truck on middle lane and swerved off highway into tree to avoid truck, evidence was sufficient to support finding that defendant was not negligent in attempting to pass truck or in turning off highway.

4. Trial ⇨397(5)

Failure of trial court to make finding as to decedent's status as guest or passenger in automobile at time of collision was not error where defendant was not negligent and plaintiff was not entitled to recover damages.

Gary W. Sawtelle and John J. Hall, Los Angeles, for appellant.

Hunter & Liljestrom and Kenneth H. Clausen, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment for defendants in her action seeking damages because of the death of her daughter while riding in an automobile driven by the defendant Charlotte and owned by Charlotte's father, the defendant Melvin Phelps.

The first ground for reversal stated by appellant in her opening brief is that the evidence is insufficient to support the finding of fact that defendant Charlotte Phelps was not negligent. Appellant's objections to that finding and findings contrary thereto proposed by her were filed in the trial court before the judgment had been rendered.

Appellant contends that the judgment must be reversed because the evidence establishes negligence on the part of Charlotte as a matter of law. She relies upon the decision in *Gray v. Brinkerhoff*, 41 Cal. 2d 180, 183, 258 P.2d 834. In the cited case, the defendant driver ran down a careful pedestrian who was more than half way

across a marked crosswalk. There was no conflict in the evidence and the judgment for defendant based upon the finding that the driver was not negligent was reversed on appeal. *Gray v. Brinkerhoff*, supra, is not authority for reversal of a judgment for defendant where there is conflicting evidence regarding the circumstances of the collision.

In the instant action, the only testimony of an eyewitness was that of Charlotte. She lived in Puente, was 18 years and one month old, had a valid drivers license, and had been driving an automobile for about a year. She traveled the same road every week day. On November 14, 1950, she was driving her father's 1940 De Soto. It was in good mechanical condition. On the front seat beside her was the decedent, her cousin Geraldine Waterous, who was living in the home of the Phelps in Puente. Both girls attended Junior College in Pomona, about nine miles east of their home. On the day of the accident they left home about 7:30, proceeded to and turned east on Valley Boulevard. Decedent was studying for her German test. It was "raining slightly, just drizzling". The windshield wiper was running. They were due at school at 8 o'clock. Valley Boulevard between Puente and Pomona was then a three lane highway. The accident occurred about 7:45, approximately $\frac{1}{2}$ mile west of the village of Walnut.

Mrs. Prentiss testified that she was a Supervisor in the Health and Safety Education of the Los Angeles County Schools. She drove east on Valley Boulevard on the morning of November 14, 1950. It was "raining pretty hard". She remembers seeing Charlotte and the decedent pass her. She was a little late for school and was going around 40 miles per hour, or maybe a little more. The place where they passed her was probably more than half a mile from the place of the accident, maybe a mile. She did not see the accident but she heard a crash which she presumes was it. She remembers no one else passing her except one large truck which she believes passed her after the girls did. A man and a boy were at the scene of the accident when she stopped there. Also a truck head-

ed east was stopped in the south lane of Valley Boulevard opposite the spot where defendant's car had struck a tree on the north side of the boulevard. She does not recall seeing any westbound truck that morning until after she had arrived at the scene of the accident.

Dan Flemming, an apparatus engineer for the County Fire Department then stationed at Walnut, also drove east along Valley Boulevard on the morning of the accident. He passed Charlotte and decedent. He was then driving about 45 miles per hour and passed without changing his speed. Charlotte was then driving about 35 miles per hour. Soon after that, Flemming passed an oil tanker going east at approximately 25 to 30 miles per hour. It was then going slower than Charlotte had been, and just as he passed it he heard its gears being shifted for the slight grade. When he got to Walnut, he started to make a lefthand turn and had to wait for a big new Diesel oil tanker to pass. It was westbound, traveling 45 to 55 miles per hour. At that time the Diesel was in the North lane of Valley Boulevard. Flemming traveled that route often and he believed there was about 200 yard visibility from curb to curb from all points in the vicinity for one approaching and passing the site of the accident from the West. According to Flemming, as well as other witnesses, there were pepper trees along both sides of the boulevard, their branches almost met over it, and on the rainy day of the accident they hung lower than the tops of trucks traveling in the north or south lanes. The trees were trimmed about twice a year.

The photographs in evidence show a clear view of the site of the accident from 634 feet in each direction. The photographer who took the pictures and paced the distances testified that the minimum visibility from curb to curb was approximately 600 feet, for considerable distance when approaching the site of the accident from east or west.

By the collision on November 14, 1950, Charlotte had both her legs broken, received a blow and cut on her head, was rendered totally unconscious for seventeen days, hospitalized for nine weeks, and kept

in bed for five and one-half months. At the time of the trial in August, 1954, she testified that she had no actual memory of the accident and that her reading of the deposition the night before had not refreshed her recollection; that she did not know whether her testimony given in the deposition in January, 1952, was based upon her then actual memory or upon what she believed had happened from what her family and friends had told her.

The following testimony quoted from her deposition is the basis of appellant's contention that as a matter of law Charlotte was not free from negligence as found by the trial court.

"Q. Now, I wonder if you would just describe to us what happened in this accident? A. Well, I can't remember very clearly what happened, because it was so long ago, but I believe it was like this: I pulled out to pass a semi truck, therefore, I would be pulling out into the middle lane. While I was passing this truck, I saw another truck, another big truck, semi, coming down on me. I had either one choice or the other, to hit the truck or try and get out of its way since it didn't move for me, therefore, I pulled off the road. * * * I pulled off on my left. * * * or to the northerly side of Valley Boulevard. * * *

"Q. What do mean by a 'semi'? A. A two section truck. It was like a gasoline truck.

"Q. Can you give us an estimate as to how long this semi was to which you referred, which you were passing? A. I couldn't judge the length of it.

"Q. Well, perhaps we could state it in car lengths or some term with which you would be more familiar than just feet. Is there any medium of expression of that distance that would make it easier for you to estimate the length of that vehicle? A. I would judge it close to two and a half to three car lengths.

* * * * *

"Q. Do you remember looking ahead of you at the time you started to pass it? A. Yes, I did.

"Q. And in what lane were you traveling at that time? A. I was in my own lane, the outer lane. * * * The southernmost lane of Valley Boulevard. * * *

"Q. And for how far ahead of you could you see the road, that is, Valley Boulevard, at that time? A. I thought that I had clear vision, before I passed the truck, about two hundred to two hundred and twenty-five feet.

"Q. And at that time, how fast, approximately, were you traveling? A. I was traveling approximately thirty miles an hour.

"Q. Do you remember the approximate speed of this semi that you set out to pass? A. About my speed, about thirty miles.

"Q. Did you speed up at all to pass it? A. Slightly, yes * * * maybe up to 35 miles an hour.

* * * * *

"Q. Did you get entirely past the semi that you set out to pass, the one going in the same direction you were? A. No, I did not.

"Q. Then how far along its length, if you can estimate, did you get at the time you swerved off the road? A. I was approximately in the middle.

"Q. Now, I believe you said when you looked two hundred and twenty feet down the road, that you had clear vision for that length? A. When I was passing the semi, my vision was cut down since I was moving over, further over into the middle lane.

"Q. At that time that you were actually abreast of this semi you were passing, how far did you have clear vision down Valley Boulevard at that time? A. Approximately I would judge about one hundred fifty feet.

"Q. And it was the fact that the road curved slightly that limited your vision further than that? A. Yes, also the fact that I was pushed further over and didn't have the breadth to look over from the end lane to the middle lane.

"Q. You swung to your left, then, into the middle lane to pass this semi, is that correct? A. That is correct.

"Q. And did you, all during the time you were in the act of attempting to pass that semi, remain in that middle lane? A. I did.

"Q. Where were you, that is, where was your car with relation to the semi you were attempting to pass, at the time you first noticed the vehicle moving in the opposite direction? A. I was approximately in the middle, about the middle of the length of the semi I was passing.

"Q. And that was the first time you recall seeing the semi coming at you in the opposite direction? A. That is correct.

"Q. And approximately how far was that semi coming at you in the opposite direction, about how far away was it from you at the time you were midway of the semi you were passing? A. At the beginning of my vision, which would be about one hundred fifty feet away. * * *

"Q. At that time, do you recall formulating an estimate of its speed? A. The only thing that I recall is that I noticed it was coming awfully fast on me.

"Q. Well, 'awfully fast' is a rather relative term. If you didn't formulate an estimate of its speed, you can say so, but if you did, we would like your best estimate. A. Well, I would say it was going at least the extent of the speed limit, if not over it, fifty-five or sixty.

* * * * *

"Q. And in what lane was it traveling when you first saw it, this semi moving in the direction opposite to that which you were going? A. It was also coming down the middle lane.

"Q. Did you notice at that time any other cars on the highway at all besides your car and the two semis? A. No, I did not.

* * * * *

"Q. I believe you testified that you swung your car to your left or to the northerly side of Valley Boulevard, is that correct? A. That is correct.

"Q. Could you tell us approximately how far away the oncoming truck was from your car when you did that? A. I could not judge except that it was practically on top of me.

"Q. Well, would it be ten feet away from you? A. Possibly.

"Q. Would it be as far as twenty feet away from you? A. I don't believe so.

"Q. In other words, would it be fair to say it was between ten and twenty feet away from you when you swerved your car to your left or to the northerly side of Valley Boulevard? A. Yes.

* * * * *

"Q. From the time you first saw the oncoming truck, did it get over into the northernmost lane or did it continue in the middle lane? A. It stayed in the middle lane.

* * * * *

"Q. Is this correct, that the highest speed that you estimate you attained while attempting to pass the semi moving in the same direction you were, was approximately thirty-five miles an hour? A. That is right, approximately, that speed.

"Q. It could have been a few miles per hour either way? A. That is right.

"Q. Would you have attained a speed during that time as high as, say, forty miles an hour? A. It is conceivable.

"Q. Could you have attained a speed during that time you were attempting to pass the vehicle, of, say, forty-five miles an hour? A. I don't know. It is possible.

"Q. Is it possible that you attained a speed while you were attempting to pass that vehicle of as high as fifty miles an hour? A. I don't believe so."

Based upon Charlotte's testimony hereinabove quoted from her deposition, appellant, in her opening brief, argues as follows:

"Since the truck was 38 to 45 feet long, it would take Charlotte 6 seconds just to

reach the front of the truck. In 6 seconds, traveling at the speed of 35 miles per hour, or approximately 52 feet per second, the De Soto would cover a distance of over 300 feet. Yet, by her own testimony, Charlotte could see only 200 to 225 feet ahead of her when she first pulled out to pass the truck, and only 150 feet ahead of her when she was half-way alongside the truck she was attempting to pass.

"She stated that her vision was limited by the curve in the road and by her position in the middle lane as she was attempting to pass the truck.

"By this conduct, which was the proximate cause of the death of deceased, defendant Charlotte Phelps showed a lack of reasonable care in attempting to pass a long trailer truck on a curve when her vision ahead of her was obscured. Her account of the accident is not only contradicted, but the only evidence of how the accident happened.

"Therefore, plaintiff submits that reasonable men can draw but one conclusion—that defendant Charlotte Phelps was negligent in operating the De Soto, which negligence was the proximate cause of the accident and the death of deceased."

Appellant has taken the position that the trial court was required to find that all of the estimates of speeds and distances given by Charlotte in her deposition were accurate. Appellant ignores the testimony of Mrs. Prentiss that Charlotte passed her when she was traveling about 40 miles an hour, and Dan Flemming's testimony that when he passed Charlotte she was driving about 35 miles an hour. Appellant, in her mathematical calculations by which she attempts to prove Charlotte's negligence, also ignores all the other and more convincing evidence that Charlotte had clear vision for over 600 feet instead of 200 to 225 as estimated by her. Appellant dismisses the photographs of the site of the accident by saying they were taken on a brighter day.

While Charlotte herself was the only eye witness to the accident who testified at the trial, there was other and highly conflicting evidence as to the character of the curve

in the road at the site of the accident, and the speeds of the other automobiles, as well as the one Charlotte was driving.

Appellant also urges that "When an automobile goes off the highway and collides with a stationary object, a tree in this case, such an accident does not ordinarily occur in the absence of someone's negligence. *Druzanich v. Criley*, 1942, 19 Cal.2d 439, 122 P.2d 53; *Goss v. Pacific Motor Co.*, 1927, 85 Cal.App. 455, 259 P. 455. * * *

"Accordingly, plaintiff submits that the doctrine of *res ipsa loquitur* applies in this case, and that plaintiff was entitled to an inference of negligence."

[1] Assuming, but not deciding, that the doctrine of *res ipsa loquitur* does apply to the facts of this action, where the record contains evidence regarding the cause of the accident and the acts of the defendant Charlotte, as well as the reasons for those acts, the inference of negligence arising from the doctrine of *res ipsa loquitur* is merely additional conflicting evidence. *Pellegrino v. Los Angeles Transit Lines*, 79 Cal.App.2d 40, 43, 179 P.2d 39; *Druzanich v. Criley*, supra, 19 Cal.2d at page 444, 122 P.2d 53.

[2] It is not the province of an appellate court to reweigh the evidence or to resolve its conflicts. We must assume that the trial court has considered all the evidence before it, determined which witnesses are to be believed, explained all discrepancies and inaccuracies to its own satisfaction, and that the findings express the facts.

[3] In the instant action, there is substantial evidence in the record supporting the challenged finding that Charlotte was not negligent.

[4] There being no negligence on the part of the defendant, plaintiff is not entitled to recover damages. Therefore, the question as to decedent's status as a guest or a passenger in the automobile at the time of the collision need not be considered, and the trial court's failure to find thereon was not error.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

136 Cal.App.2d 704

D. H. LORD, Gertrude Lord, Maglore Keaveny, Lucy Keaveny, Rio Nakatsu, Jesse Rapley, Laura E. Rapley, Plaintiffs and Respondents,

v.

Anthony R. SANCHEZ and Dolores Sanchez, Defendants and Appellants.

Adele White, San Jose Abstract and Title Insurance Company, Jack L. Woolf, Olympia Woolf, et al., Defendants.

No. 16443.

**District Court of Appeal, First District,
Division 1, California.**

Nov. 2, 1955.

Action involving establishment of easement by prescription. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., rendered judgment for plaintiffs, and two of the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence supported the award of an easement in a strip 15 feet wide.

Affirmed.

1. Easements ⇨61(9½)

In action involving prescriptive easement in 15 foot strip adjacent to 20 foot strip as to which plaintiffs had acquired easement by grant, finding that if defendants obstruct the 35 foot easement "plaintiffs would have no means of ingress and egress" was not a finding that 15 foot strip was way of necessity and as such, a finding that was inconsistent with finding that easement in 15 foot strip was acquired by prescription.

2. Easements ⇨10(1)

No length of user by way of necessity can ripen into an easement by prescription, at least while the necessity continues.

3. Easements ⇨18(2)

A way of necessity arises by operation of law when a grantor conveys land shut off from access to road by grantor's remaining land, and such a way is vested in grantee as an appurtenance to the estate granted.

289 P.2d—3½

4. Easements ⇨18(1)

A way of necessity cannot be established except in a case of strict necessity.

5. Easements ⇨36(1), 61(8, 9½)

That plaintiff's use has been uninterrupted and that plaintiff's claim of right has been communicated to defendant are elements of proof in establishing title by prescription, and such elements are covered by a plea or a finding of ownership of right of way in real property.

6. Easements ⇨61(8)

Title by prescription may be established under an allegation of ownership.

7. Easements ⇨61(8, 9½)

Plaintiffs' allegation that they "have an easement" and finding that they "have acquired an easement by prescription across the said real property" and conclusion that they had an "easement and right of way for ingress and egress" and that it was "appurtenant" to plaintiffs' lands were sufficient, notwithstanding failure to expressly find that plaintiffs' use was "uninterrupted" and that plaintiffs' claim of right was "communicated" to defendants.

8. Easements ⇨36(3)

In action involving easement in 15 foot strip by prescription, evidence disclosed uninterrupted use during prescriptive period, use under claim of right based upon belief in right to use road, communication of right, and that user was of a roadway 18 feet wide, three feet of which were on a 20 foot easement that had been created by grant.

9. Easements ⇨9(1)

As to "claim of right" relied upon in establishing easement by prescription, it is not necessary in order that a use be adverse that it be made either in the belief or under a claim that it is legally justified; the essential quality is that it be not made in subordination to those against whom it is claimed to be adverse; and one who uses under a claim of right in himself is denying a use by the permission of another.

Donald J. Kennedy, Palo Alto, for appellants.

Crist, Peters & Donegan, Palo Alto, for respondents.

FRED B. WOOD, Justice.

Defendants Anthony and Dolores Sanchez own a parcel of land which fronts upon a highway. Plaintiffs acquired by grant an easement 20 feet wide across the Sanchez parcel as a means of access to their adjoining and nearby lands but they use a roadway which embraces only 3 feet of that easement and includes an adjoining strip 15 feet wide.

The court found that the plaintiffs acquired an easement in the 20 foot strip by grant and in the 15 foot strip by prescription; concluded that plaintiffs have an easement for ingress and egress across said 35 foot right of way; and quieted their title thereto.

Defendants Sanchez have appealed, challenging the easement by prescription, not the easement by grant. They question the sufficiency of the findings to support the judgment and the sufficiency of the evidence to support the findings.

[1-4] A finding that if defendants obstruct this 35 foot easement "plaintiffs would have no means of ingress and egress to their respective parcels of real property" is not, as claimed by defendants, a finding that the 15 foot strip is a way of necessity and as such a finding that is inconsistent with the finding that the easement in the 15 foot strip was acquired by prescription.* The 20 foot easement by grant was and is available, though less convenient because of trees, shrubs and other obstructions upon it. Obstruction of both easements (the entire 35 feet of right of way) would be a quite different thing from obstruction of the 15 foot or the 20 foot strip only, leaving the other available for use.

* " * * * no length of user by way of necessity can ripen into an easement by prescription, at least while the necessity continues * * *." *Martinelli v. Luis*, 213 Cal. 183, 184-185, 1 P.2d 980.

A way of necessity arises by operation of law when a grantor conveys land shut off from access to a road by the grantor's remaining land. It is vested in the

[5-7] Defendants claim the findings are fatally defective because of a failure expressly to find that plaintiffs' use was "uninterrupted" and that plaintiffs' claim of right was "communicated" to the defendants. Those, of course, are elements of proof in establishing a title by prescription. They are covered by a plea or a finding of "ownership" of a right of way in real property. *Corea v. Higuera*, 153 Cal. 451, 454-455, 95 P. 882, 17 L.R.A., N.S., 1018; *Richert v. City of San Diego*, 109 Cal.App. 548, 552-553, 293 P. 673. Title by prescription may be established under an allegation of ownership. *Glatts v. Henson*, 31 Cal.2d 368, 372, 188 P.2d 745. Accordingly in our case, plaintiffs' allegation that they "have an easement" and the finding that they "have acquired an easement by prescription across the said real property," and the conclusion that they have an "easement and right of way for ingress and egress" and that it is "appurtenant" to the lands owned by plaintiffs are deemed sufficient.

[8,9] Defendants claim there was a failure to prove that plaintiffs' use was "uninterrupted" during the prescriptive period. The "interruptions" to which they refer were mere oral protests now and then made by various of defendants' predecessors in interest and in one instance the parking of some cars across the roadway, which cars were removed when plaintiff Lord objected, and none thereof availed to stop or suspend plaintiffs' use, which went right on. This was far short of the physical obstructions which prevented use of the roadway in *Lapique v. Morrison*, 29 Cal.App. 136, 154 P. 881. As held in *Cox v. Clough*, 70 Cal. 345, 347, 11 P. 732, 733, "the mere disputing their right" would not prevent the bar of the statute. See also *Crossett v. Souza*, 3 Cal.2d 721, 723-724, 45 P.2d 970.

grantee as an appurtenance to the estate granted. *Mesmer v. Uharriet*, 174 Cal. 110, 112, 162 P. 104; see also 17 Cal.Jur. 2d 112-115, § 16.

A way of necessity "cannot be established except in a case of strict necessity." *Orr v. Kirk*, 100 Cal.App.2d 678, 684-685, 224 P.2d 71, 75.

The evidence is sufficient to show that the use was made under a claim of right. Plaintiffs Lord, Rapley and Nakatsu testified they felt they had a right to use the road. There is evidence that the plaintiffs and their predecessors openly used the road and never asked or received permission to use it. That would support an inference of a claim of right. *O'Banion v. Borba*, 32 Cal.2d 145, 147-148, 195 P.2d 10; *Pratt v. Hodgson*, 91 Cal.App.2d 401, 404-405, 204 P.2d 934.

As to "claim of right," it is "not necessary in order that a use be adverse that it be made either in the belief or under a claim that it is legally justified. The essential quality is that it be not made in subordination to those against whom it is claimed to be adverse. Yet he who claims a right in himself is impliedly asserting an absence of any right in another inconsistent with the right claimed. Hence one who uses under a claim of right in himself is denying a use by the permission of another." *Restatement of the Law of Property*, § 458, Comment d. See also *Humphreys v. Blasingame*, 104 Cal. 40, 42-43, 37 P. 804; *Wood v. Davidson*, 62 Cal.App.2d 885, 888, 145 P.2d 659; *Shonafelt v. Busath*, 66 Cal. App.2d 5, 13, 151 P.2d 873.

There is evidence that plaintiffs' claim of right was communicated to the defendants Sanchez. Plaintiff Lord expressly communicated his claim of right to Anthony Sanchez and to at least three prior owners. In so doing he used the plural ("we"), from which it could be inferred he was giving notice of a right claimed by all the plaintiffs. Also the character of the use (continuous, open, notorious) would warrant an inference that the owner of the servient land was aware of the fact that plaintiffs were acting under a claim of right. *Crossett v. Souza*, supra, 3 Cal.2d 721, 724, 45 P.2d 970; *Dooling v. Dabel*, 82 Cal.App.2d 417, 421-422, 186 P.2d 183.

Defendants claim the evidence fails to support the finding that plaintiffs Keaveny and Rapley acquired prescriptive rights. As to the Keavenys, defendants rely upon an alleged conversation between them and Anthony Sanchez in February, 1952. The

Keavenys had an easement by prescription across the road by November of 1950 because they trace their title to their property back to the Lords whose adverse use started not later than November of 1945. Therefore, nothing that Sanchez said in February of 1952 could wipe out their right to use the motel road. As to the Rapleys, defendants base this contention on the fact that Mr. Rapley at first thought that this was a public road. It is true that for a while he did think it was a public road. In other words, his use of the road was not in recognition of any authority on the part of the owners of the "Sanchez" property to prevent or permit such use. In *Humphreys v. Blasingame*, supra, 104 Cal. 40, 37 P. 804, the plaintiff mistakenly "supposed" he had a right of way. In the present case, Mr. Rapley "just figured that there was a road there and we could use it." And in *O'Banion v. Borba*, supra, 32 Cal.2d 145, 151, 195 P.2d 10, 14, the plaintiff "figured we had a right to go there." In each of these cases the claim of right is based upon the belief in the right to use the road, and this is sufficient to support the finding of a claim of right.

Defendants claim that the evidence does not support the award of the full 15 foot easement by prescription. They rely heavily upon testimony by Lord that at one time cars were parked parallel in front of the motel and encroached upon this roadway. But that was only a temporary encroachment. Lord further testified that he requested removal of those cars and that they were removed. Our review of the other evidence bearing upon this issue convinces us that it furnished an adequate basis for the inference that the user was of a roadway 18 feet wide, three feet only of which were on the 20 foot easement that had been created by grant. There is, for example, evidence that this roadway was used continuously for ingress and egress, and that plaintiffs many times repaired and maintained the entire length and width of the 18 foot roadway. In *Stevens v. Mostachetti*, 73 Cal.App.2d 910, 912, 167 P.2d 809, evidence that the average width of a road was 20 feet although the entire 20 feet was

not constantly traveled, was held to be sufficient to support an award of a 20 foot right of way. See also *Crossett v. Souza*, supra, 3 Cal.2d 721, 724-725, 45 P.2d 970.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



136 Cal.App.2d 572

The PEOPLE of The State of California,
Plaintiff and Respondent,
v.

Niles Robert BOUD and George Edmond O'Hara, Defendants,

Niles Robert Boud, Defendant and
Appellant.
Cr. 5400.

District Court of Appeal, Second District,
Division 3, California.
Oct. 27, 1955.

Defendant was convicted in the Superior Court of Los Angeles County, Joe Raycraft, J., of sodomy in violation of Penal Code, § 286, probation was granted and proceedings were suspended, and defendant appealed from order granting probation. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to prove that penetration occurred, that defendant was not unconscious, and that defendant, without compulsion, intended to and did actively participate in act.

Order affirmed.

1. Criminal Law ☞1159(2)

Test on appeal is whether there is substantial evidence to support conclusion of trier of fact, not whether guilt is established beyond reasonable doubt.

2. Sodomy ☞6

In sodomy prosecution, evidence was sufficient to prove that penetration occurred, that defendant was not unconscious, and

that defendant, without compulsion, intended to and did actively participate in act. Pen.Code, § 286.

3. Sodomy ☞7

Whether defendant was unconscious when alleged act of sodomy occurred was question of fact for determination of trier of fact. Pen.Code, § 286.

4. Criminal Law ☞419(12)

In criminal prosecution wherein defendant's counsel asked him if he had letter from certain doctor, defendant replied in affirmative, counsel asked if he got letter after he had discussed with doctor operation that defendant had had, and defendant replied in affirmative, letter was hearsay and was properly excluded.

Albert C. S. Ramsey, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loeb, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Boud and one O'Hara were charged with violation of section 286 of the Penal Code (sodomy). In an amended information, O'Hara was charged with violation of said section 286 and with violation of section 288a of the Penal Code. He pleaded guilty to the charge of violation of section 288a. In the trial of Boud, a jury was waived. He was adjudged guilty. Probation was granted and proceedings were suspended. Boud appeals from the order granting probation.

Appellant contends that the conviction is against the law and the evidence in that the corpus delicti was not established; the evidence did not, beyond a reasonable doubt, establish penetration; the evidence disclosed that the defendant was an unconscious victim of any attempted act of sodomy; and the law should be construed as making the aggressive, active participant the violator of the law.

O'Hara, called as a witness by the People, testified that he was in the Navy; on September 20, 1954, after 2 a. m., he was walking on a street in Long Beach on his way

back to his ship, and the defendant, who was alone in a large automobile, asked him if he was going to the landing and if he wanted a lift to the landing; O'Hara got into the automobile, and defendant drove to a place outside a naval base and stopped the automobile. In his further testimony he related facts which, if believed, were sufficient to prove that defendant violated said section 286 as alleged. It is not necessary to state the details as related by him. On cross-examination, he said that during the night, prior to getting into defendant's automobile, he (O'Hara) had been in several bars, had several drinks of intoxicating liquor, was "pretty groggy," was in a daze of intoxication, and was drunk; that it was possible there was no penetration.

Officer Samuelson testified that on September 20, 1954, about 2:45 a. m., he and Officer Wolfe, who were in an automobile, saw defendant and O'Hara riding in a 1952 Cadillac automobile; the officers kept the automobile under observation; about 2:50 a. m. the automobile stopped near a barracks; the officers parked their automobile about 35 feet back of the Cadillac; there was another automobile between the officers' automobile and the Cadillac; he (Samuelson) approached the Cadillac on the right side thereof, and Officer Wolfe approached it on the left side; as they approached the automobile they were in a crouched position; he (Samuelson) flashed a light into the front seat and saw defendant and O'Hara lying in the front seat on their left sides, with their heads toward the left door; O'Hara's pants were down around his knees; defendant's pants were down to the thigh area; O'Hara was up against defendant; when the light flashed into the car O'Hara moved back, and the witness (Samuelson) saw the penis of O'Hara as it came out of the rectum of defendant; when the witness flashed the light he saw that defendant's right hand was spreading the right side of defendant's buttocks upward; defendant and O'Hara "had the indication that they had been drinking, but they were not under the influence of liquor; at the police station the officers asked defendant if this was the first

time he had participated in an act of sodomy; he replied, "Well, yes, this is."

Officer Wolfe testified that when the other officer flashed the light into the car he (witness) saw that defendant's pants were around his knees; defendant was conscious; when the witness said that he was a police officer, the defendant said "Oh," or something like that; then defendant and O'Hara began adjusting their clothing; the witness asked defendant to get out of the car; defendant finished buckling his belt and adjusting his pants, and then got out; defendant said he lived in Garden Grove or Bell Gardens and he owned a liquor store there; defendant asked if something could be done about the arrest, and he offered the witness all the money he had; defendant then counted his money, which was \$20, and he said he would write a check or they could go some place and get a check cashed; O'Hara had been drinking heavily; there was an odor of alcohol on defendant's breath, but he was not under the influence of liquor; the witness did not see defendant participating in the crime against nature; at the police station the witness asked defendant if that was the first time he had committed an act of sodomy; he replied, "Well, I guess it is."

Defendant testified that in the afternoon and night preceding the arrest he went to many bars and had many drinks of intoxicating liquor; he was feeling the drinks and he started home; he met O'Hara, but he could not tell exactly where he met him; defendant did not have any remembrance of O'Hara getting into the car; both of them were pretty drunk; he drove to the Naval Base and stopped at a gate to let O'Hara out, but O'Hara would not get out; he believed that O'Hara "was passed out or unconscious"; O'Hara was slumped down in the front seat; then defendant drove on, but he could hardly see the road; he pulled over to the side because he could not drive farther and he wanted to sleep; then he lay down in the front seat and went to sleep and passed out, and that is the last he remembered until someone said, "Police officers", his pants were up in right position when he went to sleep; he had no recollection

tion of any conversation regarding money; the officers asked him whether he had done this before; he replied that this was the first time he had been arrested, let alone doing anything like this.

A bartender, called as a witness by defendant, testified that he had known defendant about 13 years; he had seen defendant at the bar between 4 and 6 p. m. on September 19; he served defendant five or six martinis; then the witness refused to serve him any more, because defendant had plenty; defendant was then under the influence of liquor.

[1,2] Appellant's argument, in support of his contention that the corpus delicti was not established, is that the evidence did not establish beyond a reasonable doubt that there was penetration. "The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt." *People v. Daugherty*, 40 Cal.2d 876, 885, 256 P.2d 911, 916. The testimony of O'Hara and Officer Samuelson was sufficient, if believed, to prove penetration.

[3] The question as to whether defendant was unconscious when the alleged act of sodomy occurred was a question of fact for the determination of the trial judge. There was substantial evidence that he was conscious. The court could infer from the manner in which defendant drove his automobile, and from the testimony as to the manner in which defendant was using his right hand when the light was flashed into the car, and from the statements and conduct of defendant after the arrival of the officers, that defendant had not been unconscious immediately or at all before the officers arrived. Immediately after the officers arrived defendant gave responsive answers to questions, adjusted his clothing, got out of the automobile, offered to pay money, counted his money, and talked about writing a check.

Appellant also contends in effect that section 286 is not sufficiently definite and certain to include the person who is the pathic subject or victim. In *People v. Featherstone*, 67 Cal.App.2d 793, 155 P.2d 685,

wherein the defendant was charged with violation of section 286, a question was whether it was necessary that the testimony of the complaining witness (the alleged victim) be corroborated. Defendant therein contended that the witness was an accomplice and that there was no corroboration of his testimony. The court said, 67 Cal. App.2d at page 795, 155 P.2d 685, that the uncontradicted testimony showed that the witness was imposed upon by defendant, that there was no evidence that the witness encouraged the defendant, and that the evidence disclosed that the witness objected and refused to take part in the act. The court also said, 67 Cal.App.2d at page 796, 155 P.2d at page 687: "Undoubtedly, where the persons participating in an offense of this character do so without compulsion, each is an accomplice of the other, and is liable to prosecution as such." It was held therein that the witness was not an accomplice and that corroboration of his testimony was not necessary. In the present case, as above indicated, the evidence was legally sufficient to prove that defendant was not unconscious, and to prove that he, without compulsion, intended to and did actively participate in the act. The trial judge stated that he was convinced that the defendant was more the aggressor than was O'Hara. This contention to the effect that section 286 is too vague and uncertain is not sustained.

[4] Appellant, in arguing that penetration was impossible, states that appellant had undergone an operation. After making that statement he cites certain pages and lines of the reporter's transcript. That citation shows that: counsel for defendant asked him if he had a letter from a doctor in Pomona; defendant replied in the affirmative; counsel for defendant asked him if he got the letter after he had discussed with the doctor a rectal operation that defendant had; defendant replied in the affirmative. His counsel offered the letter in evidence. An objection to the letter, on the ground that it was hearsay, was sustained. The ruling was correct. Counsel for defendant also refers to, and quotes from, a report made by a doctor who was appointed by the court (apparently a doctor who was

appointed in connection with proceedings as to sexual psychopathy). Those proceedings were not a part of the trial and were had after the defendant had been adjudged guilty of the offense charged. The report is not a part of the record on appeal.

The evidence was sufficient to support the adjudication that defendant was guilty as charged.

The order granting probation is affirmed.

SHINN, P. J., and ASHBURN, J. pro tem., concur.



136 Cal.App.2d 636

Scott G. PORTER and Estelle Porter,
husband and wife, Plaintiffs and
Respondents,
v.

Pearl E. ARNOLD, Defendant and Appellant.
Civ. 20954.

District Court of Appeal, Second District,
Division 1, California.
Oct. 31, 1955.

Action to compel specific performance of agreement to sell certain realty. The Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment in favor of plaintiffs, and defendant appealed. The District Court of Appeal, White, P. J., held that where the purchasers had deposited in escrow the cash, note and trust deed required by preliminary agreement, but vendor had refused to deposit deed in escrow, finding that purchasers had performed all terms of agreement was supported by evidence, though trust deed did not contain supposed reservation of mineral rights.

Judgment affirmed.

1. Specific Performance ⇨121(11)

In action to compel specific performance of agreement to sell certain realty,

where purchasers deposited in escrow the cash, note and trust deed required by agreement, but vendor refused to deposit deed in escrow, finding that purchasers had performed all terms of agreement was supported by evidence, though trust deed did not contain supposed reservation of mineral rights.

2. Specific Performance ⇨121(3)

In action to compel specific performance of agreement to sell certain realty, finding that purchasers had demanded a conveyance in accordance with terms of contract, and vendor had refused to execute and deliver such conveyance, was supported by evidence.

3. Vendor and Purchaser ⇨82, 86

Where purchasers deposited in escrow the cash, note and trust deed required by agreement to sell certain realty, but vendor refused to deposit deed in escrow, fact that purchasers had signed escrow agent's proposed amendment to escrow instructions did not constitute an abandonment of or a change in terms of original agreement.

4. Vendor and Purchaser ⇨145

Where purchasers deposited in escrow the cash, note and trust deed required by agreement to sell certain realty, but vendor refused to deposit deed in escrow, fact that escrow agent sent to vendor for signature a deed containing a reservation of mineral rights different from that contained in original instruction, did not justify vendor's failure to comply with terms of agreement.

Charles A. Thomasset, Los Angeles, for appellant.

Potter, Potter & Rouse, Walter S. Home, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal by defendant from a judgment that she shall execute and deliver through a certain escrow a grant deed conveying to plaintiffs, as joint tenants, a certain 38.2 acre parcel of real property.

May 8, 1953, the plaintiffs and defendant entered into a written contract, whereby plaintiffs agreed to buy and defendant

agreed to sell said real property for \$4,500, to be paid \$1,500 in cash through the escrow and the balance by promissory note secured by trust deed on said property. Plaintiffs deposited in the escrow the cash, note and trust deed. Defendant failed and refused to deposit any deed in said escrow.

Appellant urges as grounds for reversal that certain findings of fact are not supported by the evidence. As listed in appellant's opening brief, they are:

"Finding XII, in substance, provides that plaintiffs had performed and fulfilled each and all of the terms and conditions of the original escrow agreement.

"Finding XIII provides, in substance, that plaintiffs demanded of defendant that she perform the terms of the original escrow agreement and that defendant refused to do so.

"Finding XIV is to the effect that defendant in refusing to execute and deliver the conveyance provided in the original escrow instruction acted in bad faith.

"Finding XV is to the effect that the allegations and denials of defendant's answer are untrue except as the facts are found to be true in the findings of fact.

"Finding XVI is to the effect that the allegations of defendant's first affirmative defense (that plaintiffs had abandoned the contract) are untrue."

[1, 2] Appellant claims that Finding XII is without evidentiary support because respondents' trust deed failed to reserve the mineral rights. Where, as in the instant action, the trust deed deposited in the escrow describes the property required by the escrow instructions, and more, it amounts to substantial evidence of respondents' performance of the terms of the original escrow agreement as found by the court.

Finding XIII is that respondents have demanded a conveyance "in accordance with the terms of said written contract" and that appellant has neglected and refused to execute and deliver such conveyance.

Each of the findings cited as error is supported by the evidence.

[3, 4] Appellant's contention is that, by their approval of the escrow agent's pro-

posed amendment to escrow instructions, respondents had abandoned the original instructions. The proposed amendment to the escrow instructions signed by respondents only could not change the terms of the written agreement. The escrow instructions signed by all parties continued to be their contract. That the escrow agent sent to appellant for signature a deed containing a reservation of mineral rights, which was not the same as in the original instructions, did not justify appellant's failure to comply with the terms of the agreement.

Since appellant's entire argument is based upon the assumption that respondents had abandoned and failed to perform their written contract, the authorities cited in her brief have no application to the facts of the instant action, as found by the trial court and supported by the record before us.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



136 Cal.App.2d 618

Ray SEE, Plaintiff and Appellant,

v.

The GRANDVIEW GARDENS et al.,
Defendants and Respondents.

Civ. 20528.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1955.

Action for personal injuries resulting from an altercation at defendants' café between plaintiff and one of defendants. From a judgment of the Superior Court of Los Angeles County, Samuel R. Blake, J., on a jury's verdict for defendants, plaintiff appealed. The District Court of Appeal, White, P. J., held that an instruction to jury that proximate cause of injury is cause which, in natural and continuous se-

quence, unbroken by any efficient intervening cause, produces injury, and efficient cause that necessarily sets in operation factors accomplishing injury, was not erroneous as confusing jury by leaving impression that if plaintiff, by his own acts, set in motion certain sequence of circumstances resulting in his injuries, he should not complain of results.

Judgment affirmed.

1. Appeal and Error ⇐989

It is not reviewing court's province to analyze or resolve conflicts in evidence.

2. Assault and Battery ⇐44

In action for personal injuries resulting from altercation at defendants' café between plaintiff and one of defendants, where jury was instructed on all issues to be determined by them, their verdict for defendant implied findings that plaintiff was aggressor and that defendant party to altercation used no more force than was reasonably necessary in defending himself.

3. Assault and Battery ⇐43(1)

In action for injuries resulting from altercation at defendants' café between plaintiff and one of defendants, instruction to jury that proximate cause of injury is cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and efficient cause which necessarily sets in operation factors accomplishing injury, was not erroneous as confusing jury by leaving impression that if plaintiff, by his own acts, set in motion certain sequence of circumstances resulting in injuries, he should not complain of results.

John C. Miles, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, A. P. G. Steffes, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment for defendants, entered upon the unanimous verdict of the jury. The action is

one for compensatory damages for injuries to plaintiff's person as the result of an altercation which occurred on June 19, 1951, at Grandview Gardens, a cafe in New Chinatown in Los Angeles. Plaintiff, with his wife and two friends, had been drinking Martinis at the bar of Grandview Gardens, which was owned and operated by Doc Wong and Norman Wong as partners. Plaintiff and Doc Wong knew each other, but Norman Wong and plaintiff did not. Plaintiff was leaving with his half finished drink in his hand. Norman Wong asked him to finish his drink and leave the glass at Grandview Gardens. In the altercation which followed, blows were struck by both parties.

[1] As to all further facts the evidence is in conflict. It is not the province of the reviewing court to analyze or resolve conflicts in the evidence. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[2] Where, as in the instant action, the jury was instructed on all issues to be determined by them, the verdict for defendant necessarily implies their findings that plaintiff (and not defendant) was the aggressor, and that defendant Norman Wong, in defending himself, used no more force than was reasonably necessary. Appellant does not claim that the evidence is insufficient to support those implied findings.

[3] Over 60 instructions were given the jury. Only one is cited as error. It reads:

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. (It may operate directly or through intermediate agencies or through conditions created by such agencies.)"

It is conceded that said instruction is a correct statement of the law. In the language of appellant in his opening brief, his "criticism made to the trial court and now presented is that it is confusing when used in connection with the assault and battery

case. The cause of confusion lies in that it leaves the impression that if the plaintiff by his own act set in motion a certain sequence of circumstances resulting in his injury he should not complain of the results. It does not impress the jury with the fact that in this type of case there may be a constant change of causes of action depending upon which party to the altercation exerts more than necessary and reasonable force to protect his person or property."

Reading the instructions as a whole, it does not appear to us that the jury could have been confused. From the record in its entirety it does not appear that any injustice has been done or that a retrial would be likely to result in a different verdict.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



136 Cal.App.2d 653

Homer A. HANSEN et al., Plaintiffs and Respondents,

v.

Lester DANIELSON et al., Defendants and Appellants.

Civ. 21097.

**District Court of Appeal, Second District,
Division 1, California.**

Oct. 31, 1955.

Action to quiet title to alleged right of way over defendants' land. The Superior Court of Los Angeles County, Thurmond Clarke, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding for plaintiffs.

Judgment modified pursuant to concession of plaintiffs, and as modified, affirmed.

1. Easements ⚡61(9)

In action to quiet title to alleged right of way over defendants' land, evidence sustained findings for plaintiffs.

2. Appeal and Error ⚡930(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged to uphold verdict if possible.

3. Appeal and Error ⚡989

Where verdict is attacked as unsupported by evidence, appellate court's power begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached, and this rule is as applicable in reviewing findings of judge as it is when considering jury's verdict.

4. Easements ⚡61(8)

Complaint seeking to quiet title to alleged right of way over defendants' land stated facts sufficient to constitute cause of action.

5. Easements ⚡30(1, 3)

Easements may be extinguished by non-use and abandonment, and by use of servient estate in manner adverse to exercise of easement for period required to give title to land by adverse possession.

6. Easements ⚡36(3)

In action to quiet title to alleged right of way over defendants' land, evidence sustained finding that easement was not extinguished by non-use or abandonment or by use of servient estate in manner adverse to exercise of easement for period required to give title to land by adverse possession.

7. Easements ⚡61(12)

In action to quiet title to alleged right of way over defendants' land, judgment rendered was sufficiently certain to identify easement in question.

8. Quieting Title ⚡52

Judgment quieting title cannot enlarge grant under which parties claim.

Homer L. Martin and Henry J. Bateman, Tujunga, for appellants.

Braeme E. Gigas, South Pasadena, for respondents.

DORAN, Justice.

This action by respondents seeks to quiet title to an alleged right of way over appellants' land located in the community of Sunland about a mile north of Foothill Boulevard. The westerly boundary of Lot 2 on which appellants' land is located, and the easterly boundary of Lot 3 where respondents' parcel is situated is a common line.

Under date of August 27, 1923, S. R. Deacon and wife conveyed to Gavin W. Craig and wife, Lot 2 involved herein, and a portion of Lot 1 not here involved, "Reserving to the grantor, however, the right of way across the above described property over roads now in use to the Government land and to Lot Three (3) in Section Eleven (11). Township Two (2) North, Range Fourteen (14) West, S. B. M., provided that the right of way to the said Lot Three (3) may be changed by the Grantee if it shall still be kept so as to provide reasonably convenient access thereto".

By deed dated May 18, 1944 the Deacons conveyed Lots 1 and 3 and also "an easement for road purposes over Lot 2", to the respondents Hansen, such easement being described as "the same easement as reserved in the deed" of August 27, 1923. On July 7, 1947, a portion of Lot 2 was conveyed to the appellants Danielson.

The record discloses evidence in support of the trial court's findings that as far back as 1904 there had been a roadway across the Danielson portion of Lot 2 leading to Lot 3, and that up to 1952 this way had been used by landseekers, land commissioners, surveyors, engineers, hunters with wagons and automobiles, miners, farmers, equestrians, moving picture companies, and others. When the Danielsons built a home on Lot 2, no fence or gate was built and the Hansens continued to travel across the Danielson property without interruption. The Hansens were ordered off

the Danielson property for the first time in 1952.

Before taking testimony the trial judge and all parties interested visited and inspected the property in question. During the trial some 24 witnesses testified and 20 exhibits were received in evidence. Judgment was rendered in favor of the Hansens, respondents herein.

In explanation of the original reservation of "the right of way across the above described property over roads now in use to the Government land and to Lot Three", the trial court found that "the term 'government land' referred to and meant the Angeles National Forest Lands in the San Gabriel Mountains and that the phrase 'over roads now in use to the government lands' referred to and meant a road which, in 1923, and for many years prior thereto, was located in or near the bottom of a canyon shown on maps as Ebey Canyon; ran from the point where said canyon intersected Tujunga Wash or Canyon and then traversed a portion of said Lot 2 northerly to the Angeles National Forest". The court also found that the location of such right of way reserved in the 1923 deed, "was not at any time changed".

The trial court further found that "When said defendants acquired said portion of Lot 2 they did so with actual and constructive knowledge of the existence of the West Mesa Road and the right of plaintiffs to freely use the same * * * to and from Lot 3 which plaintiffs own"; and that "the first time any of the defendants barred plaintiffs from using the West Mesa Road across their property to Lot 3 was in the early months of 1953".

[1-3] Appellants' contention that "There is no evidence to support the findings of fact, conclusions of law and judgment", cannot be sustained. On the contrary the record discloses abundant and substantial evidence in support thereof. The rule as stated in *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690, and elsewhere is that "In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences in-

dulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached * * *. The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict." A number of witnesses testified to use of the roadway in question over a long period of years.

[4] The contention that plaintiffs' complaint does not state facts sufficient to constitute a cause of action, is likewise without merit. As stated in respondents' brief, "the complaint alleges with sufficient certainty that the right-of-way referred to in the 1923 deed passed over that portion of Lot 2 later owned by appellants Danielson." Moreover, as respondents point out, the record reveals that at all stages of this case prior to appellants' Opening Brief, including a pre-trial conference, the complaint was treated as sufficiently stating the issues upon which the case was tried.

[5, 6] It is true, as stated by the appellants, that "An easement may be extinguished by non-use and abandonment", and also that it may be extinguished "by the use of the servient estate in a manner adverse to the exercise of the easement for the period required to give title to land by adverse possession". However, a survey of the record indicates that there is substantial evidence to the effect that there was no such non-use or abandonment. While it is true that defendants presented evidence as to the building of a fence in 1948, there was likewise evidence that appellants freely used the roadway until 1953. The rule of appellate review in reference to conflicting evidence has been herein previously stated.

Other points raised are likewise predicated upon an interpretation of the evidence favorable to appellants' contentions, where-

as, under the long established rule hereinbefore mentioned, the trial court's interpretation must be adopted where the judgment is supported by any substantial evidence. This is true in respect to appellants' contention that the claimed easement was superseded by a 1947 easement deed arrangement between respondents and other parties which under respondents' theory related to property east of the Danielson property and not involved herein.

[7] There is no merit to appellants' other contentions to the effect that the judgment is indefinite and uncertain "as to the property affected and location of the easement"; and that neither the Deacons who created the original easement, nor the parties to whom the easement was given, "intended, used or in any manner conducted themselves in such a manner as to indicate the existence of a road over the property now owned by the defendants Danielson". The judgment as rendered is sufficiently certain to identify the easement in question. The trial court's conclusion, contrary to the other point mentioned above, is supported by substantial evidence.

[8] Respondents concede that appellants are correct in the contention that the judgment is at fault in not preserving to the servient estate the privilege created in the 1923 deed "that the right of way to the said Lot 3 may be changed by the Grantee if it shall be kept so as to provide a reasonably convenient access thereto", since a judgment quieting title cannot enlarge the grant made by the parties.

The judgment is modified by adding the following sentence at the end of said judgment: "As provided in the 1923 deed creating said easement, 'the right of way to the said Lot 3 may be changed by the Grantee if it shall be kept so as to provide a reasonably convenient access thereto'", and as so modified is affirmed, the parties to bear their respective costs on appeal.

WHITE, P. J., and DRAPEAU, J., concur.

136 Cal.App.2d 615

**Richard Washington BIRCH, Plaintiff,
Cross-Defendant and Appellant,**

v.

**Antonina BIRCH, Defendant, Cross-Com-
plainant and Respondent.**

Civ. 16562.

**District Court of Appeal, First District,
Division 2, of the State of California.
Oct. 31, 1955.**

Suit for annulment on ground that defendant was married to another and not divorced, wherein defendant cross-complained seeking divorce on grounds of cruelty. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment denying both annulment and divorce, and plaintiff alone appealed. The District Court of Appeal, Nourse, P. J., held that presumption in favor of validity of second of two successive marriages, together with uncontradicted evidence of defendant that she had procured divorce from her former husband, was sufficient to support denial of annulment.

Judgment affirmed.

1. Marriage $\S$ 60(7)

In suit for annulment on ground that defendant was married to another and not divorced, burden was on plaintiff to show that former marriage had not been dissolved in legal manner pursuant to judicial practice at time and place alleged by defendant.

2. Marriage $\S$ 40(5)

When a person has entered into two separate marriages, presumption arises as to validity of second marriage.

3. Marriage $\S$ 60(7)

In suit for annulment on ground that defendant was married to another and not divorced, presumption in favor of validity of second of two successive marriages, together with uncontradicted evidence of defendant that she had procured divorce from her former husband, was sufficient to support judgment denying annulment.

4. Evidence $\S$ 362

Textbooks in English or French on Chinese family law, which were not official documents or public records within code sections, but were merely expressions of authors' opinions as to what law was, were inadmissible. West's Ann.Code Civ.Proc. $\S$ 1900, 1918, 1919.

5. Evidence $\S$ 366(5)

Where Consul General of Republic of China was not officer having charge of original Civil Code of China, his certificate embodying sections of such code relating to divorce was inadmissible. West's Ann.Code, Civ.Proc. $\S$ 1901.

6. Evidence $\S$ 517

In suit for annulment on ground that defendant was married to another and not divorced, wherein defendant testified that she had procured divorce from her former husband pursuant to judicial practice of Harbin, China, in period 1935-1937, expert testimony as to applicable foreign law would have been admissible if offered.

Neil Cunningham, San Francisco, for appellant.

John C. Alaimo, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the annulment of the marriage of the parties on the ground that the defendant was married to another and not divorced. Defendant cross-complained seeking a divorce on the ground of plaintiff's cruelty. Judgment went for the defendant on plaintiff's complaint and on her cross-complaint a divorce was denied on the ground that her testimony concerning the acts of cruelty was not corroborated. Plaintiff alone appeals.

The trial court found that plaintiff had failed to prove that defendant's former marriage had not been legally dissolved prior to the marriage of the parties herein. Appellant first contends that this finding is contrary to the evidence. Admitted is the fact that defendant was married to Alexander Feodorovich Magnitsky on April 17,

1930, in the Saint Iversky Church of Harbin, Manchu-Di-Kuo, China. The affidavit of Magnitsky was received in evidence averring that in March, 1937, the Byzantine-Russian Church issued to him for presentation to the district court, its certificate that the parties had been ecclesiastically divorced in the year 1935 on the ground of wilful desertion by respondent, but that he did not present the certificate to the District Court at Harbin. However, the respondent testified that she presented her copy of the ecclesiastical divorce decision to the one Chinese Court in Harbin and that she was present when that Court granted a divorce.

[1] So far as appears from any evidence offered by appellant there was nothing to show that a divorce as testified to by respondent was not valid and final. If the practice under the laws of Manchu-Di-Kuo at that time was for the Court to confirm the decision of the Byzantine-Russian Church at the request of either party there can be no question that the parties were legally divorced at that time. The burden was on the plaintiff and appellant to show that the marriage had not been dissolved in a legal manner pursuant to the judicial practice in Harbin in the period 1935-1937.

[2] The case is controlled by the settled rule that when a person has entered into two separate marriages a presumption arises as to the validity of the second marriage. This rule is clearly stated in *In re Estate of Smith*, 33 Cal.2d 279, 281, 201 P.2d 539, 540, where the court said:

"It is well established that when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage. (Citations.)"

[3] This presumption taken with the uncontradicted evidence of the respondent, which was admitted without objection and upon the interrogation of the appellant, that she had procured a divorce from her former husband is sufficient to support the judgment denying appellant's plea for an annulment.

Appellant further complains that he was erroneously prevented by rulings of the Court excluding evidence offered by him to prove that a divorce as testified to by appellant would not comply with the local law at the time of the alleged divorce.

[4] The objection to the introduction of certain text books in English or French on Chinese family law was correctly sustained. They were not "Books printed or published under the authority of a * * * foreign country * * *, or proved to be commonly admitted in the tribunals of such * * * country as evidence of the written law thereof," within the provision of section 1900 of the Code of Civil Procedure. They were not official documents or public records within sections 1918 and 1919 Code of Civil Procedure. They were merely expressions of the authors' opinions as to what the law was, and were not admissible over objection.

[5] The offered certificate of the Consul General of the Republic of China embodying sections of the Civil Code of China relating to divorce, was not within the purview of section 1901 of the Code of Civil Procedure, because said consul was not "the officer having charge of the original" code. It also was inadmissible over objection.

[6] Expert testimony as to the applicable foreign law would have been admissible, see *In re Estate of Johnson*, 100 Cal. App.2d 73, 79, 223 P.2d 105, but was not offered. We find no error.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

136 Cal.App.2d 596

C. E. GLIDDEN and Marie L. Glidden,
Plaintiffs and Appellants,

v.

H. E. WILLS, Garlan Epley, individually and doing business as Retailers Credit Association, Wilbur Smith, Henry W. Drewes, and St. Paul Mercury Indemnity Company, a corporation, Defendants, Henry W. Drewes, and St. Paul Mercury Indemnity Company, a corporation, Respondents.

Civ. 8697.

**District Court of Appeal, Third District,
 California.**

Oct. 28, 1955.

Action against constable and surety on his bond. The Superior Court, Yuba County, Warren Steel, J., sustained a demurrer, and from the judgment entered thereafter, the plaintiffs appealed. The District Court of Appeal, Schottky, J., held that if the constable in levying an attachment failed to file an inventory of the property attached and if the plaintiffs as third party claimants were thereby deprived of due and proper information and notice that their property had been attached and were thereby required to search for their property, to their damage, the constable was liable.

Judgment reversed with directions to overrule demurrer.

1. Attachment ⇨172

Under statute providing that officer levying attachment must make full inventory of property attached and return same with writ, it was duty of constable to file an inventory of attached property. West's Ann.Code Civ.Proc. § 546.

2. Sheriffs and Constables ⇨123

Property inventory which constable was bound to return with writ of attachment was part of "process" or "notice" within statute providing that any sheriff who does not return a process or notice with necessary endorsement without delay is liable to person aggrieved for all actual damages sustained. West's Ann.Code Civ. Proc. § 546; West's Ann.Gov.Code, §§ 26663, 27823.

3. Appeal and Error ⇨917(1)

In determining whether trial court properly sustained demurrer to complaint, reviewing court would have to accept allegations of complaint as true.

4. Sheriffs and Constables ⇨123

If constable failed to file inventory of property attached and if third-party claimants were thereby deprived of due and proper information and notice that their property had been attached and were thereby required to search for their property, to their damage, constable was liable. West's Ann.Code Civ.Proc. §§ 546, 689; West's Ann.Gov.Code, §§ 26663, 27823.

William H. Penaat, San Francisco, for appellants.

Rich, Carlin & Fuidge, Marysville, for respondents.

SCHOTTKY, Justice.

Plaintiffs commenced an action against a number of defendants alleging in their complaint that plaintiffs were the owners of certain personal property which was in the possession of defendant Wills, as bailee; that on or about September 29, 1952, defendant Crewes, as constable, attached and took into his possession certain personal property under a writ of attachment which had been issued in an action brought against Wills; that thereafter, under writ of execution, defendant Drewes, on December 14, 1952, sold said attached property to defendant Smith and delivered same to him; and further, "That defendant Henry W. Drewes, in his official capacity as Constable, failed and neglected to file an inventory of the property attached in the action referred to in paragraph VI hereof, as required by Section 546 of the Code of Civil Procedure of California, and plaintiffs were thereby deprived of due and proper information and notice that their property had been attached. They were thereby required to and did make many trips from their home in Burlingame, California, to the vicinity of Willits, Oroville, Brownsville and Marysville, California, in search of said property, to their damage in the sum of \$1,000.00."

The complaint prayed for damages against defendant Drewes and his bonding company in the sum of \$1,000.00.

Defendant Drewes and St. Paul Mercury Indemnity Company demurred to the complaint and the court sustained their demurrer without leave to amend. Plaintiffs have appealed from the judgment entered after the sustaining of the demurrer.

The sole question presented upon this appeal is whether or not appellants did, or could, state a cause of action for damages against the constable, respondent Drewes, predicated upon the constable's failure to comply with section 546 of the Code of Civil Procedure which provides in part:

"The officer levying the attachment must make a full inventory of the property attached, and return the same with the writ."

Appellants contend that since the inventory is required to be returned with the writ, it is a "process" or "notice" within the meaning of section 26663 of the Government Code, which applies to constables, Government Code, § 27823, and which reads:

"Any sheriff who does not return a process or notice in his possession, with the necessary endorsement thereon, without delay is liable to the person aggrieved for all actual damages sustained by him."

Respondents argue that the inventory is not a "process" or "notice" within the purview of the last quoted section and that appellants, who were not parties to the action in which the attachment issued, are not the person "aggrieved." Respondents maintain that appellants' sole remedy was to make a third-party claim pursuant to Section 689 of the Code of Civil Procedure.

[1,2] The precise question here involved appears to be one of first impression in this state and we have been cited to no applicable authorities from other jurisdictions. However, it cannot be doubted that it was the duty of the respondent constable to file an inventory of the attached property

as required by said section 546, and in view of the fact that said inventory is required to be filed with the writ of attachment we believe that said inventory is a part of the "process" or "notice" within the meaning of section 26663 of the Government Code. In Harlow on the Duties of Sheriffs and Constables, a work which has long served as a guide for sheriffs and constables, it is stated at section 224:

"The sheriff's return upon process is a report of his proceedings thereunder. Where the language of the law, which requires him to do certain things in the service of process, is mandatory, he should make the wording of his return conform strictly to the requirements therein expressed. * * * Care should be taken to include the inventory of attached property."

[3,4] We are unable to agree with respondents' contention that the requirement of the filing of inventory in section 546 is only for the benefit of the attaching creditor, for it might well in certain instances be of benefit to the actual owner of personal property that had been attached while not in his possession. We are here concerned with the sufficiency of a complaint and must of course accept the allegations as being true. The complaint does allege that the inventory was not filed as provided and that by reason of such failure he has been required to expend time and money in search of said property, to his damage. We do not believe that it can be held as a matter of law that under no conceivable circumstances could appellants prove damage. We believe that they have sufficiently alleged a cause of action against respondents and that the trial court erred in sustaining their demurrer.

The judgment is reversed with directions to the trial court to overrule respondents' demurrer.

VAN DYKE, P. J., and PEEK, J., concur.

Oliva BENNETT, Ernest A. Abadie, as Executor of the Will of Elisabeth Abadie, Deceased, Wilada Rappe, Dorothy Warren Gurll and Gloria Kemper, an Incompetent Person, by B. W. Kemper, Guardian of her Estate, Plaintiffs and Appellants,

v.

The HIBERNIA BANK, a corporation, et al., Defendants and Respondents.*

Civ. 16314.

District Court of Appeal, First District,
Division 1, California.

Oct. 26, 1955.

Rehearing Denied Nov. 25, 1955.

Hearing Granted Dec. 21, 1955.

Action was brought to determine rights of plaintiffs in membership bank. The Superior Court of the City and County of San Francisco, Herman A. van der Zee, J., entered judgment on the sustaining of a demurrer without leave to amend the first amended complaint, and the plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that complaint alleging that bank had previously instituted proceedings to determine members entitled to funds accumulated by bank without notifying plaintiffs or their predecessors alleged a cause of action for declaratory relief to determine plaintiff's rights, if any, in the bank.

Judgment reversed.

1. Evidence ⇨43(4)

District Court of Appeal would take judicial notice that Supreme Court in a prior similar case held that complaint for declaratory relief stated a valid cause of action as against a general demurrer.

2. Appeal and Error ⇨863

If action was an action to vacate a judgment, District Court of Appeal on appeal from judgment entered on sustaining of demurrer without leave to amend first amended complaint, was required to pass on the merits of appellant's claim.

3. Judgment ⇨405

Equity will not overturn a judgment unless it appears that a like judgment will not follow.

4. Declaratory Judgment ⇨254

Action for declaratory relief to determine rights, if any, of plaintiffs in membership bank was an action for declaratory judgment, notwithstanding prayer that judgment obtained by bank in action under the Bank Act to determine persons entitled to membership, be set aside, since prayer to have judgment set aside was merely incidental to the cause of action. St.1862, p. 199; St.1863-1864, p. 531; St. 1945, p. 1017, § 29a.

5. Courts ⇨91(1)

If decision of Supreme Court is to be overruled, it should be overruled by the Supreme Court and not by District Court of Appeal.

6. Building and Loan Associations ⇨41(5)

The phrase "all other persons who are known to the plaintiff to claim to be members" in provision of the Bank Act that corporation which has carried on banking business for 20 years, and which has no capital stock, can bring action to determine persons entitled to membership therein and who had any interest in its property or assets, naming all persons appearing and designated on books and records and "all other persons who are known to the plaintiff to claim to be members" includes persons who the corporation then knew or should have known had a claim, whether or not the persons themselves asserted a claim. St.1945, p. 1017, § 29a.

See publication Words and Phrases, for other judicial constructions and definitions of "Claim".

7. Building and Loan Associations ⇨6(2)

Members of membership bank were the owners of funds accumulated by the bank. St.1862, p. 199; St.1863-1864, p. 531; St. 1945, p. 1017, § 29a.

8. Appeal and Error ⇨917(1)

On appeal from judgment entered on sustaining of a demurrer without leave to amend first amended complaint, District Court of Appeal was required to assume that allegations of first amended complaint were true.

9. Building and Loan Associations ⇨41(5)

When membership bank determined to ascertain ownership of fund accumulated by the bank, it owed a duty to members to discover and notify them of the proceedings to declare membership. St.1945, p. 1017, § 29a.

10. Declaratory Judgment ⇨314

In action to determine rights of plaintiffs in membership bank, complaint alleging that bank had previously instituted proceedings to determine members entitled to funds accumulated by bank without notifying plaintiffs or their predecessors, was sufficient to entitle plaintiffs to a declaration of their rights. St.1945, p. 1017, § 29a.

11. Limitation of Actions ⇨180(1)

Statute of limitations may be raised on demurrer.

12. Limitation of Actions ⇨103(4)

Generally, the beneficiary of an express trust is entitled to rely on the fidelity of the trustee, and statute of limitations does not begin to run on beneficiary's right of action against the trustee until beneficiary has knowledge or notice of repudiation of the trust or of the act constituting the breach.

13. Limitation of Actions ⇨103(4)

Where action to determine rights of plaintiffs in membership bank was filed in January of 1953, and complaint alleged that rights of plaintiffs were not discovered until 1952, and bank was allegedly in fiduciary position as to plaintiffs, complaint was not barred by three year limitations. St.1945, p. 1017, § 29a; West's Ann.Code Civ.Proc. § 338, subd. 4.

14. Limitation of Actions ⇨103(4)

In case of breach of trust, actual and not constructive notice of the breach is necessary to start statute of limitations running.

1. Whether membership bank corporations could legally be organized under that act is an interesting question. In *People v. Perrin*, 56 Cal. 345, it was held that the state was estopped from questioning the validity of a membership corporation organized under the 1853 act by the enactment of subsequent legislation expressly

L. L. James, Carl E. Day, Leander L. James, III, San Francisco, for appellants.

Tobin & Tobin, Sullivan, Roche, Johnson & Farraher, Brobeck, Phleger & Harrison, San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs appeal from a judgment entered upon the sustaining of a demurrer without leave to amend to their first amended complaint. This pleading alleges a cause of action for declaratory relief to determine plaintiffs' rights, if any, in the Hibernia Savings & Loan Society and the Hibernia Bank. The basic right asserted by plaintiffs dates back to 1860. The first amended complaint is a lengthy document, which sets forth the pertinent facts in great detail. In many respects, it is substantially patterned on the complaint involved in *Maguire v. Hibernia S. & L. Soc.*, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. So far as necessary to give point to the discussion that follows, the allegations of the first amended complaint are as follows:

In the year 1859 Hibernia was first organized. The organizers purported to act under an enabling statute of 1853 which provided for the organization of stock corporations, and not for what we call "mutual" or "membership" corporations, and did not specifically refer to banks, providing expressly only for the incorporation of manufacturing, mining, mechanical or chemical enterprises, or one engaging in any species of trade or commerce.¹

The charter of Hibernia of 1859 provided for 6,000 shares of capital stock with a \$100 par value, and thus for a total capitalization of \$600,000. The certificate of incorporation recites that the incorporators "have associated ourselves together for the purpose of forming a Society * * * the object for which it is formed is, that by means of it the members thereof may

permitting the organization of membership corporations. If membership banks were illegally organized under the 1853 act, the legal effect of such illegality presents some debatable questions. Was a corporation so illegally organized a *de facto* corporation whose legality only the state could attack? Did it become an

be enabled to find a secure and profitable investment for small savings, and may have an opportunity of obtaining from it the use of a moderate capital." By-laws were adopted in the form of a contract between the members. One by-law provided: "Those who shall sign these By-Laws * * * and pay the entrance fee of two dollars, shall be styled and considered members of this Corporation. Those, who, in addition to the above, shall hold one or more shares of its Stock, shall further be styled and considered Stockholders."

The membership fee of two dollars was non-refundable. Other by-laws provided that a member was entitled to one share of stock for each \$100 deposited to his credit up to 20 shares; that deposits of over \$2,000 were to be simple deposits, but the depositor was to share equally in all dividends and losses. It was also provided that the trustees of the society were to be elected by the shareholders and that the president was to be elected by the society. These by-laws could be amended only by a $\frac{3}{4}$ vote of the "shares" represented at a meeting.

It is alleged that after incorporation the "members" of the corporation alone exercised the right to vote and to elect the trustees and to amend the by-laws; that no dividends were ever declared or paid on the outstanding stock; that all dividends were paid to the members based on their deposits; that Hibernia of 1859 issued shares from June 14, 1859, to November 29, 1861, but that between that date and June 27, 1863, all shares were voluntarily surrendered and cancelled with the exception of 4 shares which could not be found. Thereafter, so it is averred, the corporation had no stockholders and the "members" were the sole owners of the corporation, and were recognized as such.

The appellants claim an interest in the corporation descending from one Callaghan Curtin, who on October 27, 1860, signed the by-laws, paid his two dollar membership

fee, deposited \$3,500 in the bank, and so became a "member" of Hibernia of 1859. From 1860 until April 3, 1914, Curtin maintained an account in Hibernia which at no time fell below \$100. On April 3, 1914, he assigned this account to Mary Curtin, who thereupon withdrew the funds. On the death of Callaghan Curtin in 1914 his estate, including "any other property not known or discovered," was distributed to Mary Curtin. The appellants are the heirs of Mary Curtin who died January 18, 1951.

Going back to the history of Hibernia, it appears that in 1862 the Legislature provided for the incorporation of savings banks with or without capital stock. (Stats. of 1862, p. 199.) The directors of such corporations having no capital stock were required to retain at least 5 per cent of the net profits to constitute a reserve fund. Members were apparently subject to personal liability. In 1864 (Stats. of 1863-1864, p. 531) the Legislature amended the 1862 act to permit savings banks "claiming in good faith to be incorporated under the laws of this State" to incorporate under the 1862 act by filing a required certificate. Thereafter, the trustees passed a resolution to incorporate under the 1862 act as a no capital stock corporation, and on August 29, 1864, the required certificate was filed by the president and secretary.

The next pertinent date appearing in the first amended complaint is September 29, 1864. On that date the *board of directors* purported to adopt new by-laws. One provision was to the effect that all persons who were members of the society on August 29, 1864 "shall be deemed and considered members of this corporation, and the signatures of such persons to an agreement on their part to become members of this corporation, and ratifying and confirming the incorporation of said The Hibernia Savings and Loan Society, * * * shall be procured as speedily as may be.

unincorporated association between the members imposing upon them individual liability? Was the incorporation void so as to render the agreement between the

members unenforceable? These are interesting questions, but for reasons later to be discussed, they need not now be decided.

"Other persons may be allowed to become members of this corporation by a vote of the Board of Directors, and not otherwise. Membership shall not pass with the ownership of moneys deposited with or under control of the corporation." On information and belief appellants aver that Callaghan Curtin signed said agreement and thereby became a member of Hibernia of 1864.

The by-laws of 1864 did not provide any method by which they could be amended. The board of directors on several occasions purported to exercise this power. One by-law was thus adopted in 1868. This by-law provided that membership was restricted to those who were members on August 29, 1864, and who had at that time not less than \$100 to their credit. This by-law also provided that "No one shall be deemed a member whose account is once closed."

[1] At this point, for the sake of clarity, a fact should be mentioned of which we can and do take judicial notice. In February of 1944 the California Supreme Court decided the case of *Maguire v. Hibernia S. & L. Soc.*, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, and companion cases. It was there held that a complaint for declaratory relief that was admittedly used as the model for the present pleadings, and which was based upon facts substantially similar to those here averred, stated a valid cause of action as against a general demurrer. In those cases the Supreme Court, without deciding the merits as to the nature of the plaintiffs' rights in Hibernia, if any, held that a complaint for declaratory relief stated a cause of action if it alleges an actual case or controversy and requests an adjudication of plaintiff's rights; that such a complaint need not necessarily show that the plaintiff is entitled to a favorable declaration, and that the trial court should render a judgment embodying its determination, favorable or unfavorable, and should not dismiss the action.

It is next averred that in 1945, at the instigation of Hibernia, the Legislature enacted section 29a of the Bank Act.

Stats. of 1945, Chap. 512, p. 1017. By that amendment it was provided that any corporation created under the laws of this state which had been carrying on a banking business for 20 years and which had no capital stock, could bring an action to determine the persons entitled to membership therein and who had any interest in its property or assets, naming as defendants "all persons appearing and designated upon the books and records of the corporation as members therein, and all other persons who are known to the plaintiff to claim to be members therein, or to claim any right or interest in the property or assets of the corporation, and other persons unknown claiming any such right of membership in the plaintiff corporation, or any right, title or interest in the property or assets of the plaintiff corporation." The statute provides for personal service on all known defendants residing in the state, whose address is known, service on defendants outside the state whose address is known, and service upon defendants whose address was unknown and upon all unknown defendants by publication in a newspaper of general circulation in the county of plaintiff corporation's principal place of business once a week for four consecutive weeks, and the mailing of a copy of the summons and complaint where personal service was lacking to each defendant whose names and addresses are known, but if their addresses were unknown, addressed to them at the county seat of the county in which the action is commenced. The act also provided for the posting of notice on the bank's premises and at the courthouse, and for the recording of a notice of the pendency of the action. The act then provides: "The judgment after it has become final shall be conclusive against all of the persons named in the summons and complaint who have been served, and against all unknown persons, as stated in the complaint and summons, who have been served by publication, and said judgment shall have the effect of a judgment in rem."

It is next averred that pursuant to this statute, Hibernia, on October 11, 1945, filed such an action against certain named

defendants and averring that Hibernia did not know of any others who claimed to be members. In this complaint Hibernia did not name Callaghan or Mary Curtin as members. Plaintiffs in the present action aver that when this complaint was filed the books and records of Hibernia disclosed that Callaghan Curtin, or his successors, were, or claimed to be, members of the society, and that Hibernia knew of the address of Callaghan Curtin during his lifetime and the address of Mary Curtin after his death. The first amended complaint here involved then avers that in the 1945 bank action personal service was made on certain of the named defendants, and service was made upon others including "persons unknown" by posting and publication. Thereafter, in that action, fifteen of those who are named defendants in the instant case, filed their answer admitting the allegations of the complaint and alleging that they were the only persons entitled to membership in Hibernia and the sole persons entitled to its assets. Default of all other defendants was duly entered. On January 7, 1946, a judgment was entered in that action naming the individual defendants in the present action as the sole members and owners of Hibernia.

In the instant case it is next alleged that in 1947 Hibernia was reorganized as a stock corporation, the reserve fund of some seven million dollars was capitalized, and stock representing this capitalization was issued to those fifteen defendants in lieu of their present and existing interests in the corporation as members thereof; that neither Callaghan nor Mary Curtin was served with a copy of the summons or complaint in the bank action, nor were they mentioned in that complaint, although the records of the bank would have disclosed that Callaghan Curtin was a member of the society and had a right in the property and assets of Hibernia from 1860 until his death in 1914, and that such rights were inherited by Mary Curtin upon Callaghan's death. It is further averred that plaintiffs, who are the successors of Mary Curtin who died on January 18, 1951, had no knowledge of their rights or of the facts alleged in their complaint

until 1952. In this connection it is alleged that in October of 1951 a friend of Olive Bennett called that plaintiff's attention to a newspaper article referring to the settlement of claims by early depositors; that Olive Bennett knew that her grandfather had been an early depositor in Hibernia; that upon investigation by her attorneys this plaintiff then discovered that her grandfather had signed the by-laws of 1860 and paid the two dollar membership fee, and thus had become a "member" of the society; that in July of 1952 she first learned of the action brought by Hibernia under section 29a of the Bank Act and of the entry of judgment entered in that action. This was the first date upon which plaintiffs secured knowledge of their rights, if any. This action was filed on January 15, 1953. The first amended complaint alleges an actual controversy and seeks a declaration of plaintiffs' rights and to set aside the default judgment.

The demurrer of defendants not only charged that the first amended complaint did not state a cause of action, but pleaded the statute of limitations and laches, and particularly urged that the cause of action pleaded, if any, was barred by the judgment under section 29a of the Bank Act. The demurrer was sustained without leave to amend, judgment was entered, and this appeal taken.

[2, 3] At the inception of this appeal we are met with a controversy over the nature of the cause of action attempted to be pleaded. The respondents urge that the primary cause of action pleaded is an action to set aside the 1946 judgment, and not one for declaratory relief. Appellants argue that the main gist of the action is to secure a determination of their right to membership in the society, and that the prayer to set aside the 1946 judgment is only incidental to that; that the setting aside of the judgment would avail them nothing without a determination of their rights to membership. The distinction between the two types of action is important. If this is an action to vacate a judgment then we would have to pass on the merits of appellants' claim to membership. The

rule seems to be well settled that "Equity will not overturn a judgment unless it appears that a like judgment would not follow. It is incumbent upon the complainant to plead and prove that the result in the main action would have been different had the fraud or mistake not occurred." *Wilson v. Wilson*, 55 Cal.App.2d 421, 427, 130 P.2d 782, 785. But if the action is one for declaratory relief a different rule applies. The Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, held that in such an action the complaint is good against a general demurrer if it pleads a controversy over membership, and that it is immaterial, on demurrer, whether, as a matter of law or fact, the complaint avers facts showing that the asserted claim is valid or invalid. In either event a controversy has been pleaded and the plaintiff is entitled to a determination of that claim, favorable or unfavorable.

[4] We agree with appellants that this action is primarily one for a declaratory judgment, and that the prayer to set aside the 1946 judgment is merely incidental to that cause of action. If the 1946 judgment is set aside as to appellants, that relief would avail them nothing without an ultimate determination of their interests in Hibernia. Obviously, the main action is for declaratory relief, and, according to the Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, all that need be pleaded in such an action is a controversy over membership. The fact that the court here should, if a proper case is made out, set aside the 1946 judgment as to appellants, does not necessarily make the action one to set aside the judgment, thus requiring a decision on the merits. An examination of the pleading demonstrates that this is a single action for declaratory relief to determine the interest, if any, appellants have in Hibernia, and that the prayer for setting aside the judgment is merely incidental to the main relief and cause of action pleaded. The situation here presented is not different in principle from one where in a quiet title action it is also sought to vacate a judgment or to void an instrument under which the adverse parties claim. In such situations

it is well settled that the incidental relief prayed for does not convert the action into one to set aside the judgment or instrument. The proper rule is stated in *Parsons v. Weis*, 144 Cal. 410, 414, 77 P. 1007, 1009, as follows: "The complaint states only a single cause of action, viz., to quiet the plaintiff's title; as against the defendant, to the land therein described, and, as incidental thereto, for the purpose of making the judgment more effective, to have the instrument under which the defendant asserts title declared void." See also *Thompson v. Moore*, 8 Cal.2d 367, 65 P.2d 800, 109 A.L.R. 1027; *California Trust Co. v. Cohn*, 214 Cal. 619, 7 P.2d 297; *Wood v. Roach*, 125 Cal.App. 631, 14 P.2d 170.

The case of *Vincent v. Security-First Nat. Bk.*, 67 Cal.App.2d 602, 155 P.2d 63, cited by respondents does not hold to the contrary. That case merely held that where there was no controversy over a probate decree as entered, and no ground pleaded for setting aside that decree, there was no controversy. That case is in point only if it be held that no ground is pleaded for setting the judgment aside. In that event the judgment would be a bar. But if any ground is pleaded for setting the judgment aside, then we are right back to the Maguire case. 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. That case holds that a complaint, substantially the same as the one here involved, stated a cause of action for declaratory relief good as against a general demurrer. Thus, the only questions that this court should decide at the present time is whether any ground for setting aside the 1946 judgment has been pleaded, and whether the statute of limitations has run on the judgment so as to make it binding.

Respondents attack this approach to the problem, contending that this court must do the very thing the Supreme Court expressly refused to do in the Maguire case, 23 Cal. 2d 719, 146 P.2d 673, 151 A.L.R. 1062, namely, determine the validity or invalidity of appellants' claim to membership. They must concede, of course, that such was not done in the Maguire case, *supra*, but they urge that that case has, in effect, been overruled by the later case of *Essick v. City of*

Los Angeles, 34 Cal.2d 614, 213 P.2d 492. There the plaintiffs filed an action against the city and others for declaratory relief, seeking to have declared void certain ordinances and a resolution of the city council. Defendants moved in the trial court to dismiss the action on the grounds that the court had no jurisdiction of the controversy because the complaint presented no justiciable controversy, and because, under the facts alleged, it was not necessary or proper to make a declaration of rights of the parties. The motion was granted, and plaintiffs appealed. The court then considered the allegations of the complaint and found that they did not state a justiciable controversy on the merits. Then, citing the Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, and another case, the court held that it was error for the trial court to have entered a judgment of dismissal but it should have "entered its judgment decreeing expressly (as is implied by the judgment of dismissal) that the plaintiffs are not entitled to the declarations in their favor * * *." 34 Cal.2d at page 624, 213 P.2d at page 499. The Supreme Court then modified the judgment by striking the judgment of dismissal, by declaring the application for a conditional use permit was not void and did not violate the city charter, and by holding that the resolution issuing it was valid "as against all contentions of plaintiffs at issue in this suit." 34 Cal.2d at page 625, 213 P.2d at page 499. The judgment so modified was affirmed.

[5] It will be noted that in that case the court did pass on the merits of the cause of action pleaded. But the court, far from overruling or qualifying the rule of the Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, purported to be following it, and cited it with approval. It is a fair interpretation of the case that what it actually holds is that where the complaint does not allege facts showing a real controversy, but discloses in fact that no controversy exists, the trial court should decide the case on a demurrer or motion to dismiss by holding that, as a matter of law, no justiciable controversy has been presented. But that is fundamentally different from the situation here involved. Here

there certainly is a real dispute as to whether these plaintiffs have any interest in Hibernia. The reasons why this is so have been pointed out at length in the Maguire case. 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. It certainly would reflect on the orderly and fair administration of justice for the Supreme Court to hold, as it did in the Maguire case, *supra*, as to one set of litigants, that it was improper for the trial court to determine on demurrer whether the plaintiffs there involved were entitled to a favorable or unfavorable determination of their rights, and then for a District Court of Appeal to hold, as to another set of litigants, that the Supreme Court, in effect, was wrong in that case, that it should have passed on the membership issue, and that the appellate court will pass on that issue. It must be remembered that, in both the Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, and this case, so far as membership is concerned, the pleadings on this issue are substantially the same and the same legal issue is presented. Both sets of litigants are entitled to the same treatment. If the Maguire case is to be overruled this should be done by the Supreme Court and not by an intermediate appellate court.

Thus, the only basic question for this court to determine is the legal effect of the 1946 judgment. This, of course, was not involved in the Maguire case, *supra*. In considering this point we must assume that the facts alleged prior to 1946 present a justiciable controversy over the issue of membership in the corporation. If the 1946 judgment, as a matter of law, bars any action by plaintiffs to have their claim of membership decided, if that judgment as a matter of law cannot be set aside, then there would be no justiciable controversy and the rule of the Essick case, 34 Cal.2d 614, 213 P.2d 492, would be applicable. See also *Vincent v. Security-First Nat. Bk.*, 67 Cal.App.2d 602, 155 P.2d 63. Equally true it is that if the statute of limitations has run on an action to set aside the judgment, such point can and should be decided on demurrer, and no case or controversy is presented. *Maguire v. Hibernia S. & L. Soc.*, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R.

1062. But if that judgment, or the statute of limitations, is not a bar, then plaintiffs have alleged a case or controversy for declaratory relief, the merits of which should not be passed on by demurrer. Maguire case, supra. We pass to a consideration of those questions.

First, what is the effect, if any, of the 1946 judgment on the rights asserted by appellants? Does it validly determine that appellants have no rights in Hibernia? Is it *res judicata* of the entire proceedings?

Section 29a of the Bank Act provides:

"Said action shall be commenced by the filing of a verified complaint, and there shall be included as defendants in such action all persons appearing and designated upon the books and records of the corporation as members therein, and all other persons who are known to the plaintiff to claim to be members therein, or to claim any right or interest in the property or assets of the corporation, and other persons unknown claiming any such right of membership in the plaintiff corporation * * *.

"Each of the defendants residing in the state of California whose place of residence is known to the plaintiff shall be served personally with said summons * * *."

The act also provides that as to defendants whose addresses are unknown that a copy of the complaint and summons shall be mailed to them addressed to the county seat of the county in which the action is commenced. This statute was modeled on the McEnerney Act passed after the 1906 fire and earthquake in San Francisco.

The first amended complaint alleges that the books and records of Hibernia disclosed that Callaghan Curtin up to the time of his death in 1914 was, or claimed to be, a member of the bank, or claimed a right or interest in the property or assets of the corporation, and that such claim or right passed to his successors, but that neither Callaghan, nor Mary, nor her successors were named in the complaint, nor was a copy of the summons and complaint served upon them although the address of Mary Curtin, who resided in this state, was known to Hibernia, nor was a copy mailed

to Callaghan or Mary at the county seat of the county in which the action was commenced.

Appellants argue that under section 29a either Callaghan or Mary Curtin should have been named in the complaint as "persons appearing and designated upon the books and records of the corporation as members therein, and all other persons who are known to the plaintiff to claim to be members therein, or to claim any right or interest in the property or assets of the corporation."

The pertinent provisions of the first amended complaint read as follows:

"The Hibernia Savings and Loan Society knew, as disclosed by its books and records, that said Callaghan Curtin, up to the time of his death, was, or claimed to be, a member of The Hibernia Savings and Loan Society, and had or claimed rights of membership in said corporation and rights and interests in its property and assets; that said membership, rights of membership, and rights and interests in the property and assets of said corporation, passed to the successors of said Callaghan Curtin upon his death."

"* * * said defendants knew that Callaghan Curtin, during his lifetime, was a member of said corporation, and that, upon his death, his successors became entitled to membership in said corporation and had a right or interest in its property or assets."

"* * * said right of membership therein and said right in the property and assets thereof * * * was distributed to Mary G. Curtin as sole devisee * * * had vested in said Mary G. Curtin; all of which was then, and ever since has been, known to defendants herein, or could have been ascertained by inspection of the records of The Hibernia Savings and Loan Society and the records of said Superior Court of the State of California, in and for the County of Santa Clara."

"Said Mary G. Curtin (Travers), up to the time of her death, although knowing that Callaghan Curtin was one of the early depositors of The Hibernia Savings and Loan Society, had no knowledge of the fact

that he was a member thereof, or was possessed of any of the rights of a member thereof, and plaintiffs herein had no such knowledge until about the month of June, 1952."

Do these allegations aver that plaintiffs are in any of the groups named in section 29a? There is no clear direct allegation that at the time of filing the action by Hibernia that Callaghan Curtin appeared on the books as a member. In fact, the pleading of the by-laws would seem to indicate that upon the closing of the account rightly or wrongly he no longer appeared upon the books of the bank as a member. Thus, the question is really whether the first amended complaint sets forth facts sufficient to show that either Callaghan or Mary Curtin were in the class of "all other persons who are known to the plaintiff to claim to be members therein, or to claim any right or interest in the property or assets of the corporation."

[6] The parties differ as to how this provision should be interpreted, both arguing at some length as to the proper meaning of the word "claim" as used in the section. The main argument of respondents is that since it is alleged that Mary had no knowledge of the fact that Callaghan was a member, or was possessed of the rights of a member, and appellants had no such knowledge until June of 1952, that this shows that appellants did not know that they had a "claim." This, it is urged, is equivalent to alleging that at no time until June of 1952 did Mary or appellants "claim" membership. Therefore, say respondents, when the suit was filed Mary and appellants were not persons "claiming" to be members, and, since Callaghan was then dead, he was certainly not then "claiming" to be a member. Appellants in effect argue that the phrase "all other persons who are known to the plaintiff to claim to be members" necessarily must include persons who the bank then knew or should have known had a claim, whether or not the persons themselves asserted a claim. It is argued that any other construction would allow the bank to destroy, without notice, property interests of persons whom

they knew or should have known had an interest, and that this could not have been the intent of the Legislature.

There is merit in appellants' argument. The construction contended for is substantially the interpretation given to similar language appearing in the McEnerney Act of 1906, St.1906, Ex.Sess., p. 78, which statute was admittedly the model for the one here involved. That statute required summons to be served on persons who are known to the plaintiff "to claim" any interest in the property adverse to the plaintiff. In Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, at page 317, 88 P. 356, 363, 8 L.R.A.,N.S., 682, the court stated: "* * * so far as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi *in rem*, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. * * *

We have no doubt that, where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. For the purposes of this statute the adverse claimants whom plaintiff 'knows or of whom he has been informed' include all as to whom he would by reasonable inquiry have had knowledge or information. * * * 'the means of knowledge is equivalent to knowledge.'"

[7-9] In the instant case the allegations are to the effect that the bank knew or should have known of the claim of Mary Curtin, even though she herself did not know of the claim. In other words, it is argued that Mary is a person whose claim was or should have been known to the bank, but who did not claim an interest at the time suit was filed because of ignorance of her rights. Although this is somewhat broader than the interpretation of the statute made by the court in the Kerrigan

case, *supra*, because in that case the person involved knew of her rights while here she did not, and the statute was there extended to include persons whom the plaintiff should have known claimed such rights, we think such interpretation a proper one. If the statute here involved had expressly provided that the bank could serve constructively persons whom it knew or should have known had rights in Hibernia but were ignorant of such rights because the bank in violation of its fiduciary duty to members had kept such members in ignorance of their rights, the unreasonable nature of the statute would be obvious. If it be assumed that the appellants were in fact members of Hibernia, a point we do not decide for reasons already stated, but a point we must assume in discussing the point now involved, then the bank and its trustees were, of course, in a fiduciary relationship with all its members. Based on such assumption, the bank and its trustees owed the members a positive duty of disclosure. Had this duty been performed at the time the 1946 action was filed, of course, Mary would have claimed her interest and thereby would have fallen directly into the class protected by the statute. Yet respondents are asking that the statute be interpreted to mean that even if the bank knew or should have known that Mary had an interest but was ignorant of it because the bank or its trustees violated its fiduciary duties toward her by keeping her in ignorance of her rights, that the bank was under no duty to serve her. So interpreted, the statute would be unreasonable and probably unconstitutional. See, generally, *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356, 8 L.R.A.,N.S., 682; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; *People v. One 1941 Chrysler 6 Touring Sedan*, 81 Cal.App.2d 18, 183 P.2d 368. It must be remembered that there is here involved a fund of over seven million dollars accumulated by a membership bank. In such a bank the members are the owners. If the allegations of the first amended complaint are true, which we must here assume, and if plaintiffs are members, a point we do not

pass on but assume, then the 1946 action was an apparent attempt by the few then in control of the bank to destroy, for the benefit of those few, the rights of the many. It must be the law that when the bank determined to ascertain the ownership of this fund, since it and its trustees were in a fiduciary position to all its members, it owed a duty to these members to discover and notify these owners of the proceedings to declare membership. The records of those persons who had paid a membership fee and signed the by-laws were in the possession of Hibernia. It knew that the persons involved in the Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, claimed to be members. It knew that there were other persons such as appellants who, if they knew of their rights, would claim to be members. Yet, according to the allegations of the first amended complaint, the bank made no attempt to locate these persons or to notify them of their rights, but attempted to cancel their rights, if any, by the 1946 action, in violation of the bank's fiduciary duty.

For these reasons it must be held that, if there is merit in appellants' claim to a proprietary interest in the bank, there was noncompliance with the statute so far as service is concerned.

[10] Of course, this ruling is predicated on the assumption that Mary Curtin in 1945 had a proprietary interest in Hibernia. Of course, if she had no such interest, then the bank and its trustees owed her no fiduciary duty and did not know she claimed an interest, and the 1946 judgment would be binding on her and her successors. Respondents argue, therefore, that on this appeal we should determine whether she has such an interest. But to do this would be in direct violation of the rule of the Maguire case. 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. Although the allegations in the first amended complaint here involved differ in several respects from those in the Maguire case, except for the 1946 judgment and the statute of limitations as to such judgment, the problems involved as to membership are substantially the same in the

two cases. As already pointed out, if the plaintiffs in the Maguire case were entitled to a declaration of their rights, if any, in Hibernia, so are the appellants here entitled to such a determination. The fact that appellants pleaded the facts as to the 1946 judgment does not change the legal situation. If they were members, that judgment, for reasons already stated, does not constitute a bar to this action. That brings us right back to the question of membership—right back to the rule of the Maguire case, *supra*. The question of membership should not be passed on by demurrer in a declaratory relief action. The appellants are entitled to a declaration, favorable or unfavorable, of their legal position. This they have not had. We should not attempt to make such declaration on this appeal.

[11] Of course, and as the Maguire case held, the statute of limitations may be raised on demurrer. The questions here presented are whether the statute of limitations ever runs on a judgment which is void for lack of jurisdiction but where the invalidity does not appear on the face of the judgment, and, if so, what statute of limitations is here involved? In the instant case the judgment was entered in January of 1946. This action was filed in January of 1953. Discovery of their rights was made by plaintiffs in 1952.

[12, 13] The parties dispute, at some length, the question as to whether any statute of limitations is applicable to a void judgment, even where the invalidity does not appear on the face of the judgment. Cases can be and are cited that apparently hold both ways on the subject. We do not find it necessary to decide this question. We will assume, for the purposes of this opinion, that, as respondents contend, some statute of limitations does run on such a judgment. The basic questions are what statute, and when does it begin to run? It is a general rule that the beneficiary of an express trust "is entitled to rely on the trustee's fidelity and the statute does not begin to run until he has knowledge or notice of repudiation of the trust or of the act constituting the breach." 1 Witkin, California Procedure, p. 660; see also Cor-

telyou v. Imperial Land Co., 166 Cal. 14, 134 P. 981; England v. Winslow, 196 Cal. 260, 237 P. 542; Kornbau v. Evans, 66 Cal.App. 2d 677, 152 P.2d 651; Martin v. Bank of America N. T. & S. Ass'n, 4 Cal.App.2d 431, 41 P.2d 200; San Leandro Canning Co., Inc., v. Perillo, 211 Cal. 482, 295 P. 1026. Thus, the proper statute is the three-year provision of section 338, subd. 4, of the Code of Civil Procedure which provides that "the cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Such discovery is alleged to have been made in 1952. Therefore, it would appear that, for pleading purposes, the complaint filed in 1953 was filed well within the three year-period.

As already pointed out in discussing the *res judicata* point, the trustees, and later the board of directors of Hibernia, were in a fiduciary position to its members. This was necessarily impied, if not directly held, in the Maguire case. 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. That case held that the statute of limitations had not there run on analogy to the cases that hold that no statute runs against a stockholder until he has knowledge that his rights have been denied.

Respondents attempt to argue many points as to why Callaghan or Mary Curtin should have acquired knowledge of their rights long prior to 1946. But the Maguire case held that the statute had not, as a matter of law, then run. Most of the arguments now made on this point were or could have been made in the Maguire case, and the Supreme Court held them unsound. We, too, find them unconvincing. Once it is assumed that the appellants have a proprietary interest, then the fiduciary relationship existing prevented the statute from running.

The respondents make a lengthy argument that the complaint in the instant case differs from that in the Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, in alleging, on information and belief, that Callaghan signed the by-laws of 1864. One of those by-laws provided that "Member-

ship shall not pass with the ownership of moneys deposited with or under the control of the corporation." In the Maguire case, supra, the plaintiffs were relying on membership in Hibernia of 1859. Respondents argue that if Callaghan signed the by-laws of 1864 then he and Mary in 1914, as a matter of law, upon the assignment of the account and Callaghan's death, had notice of the repudiation. There may or may not be merit in these arguments. But they, basically, are merely another attempt to get this court on this appeal to pass on the merits of the question of membership, a point not now involved. Certainly the arguments do not establish, without question, that appellants or their predecessors had knowledge in 1914, or earlier. The questioned by-law is capable of being interpreted as separating the ownership rights from the mere rights of a depositor, that is, of accomplishing a separation of the proprietary interest created upon the signing of the by-laws and payment of the membership fee, from the debtor-creditor relationship created by a mere deposit. It can be reasonably inferred that membership may have been retained on the closing of the account and may have been inherited by Mary. Thus, a repudiation, under this view, would not have been brought to her attention. Moreover, even if membership terminated in 1914, a point we do not now decide, Callaghan, as a member until that time, may have had some right in the then accumulated reserve fund, but since there was no liquidation of the corporation at that time, there was no legal necessity of asserting this right in 1914. Under this view, Callaghan's ownership in the proportionate share of the surplus continued to exist until knowledge of its conversion was brought home to him or to his successors in 1952.

The parties also argue as to whether the allegation on information and belief that Callaghan signed the by-laws of 1864, the records being in possession of respondents, is binding on a general demurrer. In view

of the discussion above, it is not necessary to decide that point.

[14] Thus, the only question as to the statute of limitations is when the statute started to run, if it did start to run, on the 1946 judgment. As already pointed out, the action, in cases of violation of an express trust, do not run until discovery of the repudiation. Discovery is alleged to have occurred in 1952. But, say respondents, appellants were put on notice in 1945 when the action was filed because it was a matter of great notoriety. Assuming breach of the trust, actual and not constructive notice was required. *MacDermot v. Hayes*, 175 Cal. 95, 170 P. 616.

Respondents next bring forth the novel argument that since Mary is dead there is no way of proving the allegation that she did not have actual knowledge prior to 1952, and that without that proof the statute of limitations is a bar. The point requires scant consideration. On a demurrer, we must accept the allegations of the first amended complaint as true. We must assume that appellants can prove these allegations by direct or indirect evidence. See, generally, *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 159 P.2d 958.

The other points on the statute of limitations were either disposed of in the Maguire case, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, or are answered by the holding that it must be assumed on this appeal that a fiduciary relationship existed.

We conclude that the trial court erred in sustaining the general demurrer and in dismissing the action. We do not decide that in some respects the complaint is not subject to special demurrer, but are sending the action back to the trial court which, in its discretion, may require clarification of any uncertainties and ambiguities that may exist.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

136 Cal.App.2d 709

The PEOPLE of the State of California,
Plaintiff and Appellant,
v.

Daniel MARTIN, Defendant and Respondent.
Cr. 2632.

District Court of Appeal, Third District,
California.
Nov. 2, 1955.

Rehearing Denied Nov. 10, 1955.

Hearing Denied Nov. 30, 1955.

Proceeding on motion to set aside information charging defendant with driving an automobile in a grossly negligent manner and thereby feloniously and without malice killing a passenger in the automobile. The Superior Court, Nevada County, James Snell, J., entered an order dismissing the information and the State appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient at the preliminary examination to support an order holding defendant to answer the information.

Order reversed.

1. Criminal Law Ⓒ240

To justify an order holding a defendant to answer to the Superior Court, reasonable or probable cause may be found, although the evidence does not establish the defendant's guilt beyond a reasonable doubt and all that is required is a reasonable probability of defendant's guilt. Pen.Code, § 995.

2. Criminal Law Ⓒ240

"Reasonable or probable cause" required to uphold the commitment of a defendant exists if there is sufficient proof to make it reasonable to believe that defendant is guilty of the offense charged. Pen.Code, § 995.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

3. Indictment and Information Ⓒ137(4)

On motion to set aside an information, question of guilt or innocence of defendant is not before court, nor does issue con-

cern quantum of evidence necessary to sustain conviction, but court only determines whether magistrate, acting as a man of ordinary caution, could conscientiously entertain a reasonable suspicion that a public offense has been committed in which defendant participated.

4. Indictment and Information Ⓒ137(4)

On motion to set aside an information, the court may not substitute its judgment as to the weight of evidence for that of the magistrate, and if there is some evidence to support information court shall not inquire into its sufficiency. Pen.Code, § 995.

5. Indictment and Information Ⓒ137(4)

Under the statute, an information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with the crime shown to have been committed. Pen.Code, § 995.

6. Criminal Law Ⓒ238

In hearing on motion to set aside information charging defendant with driving an automobile with gross negligence and thereby feloniously and without malice killing a passenger in the automobile, evidence was sufficient to support the order holding defendant to answer the information. Pen.Code, § 192, subd. 3.

7. Indictment and Information Ⓒ140(2)

In hearing on motion to set aside information charging defendant with driving an automobile in a grossly negligent manner and thereby feloniously and without malice killing a passenger in the automobile, record disclosed conduct on part of defendant that would warrant a man of ordinary caution or prudence in believing or conscientiously entertaining a strong suspicion that defendant was guilty of gross negligence. Pen.Code, § 192, subd. 3.

8. Indictment and Information Ⓒ140(2)

In hearing on motion to set aside information charging defendant with driving an automobile in a grossly negligent manner thereby feloniously and without malice killing a passenger in the automobile, evidence was sufficient to show that defendant failed to comply with provisions of Motor

Vehicle Code requiring a driver to hold motor vehicle under control at all times and as near the right-hand side of the road as possible, and also requiring a vehicle to be driven at a reasonable, prudent speed. Pen.Code, § 192, subd. 3; Vehicle Code, §§ 510, 525, 597.

Vernon Stoll, Dist. Atty., Nevada County, Grass Valley, Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for appellant.

Harold A. Berliner, Nevada City, for respondent.

SCHOTTKY, Justice.

An information was filed charging the defendant above named with a violation of section 192(3) of the Penal Code in that "on or about the 4th day of May, 1955, in the said County of Nevada, State of California, he did feloniously and without malice, while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, with gross negligence, and while in the commission of a lawful act which might produce death, in an unlawful manner, with gross negligence, kill Andrew Patrick Monahan, a human being, and that the death of said decedent was the proximate result of the driving of said vehicle by the said defendant at the time, place and in the manner as aforesaid."

Upon defendant's arraignment in the Superior Court counsel was appointed to defend him, and thereafter his counsel moved to dismiss the information on the ground that defendant had been held to answer without reasonable or probable cause. After argument on said motion the court granted the motion and remanded the defendant to the custody of the sheriff for further preliminary hearing.

The People have appealed from the order dismissing the information and contend most earnestly that the order was erroneous. Before discussing these contentions we think it well to set forth certain well settled principles applicable to the instant appeal, which are well stated

in *People v. Platt*, 124 Cal.App.2d 123, at page 130, 268 P.2d 529, at page 534, as follows:

[1,2] "The evidence necessary to justify an order holding a defendant to answer to the superior court is not subject to the same test as that before a trial jury in a criminal action, and reasonable or probable cause may be found for holding to answer although the evidence does not establish the defendant's guilt beyond a reasonable doubt. All that is required is a reasonable probability of the defendant's guilt. *Davis v. Superior Court*, 78 Cal.App.2d 25, 27, 177 P.2d 314. 'Reasonable or probable cause', required to uphold the commitment of a defendant, Pen.Code, § 995, exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. *People v. George*, 95 Cal.App.2d 425, 429, 213 P.2d 33; *People v. Thomas*, 90 Cal.App.2d 491, 494, 203 P.2d 567.

[3-5] "On a motion to set aside an information, the question of the guilt or innocence of the defendant is not before the court, nor does the issue concern the quantum of evidence necessary to sustain a judgment of conviction. The court is only to determine whether the magistrate, acting as a man of ordinary caution or prudence could conscientiously entertain a reasonable suspicion that a public offense had been committed in which the defendant had participated. *Weber v. Superior Court*, 35 Cal.2d 68, 69, 216 P.2d 871. A court may not substitute its judgment as to the weight of the evidence for that of the magistrate. If there is some evidence to support the information, the courts will not inquire into its sufficiency. Under section 995 of the Penal Code, the information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with a crime shown to have been committed. *Lorenson v. Superior Court*, 35 Cal.2d 49, 55-57, 216 P.2d 859."

It appears from the record of the preliminary examination that defendant and a friend, Paul Pettipas, left Auburn about

11 a. m. on May 4, 1955, and drove to Reno on Highway 40. During that day and evening the defendant had several drinks. Defendant and Pettipas left Reno for Auburn around 9 p. m., stopped in Truckee for a glass of beer and again at Cisco Grove. Prior to the time they reached Truckee and when they were stopped at the inspection station, the inspector suggested that Pettipas should drive, and not defendant. However, defendant allowed Pettipas to drive only a few miles and then defendant insisted that he again be allowed to drive as it was his brother's car. At Cisco Grove defendant and Pettipas while in the bar picked up the decedent who desired a ride to Auburn with them as his car had broken down. The decedent sat in the back seat and defendant and Pettipas in the front. Approximately one mile west of Cisco Grove where Highway 40 curved sharply in an S curve to the right and while defendant was driving at a speed of 55 to 60 miles per hour, he failed to make the turn to the right and the car went off the left side of the road. The vehicle made a complete somersault and the decedent was thrown from the car and killed.

The highway patrol officer who arrived at the scene at about 12:45 a. m., testified that the accident occurred one mile west of Cisco Grove in Nevada County. The highway for many miles on both sides of the scene of the accident followed a mountainous terrain. The highway east of the scene was a level road with some curves but at the location of the accident there was a sharp S curve. Driving west and approaching this curve, you would turn to the left and sharply to the right. Adjacent to the highway at this point was the South Fork of the Yuba River which ran along the highway approximately 30 to 40 feet south of the edge of the pavement and about 20 feet below the level of the highway. The embankment between the river bed and the highway was quite rocky.

From the tire friction marks on the highway it appeared that on the south shoulder of the highway which was quite wide between the county line and where the vehi-

cle went over the bank, there were tire marks 70 feet long. From where the tire marks left the highway to where the body of decedent was found on the rocks, it was a distance of 25 feet, and a distance of 40 feet to where the automobile stopped. From the evidence on the rocks and boulders it appeared that the vehicle turned over end upon end, coming to a rest upon its wheels. The physical evidence also showed that the vehicle had negotiated a left-hand turn and continued straight across the highway instead of turning sharply to the right.

When the highway patrol officer saw the defendant at the scene, defendant was bleeding from the face and confused or dazed. The officer noticed an odor of liquor but could not tell whether defendant's actions were the result of drinking or shock. Defendant, however, in reply to a question by the officer as to whether he had been drinking, denied that he had. He also stated to the officer that he evidently lost control and did not see the turn while talking to his passengers.

In replying to appellant's contention that there was reasonable or probable cause for holding defendant to answer, defendant quotes from *People v. Nagle*, 25 Cal.2d 216, at page 222, 153 P.2d 344, at page 347, as follows: "'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." Defendant also quotes the following from *Bentley v. Superior Court*, 122 Cal.App.2d 262, at page 263, 264 P.2d 990, at page 991: "It is well settled that reasonable or probable cause required to uphold the commitment of an accused under section 995, Penal Code, exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged."

Defendant then argues that the charge in the instant case requires a showing of "gross negligence" and quotes the definition of gross negligence given in *People v. Costa*, 40 Cal.2d 160, at page 166, 252 P.2d 1, at page 5: "'Gross negligence has been

repeatedly defined in the California cases as "the want of slight diligence," "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and "that want of care which would raise a presumption of the conscious indifference to consequences."'"

[6] Applying the well-settled rules heretofore set forth to the facts shown by the record in the instant case, we are satisfied that the evidence at the preliminary examination was sufficient to support the order holding the defendant to answer. Here the evidence disclosed that the defendant, after having consumed several alcoholic drinks, and notwithstanding the admonition of the checking-station inspector, nevertheless insisted on driving his brother's car on a mountain road, Highway 40, about one mile west of Cisco Grove, at a speed of 55 to 60 miles per hour. He failed to negotiate a sharp S curve in the road but instead drove his car off the opposite side of the road after skidding some 70 feet on the wide shoulder. The car somersaulted down the bank on the opposite side of the road from which defendant had been driving and the victim, who had been riding in the back seat, was thrown some 40 feet from where the car finally came to rest. The victim died from the injuries he received prior to the time the officers arrived at the scene of the accident. Subsequent to the accident, the defendant had the odor of alcohol on him and admitted to the police officer that he had been driving the car at the time of the accident, that he evidently lost control and did not see the turn while talking to his passengers.

[7] The record shows that defendant drove from Auburn to Reno in the daytime and therefore was fully aware that Highway 40 was a mountainous highway with many curves. To drive back over said highway in the nighttime at a speed of 55 to 60 miles per hour in the manner that defendant was driving at the time of the accident would comply with the requirements of probable cause as above defined, that

is, such conduct would warrant a man of ordinary caution or prudence in believing and conscientiously entertaining a strong suspicion that the accused was guilty of gross negligence.

[8] The evidence shows also that defendant failed to comply with the provisions of section 597 of the Vehicle Code which requires a driver of a motor vehicle when driving upon mountain highways to hold the motor vehicle under control at all times and as near the right-hand side of the road as possible. Here the defendant clearly failed to drive the vehicle in the manner required, but, on the contrary, endeavored to either cut the curve or was traveling too fast to negotiate a sharp curve in the road. There is also some evidence that defendant failed to comply with the provisions of section 525 of the Vehicle Code, which requires a vehicle to be driven on the right half of the highway (with certain exceptions which are not here pertinent). The accident occurred after defendant's car had driven off the opposite side of the road from that on which he was traveling and went off the embankment. Section 510 of the Vehicle Code provides that no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic and condition of the highway, etc. It is therefore a reasonable inference from the evidence that defendant at the time of the accident was violating at least three sections of the Vehicle Act.

None of the cases cited by defendant involve similar factual situations and no useful purpose would be served by discussing them. Each case must depend upon its own facts.

It may well be that when the conduct of defendant is fully explained to a court or jury trying the facts, he will not be convicted, but the question of his guilt or innocence is not now before this court. The present issue does not concern the quantum of evidence necessary to sustain a judgment of conviction but only the question of whether the magistrate at the preliminary examination, "acting as a man of ordinary

caution or prudence, could conscientiously entertain a reasonable suspicion that a public offense had been committed in which defendant participated."

In view of the foregoing we conclude that the court erred in dismissing the information.

The order appealed from is reversed.

VAN DYKE, P. J., and PEEK, J., concur,



136 Cal.App.2d 577

MATSON NAVIGATION COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Appellant.

Civ. 8556.

District Court of Appeal,
Third District, California.
Oct. 27, 1955.

Hearing Denied Dec. 21, 1955.

Action by seller of ocean-going passenger vessel to recover taxes alleged to have been improperly assessed under Sales and Use Tax Law. From portion of judgment of Superior Court, Sacramento County, J. O. Moncur, J., in favor of plaintiff, defendant appealed. The District Court of Appeal, Finley, J. pro tem., held that completed sale of ocean-going passenger vessel to foreign owner, including change of registry and flag, constituted exportation of the ship, and sales tax levied upon sale constituted impost upon export within meaning of United States Constitution, and was, therefore, invalid.

Judgment affirmed.

1. Commerce ☞77

Ocean-going passenger vessel was proper object of export, and when sold to Pana-

239 P.2d—5½

manian corporation, it was sold as export into export trade. U.S.C.A.Const. art. 1, § 10, cl. 2; 15 U.S.C.A. § 173; 46 U.S.C.A. §§ 23, 41; Shipping Act, 1916, § 9, 46 U.S.C.A. § 808; Merchant Marine Act, 1920, § 27, 46 U.S.C.A. § 883.

2. Commerce ☞77

Word "export", as used in Constitution and laws of United States prohibiting taxes on "exports", generally means transportation of goods from United States to foreign state or country, or carrying or sending abroad. U.S.C.A.Const. art. 1, § 10, cl. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Export".

3. Commerce ☞77

"Exportation" means severance of goods from mass of things belonging to United States with intention of limiting them to mass of things belonging to some foreign country, and another country as intended designation of goods is essential to idea of exportation. U.S.C.A.Const. art. 1, § 10, cl. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Exportation".

4. Commerce ☞77

In sale of ocean-going passenger vessel to Panamanian corporation as export, act claimed to be subject to sales tax was very act which passed title and which would have incurred tax had transaction been domestic, and transaction could not have been completed before export began and was not thereby deprived of sales tax exemption. Revenue and Taxation Code, § 6001 et seq.; U.S.C.A.Const. art. 1, § 10, cl. 2.

5. Commerce ☞77

True construction of United States constitutional provision prohibiting state imposts or duties on exports is that no burden by way of tax or duty can be cast upon exportation of articles, and does not mean that articles exported are relieved from prior ordinary burdens of taxation which rest upon all property similarly situated. U.S.C.A.Const. art. 1, § 10, cl. 2.

6. Licenses $\Rightarrow$ 15.1(5)

Under Sales Tax Act, levy of tax is on completed sale and not on several steps which may enter into or be necessary to its completion. Revenue and Taxation Code, § 6001 et seq.

7. Commerce $\Rightarrow$ 77

Completed sale of ocean-going passenger vessel to foreign owner, including change of registry and flag, constituted exportation of the ship, and sales tax levied upon sale constituted impost upon export within meaning of United States Constitution, and was, therefore, invalid. Revenue and Taxation Code, § 6001 et seq.; U.S.C.A. Const. art. 1, § 10, cl. 2; 15 U.S.C.A. § 173; 46 U.S.C.A. §§ 23, 41; Shipping Act, 1916, § 9, 46 U.S.C.A. § 808; Merchant Marine Act, 1920, § 27, 46 U.S.C.A. § 883.

Edmund G. Brown, Atty. Gen., James E. Sabine and Irving H. Perluss, Asst. Atty. Gen., Charles J. Miller, Deputy Atty. Gen., for appellant.

Brobeck, Phleger & Harrison, San Francisco, for respondent.

FINLEY, Justice pro tem.

This appeal is from a portion of a judgment of the Superior Court in favor of plaintiff and respondent Matson Navigation Company, a corporation, and against the State Board of Equalization of the State of California, defendant and appellant. The action was brought to recover taxes alleged to have been improperly assessed under the Sales and Use Tax Law. Section 6001 et seq., Revenue and Taxation Code.

The principal question for decision is whether the sale by plaintiff, a California corporation, of the S.S. Matsonia, an ocean-going passenger vessel docked in a California port, to a foreign purchaser was a transaction exempt from sales tax by virtue of the import-export clause contained in Article I, Section 10, Clause 2, of the Constitution of the United States. Plaintiff also contends that the sale of the S.S. Matsonia was an "occasional sale" exempt under the provisions of sections 6006.5 and 6367 of the Revenue and Taxation Code.

Plaintiff has been for many years a carrier of freight and passengers, principally between California and Hawaii, and in 1948 owned a large fleet of freighters and two passenger liners, the Lurline and Matsonia. The sale in 1948 of the Matsonia is the source of this dispute. At that time the vessel was about 21 years old, had been used by the government for five years during the war, and, when returned, was badly deteriorated and in need of extensive repair. Plaintiff decided to restore the Lurline and determined that the economically useful life of the Matsonia had ended because of inroads of air transportation upon surface travel and the large amount of restoration and repair needed.

The Matsonia was offered for sale to domestic operators, but there were none interested. It was then offered to foreign buyers. In January, 1948, negotiations were entered into with Panamanian Lines, Inc., a corporation organized under Republic of Panama laws, which was wholly owned by non-resident aliens and which has never done business in California. Both parties intended at and prior to the sale of the Matsonia that it should be registered as a foreign vessel upon such sale and taken from the United States to Italy. These dealings resulted in a contract of sale between plaintiff and Panamanian on July 13, 1948, following which, on July 15th, plaintiff applied to the United States Maritime Commission for approval of such sale. Approval was granted on September 24, 1948. Title 46, U.S. Code, § 808, 46 U.S.C.A. § 808, made mandatory the approval by the Maritime Commission of any such sale to foreign owners or a transfer to foreign registry.

Delay by the Commission in approving the flag transfer, and the 1948 San Francisco waterfront strike resulted in extension of the time for delivery. On December 15, 1948, title was transferred by a bill of sale delivered in New Jersey, and at the same time and place the consideration passed. On the same day, physical possession of the vessel was given to Panamanian in San Francisco, and the vessel was registered as a Panamanian vessel with the San Francisco Panamanian Consul. On December 16, 1948, plaintiff filed with the Collector of

Customs a declaration of the Matsonia as an export, as required by federal law and regulations, i. e., Title 15, U.S.Code, § 173, 15 U.S.C.A. § 173, and Title 15, Chapter 1, Part 30, Sec. 30.30(d) (2) Code of Federal Regulations. On the same day her American Certificate of Enrollment was surrendered to the Collector of Customs. Federal law required prompt surrender of American registration, Title 46, U.S.Code, § 23, 46 U.S.C.A. § 23, under penalty of forfeiture of the vessel, Title 46, U.S.Code, § 41, 46 U.S.C.A. § 41. Upon sale to foreign owners, the Matsonia was legally disabled from ever thereafter engaging in domestic trade. Title 46, U.S.Code, § 883, 46 U.S.C.A. § 883.

On December 22, 1948, Panamanian signed on a foreign crew and the Matsonia sailed for Italy with neither cargo nor passengers. Since being repaired and outfitted in Genoa, Italy, the Matsonia has not returned to California, but has been used in trans-Atlantic trade.

Plaintiff is engaged in the transportation business and is not a ship merchant. The Matsonia was acquired for the transportation business and was sold when her useful life had ended. From 1942 through 1945, plaintiff sold no vessels. From 1946 to the time of trial in 1953 plaintiff sold 14 freighters and one barge in addition to the Matsonia, for a total price of \$3,721,325. These sales were made within the period from April, 1946, to May, 1949. Each of the ships sold was about 20 years of age and some were substantially older. All had been used in the war and suffered considerable depreciation incident thereto, and therefore were disposed of as soon after war service as they could be replaced by newer equipment. Plaintiff generally considered the normal useful life of such ships to be twenty years, and at the time of their acquisition contemplated they would be resold at the end of such useful life unless sooner scrapped or lost at sea. Of vessels other than the above referred to acquired during the 1920's, three were sold for scrap and three were lost at sea for reasons other than war service. All of these ships were acquired for use in plaintiff's operations and not for resale.

Although it was not so specifically found, the record supports an inference that the reason for this apparently large number of sales in a three-year period was that the normal process of replacement of obsolete and worn-out equipment was interrupted by the extraordinary demands of wartime service resulting in an abnormal accumulation.

During the entire period under consideration, the Matsonia was berthed at Pier 34, San Francisco, and plaintiff held no State Sales Tax permit for that location, although it did hold several other such permits for other locations for purposes of retail sales of such things as tobacco, candy, liquor and vessels' stores, and for scrap sales at Wilmington, California.

The issues before us may be summarized as follows: (1) Is a large commercial trans-ocean passenger steamship of American registry such an object as can in legal contemplation be considered or treated as an article of export; (2) If it can be, is it to be so considered and treated where it is sold to a foreign purchaser for use in international trade; (3) If it can be and is sold as an export to a foreign purchaser for such use at what point does the transaction come under the protective mantle of the export clause of the United States Constitution; and, (4) If under the factual situation of this case the sale is not one to be considered as a sale into export trade and therefore not exempt from the provisions of the California Sales Tax Act is it nevertheless to be considered as an occasional sale and exempt from levy of the sales tax for that reason.

It is quite apparent that if question No. 1 above is to be answered in the negative, questions (2) and (3) become moot. Appellants contend that it must be so answered, but neither their authorities nor their logic seem convincing. The United States Constitution is silent on the subject and the legal authorities cited do not support appellant's position. No cogent reason has been advanced why an article of conveyance once having been used as a common carrier is thereby or thereafter to be quarantined as an article of commerce or foreign export. Appellant makes this observation: "It is the

difference between an article of commerce and an instrumentality of commerce." This comment directs attention to a distinction rather than a difference, a distinction which has not, so far as we can see, the slightest legal significance. It must be remembered that, generally speaking, each and every piece of equipment in the world's transportation system was an article of commerce between the time the manufacturer relinquished title and the operator acquired it. We cannot see how or why the legal character of such an article could or should be changed by the mere circumstances of its use for a time as an "instrumentality of commerce." Appellant seeks to inject here the question of consumability, arguing that the ordinary articles of commerce exported to foreign countries are *consumed* there and that the possibility is at least remote that they would ever again be returned in the course of commerce to the country of origin. This argument seems without merit for certainly there is no legal prohibition against the export of imperishable articles of utility which might conceivably find their way back into domestic use. It is customarily presumed, it is true, that in the ordinary course of events they will not and it is further true perhaps that they do not. Appellant refers to *A. G. Spalding & Brothers v. Edwards*, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865; and to *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80, and cites baseball bats and oil as examples of consumable goods. Certainly the possibility that oil once sold as an export will ever again reenter the field of domestic commerce is much more remote than in the case of the baseball bats referred to in the Spalding case. But it seems to us that in either case, remote though the possibility may be, there still remains a possibility, while in the case of the *Matsonia* there is none by reason of the Federal prohibition against a vessel once sold into foreign registry ever again engaging in domestic commerce. The element of consumption of goods exported may be a factor, but only a factor of assurance against the return of such goods into domestic commerce. The

identity of baseball bats and oil might conceivably be hidden, but we cannot conceive the same relation to a large ocean-going vessel.

The case of *The Conqueror*, 166 U.S. 110, 17 S.Ct. 510, 41 L.Ed. 937, is cited by appellant for the proposition that a vessel is not an article of commerce but is treated as *sui generis*. An American citizen bought a yacht in England and brought it to New York where the Collector of Customs sought to levy a tariff duty. The owner claimed that the ship was not an "article" within the meaning of the applicable tariff act. The court upheld the owner's contention but no constitutional question was presented or decided, only a question of statutory interpretation. The holding of the case was that the vessel was not an "article", "goods" or "merchandise" within the meaning of the tariff act because so far as that and other tariff acts were concerned vessels were not treated as dutiable articles but always had been the subject of a separate and entirely different set of laws and taxes relating to vessels alone. If this be the rule then appellant has not shown by what authority an object not an "article", "goods" or "merchandise" and not recognizable as an object of export can nevertheless be subjected to the California sales tax. It is true that under the Act the tax is on the transaction or sale rather than on the object, but we do not believe that it was ever intended by the legislature that the sale of an object can be taxed, though that object may not be considered as an article of commerce or export.

The identical proposition under discussion was considered and rejected in the case of *Alaska Steamship Co. v. State of Washington*, 1948, 31 Wash.2d 328, 196 P.2d 1001, 1009-1010. The court said:

"The question here presented is novel, as well as important. We find no case in which the right of the state to levy an excise tax, in connection with the sale of merchandise claimed to be an export, concerned property which proceeded, as an export, beyond the territorial limits of the state and of the

United States under its own power.

* * *

* * * * *

"The unusual circumstance here present, that the steamship itself is the property exported, is unimportant in applying the constitutional provision. Seagoing vessels are personal property and subject to sale, as are other articles of commerce. They are, of course, subject to Federal laws concerning registry, sale, and so forth."

[1-3] We agree with this conclusion by the Supreme Court of Washington. No logical reason has been advanced by appellant to the contrary. We hold, therefore, that the Matsonia was a proper object of export. We hold further that by reason of her sale to Panamanian Lines, Inc., a foreign corporation organized under the laws of the Republic of Panama, the vessel was sold as an export into export trade. The word "export" as used in the constitution and laws of the United States prohibiting taxes on "exports" generally means the transportation of goods from the United States to a foreign state or country. *West India Oil Co. v. Sancho*, 1 Cir., 108 F.2d 144, 147. "Exportation" means a severance of goods from the mass of things belonging to the United States with intention of limiting them to the mass of things belonging to some foreign country. *United States v. 200 Watches*, D.C.N.Y., 66 F.Supp. 228, 230. Another country as the intended destination of the goods is essential to the idea of exportation. *Swan & Finch Co. v. United States*, 190 U.S. 143, 23 S.Ct. 702, 47 L.Ed. 984; *Kidd v. Flagler*, C.C., 54 F. 367, 369. To "export" means to carry or send abroad. *Canton R. Co. v. Rogan*, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488. The Matsonia was sold, delivered and became a part of the mass of goods and property subject to the laws of the Republic of Panama. She was thereby irrevocably committed to foreign trade if not to foreign ownership, for under the provisions of the United States Code, Title 46, Section 883, she could never again engage in United States coastwise trade.

[4, 5] The question next to be answered is, was she sufficiently committed into the stream of export trade at the time of sale so that the transaction would not be subject to the California Sales Tax? Appellant maintains that she was not exempt because the sale or transaction was completed before export began. This argument is untenable, for as in the case of *Richfield Oil Corporation v. State Board of Equalization*, supra, the act claimed to be subject to the tax is the very act which passed title and which would have incurred the tax had the transaction been domestic. For all practical purposes the same acts both in the *Richfield Oil* case and in the present case extinguished United States dominion over the subject matter of sale and at the same time invested it in a foreign power. A different principle is involved than in *Empresa Siderurgica, S. A. v. County of Merced*, 337 U.S. 154, 69 S.Ct. 995, 93 L.Ed. 1276, for the tax in question there was an ad valorem tax on the goods involved while there still was no sufficiently positive or certain or irrevocable commitment of those goods into the export stream. The transaction had not yet advanced the goods involved to a position where they were actually subject to dominion by a foreign country nor were they in the ordinary course of events certain to so become. As was said by the court in *Cornell v. Coyne*, 192 U.S. 418, 24 S.Ct. 383, 384, 48 L.Ed. 504.

"* * * The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation."

The *Richfield* case presented a different situation from either the *Cornell* or *Empresa* cases, for in the *Richfield* case the oil was not sought to be subjected to an ad valorem tax along with all other taxable property similarly situated, but as in the present case a sales tax was sought to be levied. Oil was pumped by the seller into

the hold of a foreign ship which is deemed for many purposes to be a segment of the country of its registry. It thereby passed into the control of a foreign purchaser and for many purposes under the dominion of a foreign land. The chances were extremely remote to say the least that it would ever be pumped out again on an American shore. As was stated in the opinion, 329 U.S. at page 83, 67 S.Ct. at page 163:

"* * * That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain."

[6] Here, even more than in the Richfield case, exportation was made more and more certain as each step took place in the procedure necessary to transfer title and registry to a foreign purchaser. The sale was not a completed transaction until each and every step had been completed. Under the California Sales Tax Act the levy of the tax is on the completed sale and not on the several steps which may enter into or be necessary to its completion. Therefore, when the entire transaction was completed and as title to the ship passed, the event became an accomplished fact which, except for the constitutional prohibition, would have activated the law and given birth to the tax. But the completion of that very act constituted the vessel the property of a foreign purchaser and placed her under the jurisdiction of a foreign power.

[7] We concur in the reasoning and agree with the Supreme Court of Washington in holding that the completed sale of an ocean-going vessel to a foreign owner, including the change of registry and flag, constitutes an exportation of the ship and that a tax levied upon the sale constitutes an impost upon an export within the meaning of Article I, section 10, clause 2, of the United States Constitution and is, therefore, invalid.

In view of this determination it will be unnecessary to pass upon the question of whether sale of the Matsonia constituted an occasional sale under the provisions of the California Sales Tax Act.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.



136 Cal.App.2d 586

ALASKA PACKERS ASSOCIATION, a corporation, Plaintiff and Respondent,

v.

The STATE of California and the State Board of Equalization, Defendants and Appellants.

Civ. No. 8557.

**District Court of Appeal,
Third District, California.**

Oct. 27, 1955.

Hearing Denied Dec. 21, 1955.

Action to recover tax paid. The Superior Court, Sacramento County, J. O. Moncur, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Finley, J. pro tem., held that under circumstances under which sea going vessel, home port of which was San Francisco, was sold to aliens for use in foreign trade, sale was an "export transaction" and exempt from California sales tax.

Judgment affirmed.

Commerce §77

Under circumstances under which sea going vessel, home port of which was San Francisco, was sold to aliens for use in foreign trade, sale was an "export transaction" and exempt from California sales tax. U.S.C.A.Const. art. 1, § 10, cl. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Export Transaction".

Edmund G. Brown, Atty. Gen., James E. Sabine and Irving H. Perluss, Asst. Attys. Gen., Charles J. Miller, Deputy Atty. Gen., for appellant.

Lillick, Geary, Olson, Adams & Charles, San Francisco, for respondent.

FINLEY, Justice pro tem.

This is a companion case to *Matson Navigation Co. v. State Board of Equalization*, Cal.App., 289 P.2d 73. In both cases the State of California levied and collected a tax on the sale and transfer to aliens of a seagoing vessel destined for use in foreign trade. The tax was paid under protest and a claim for refund was filed within the appropriate time. Appellant Board denied the claim and suit was instituted to recover the tax paid. Judgment in the trial court was for plaintiff, and defendants appealed. The question common to both cases is whether the sale to an alien purchaser of an ocean-going passenger vessel docked in a California port is a transaction exempt from sales tax by virtue of the import-export clause of the United States Constitution, Article I, section 10, clause 2. The occasional sale issue raised in the *Matson Navigation Co.* case is not involved here.

The facts which are not disputed are as follows: On December 5, 1946, in New York City, plaintiff and the Government of Yugoslavia entered into a written contract for the future sale of plaintiff's vessel, the S.S. Chirikof, which had an American registry and home port at San Francisco, California. This contract was made conditional upon the cancellation of the United

States registry and subsequent registration of the vessel under the laws of Yugoslavia.

Application for approval having been filed by plaintiff, the United States Maritime Commission on January 7, 1947, approved the sale. On January 20, 1947, in the Yugoslav Embassy in Washington, D. C., plaintiff delivered the certificate of ownership, Transfer Order No. C-4874 of the Maritime Commission, and bill of sale transferring title from it to the Government of Yugoslavia. The S.S. Chirikof was accepted by Yugoslavia in an "as is, where is" condition at Alameda, California. On January 22, 1947, pursuant to the Transfer Order, the vessel was registered under the laws and flag of Yugoslavia as the S.S. Radnik. On January 23, 1947, the permanent United States registry was surrendered to and cancelled by the Collector of Customs at San Francisco. On January 23, 1947, the Yugoslav flag was raised and a crew of Yugoslav nationals was placed aboard the vessel, preparatory to its departure. On January 29, 1947, a verified export declaration assigning Dubronik or Fiume as the destination of the vessel was filed with the Collector of Customs in San Francisco. Clearance for sailing was obtained on that day, and the vessel departed without cargo or passengers for Yugoslavia. The vessel at no time after transfer of possession to Yugoslavia was operated in the waters of the State of California, except as was necessary for its departure from San Francisco Harbor for Yugoslavia.

Inasmuch as the same discussion and reasoning would apply here as in the *Matson Navigation Co.* case, reference is hereby made to the opinion in that case. Our decision here is the same. We hold that sale of the S.S. Chirikof was an export transaction and sale and therefore under the provisions of Article I, section 10, clause 2, of the United States Constitution exempt from the California sales tax.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

136 Cal.App.2d 513

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, and Board of Education of the Norwalk City Elementary School District, Plaintiffs and Respondents,

v.

Minna Omanoff COOPER, Leon Goldin, June Lillian Sirell, Claire Sokolow Kaye, Solly Rubenstein, David Francis Arkin, Defendants and Appellants.

Civ. 20960-20965.

District Court of Appeal, Second District,
Division 2, California.

Oct. 25, 1955.

Hearing Denied Dec. 21, 1955.

Action by school district for determination of district's right to discharge certain teachers. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, McComb, J., held that refusal of public school teachers to answer under oath, before Board of Education by which he or she was employed, specific questions as to their membership in Communist Party and allied questions constituted cause for dismissal under Dilworth Act.

Judgment affirmed.

1. Schools and School Districts ⇨141(4)

Refusal of public school teachers to answer under oath, before Board of Education by which he or she was employed, specific questions as to their membership in Communist Party and allied questions constituted cause for dismissal under Dilworth Act. West's Ann. Education Code, §§ 8275, 12600-12607, 13521, 13526, 14130.5.

2. Schools and School Districts ⇨141(4)

Statute providing for discharge of school employee upon his failure to answer questions as to his knowing membership in Communist Party refers to employee's knowledge of membership, rather than to his knowledge of character of organization, and teacher could properly be discharged for failing to answer question as to knowing membership without inquiry into his knowledge of character of organ-

ization. West's Ann. Education Code, §§ 8275, 12600-12607, 13521, 13526, 14130.5.

3. Officers ⇨18

A governmental body may make reasonable inquiries into matters pertaining to fitness of its employees, and may inquire about employee's associates and conduct in determining his loyalty.

4. Officers ⇨66

Where statute provides merely for public employees' disclosure of information, on pain of discharge, it is not necessary that employee have knowledge of nature of organization, membership in which is investigated.

5. Statutes ⇨76(4)

No general law could have been made applicable to authorize inquiry as to public employees' membership in Communist Party, and statute requiring school employees to answer question as to knowing membership in Party was not in violation of constitutional provision prohibiting passage of special laws where a general law can be made applicable. West's Ann. Education Code, §§ 8275, 12600-12607, 13521, 13526, 14130.5; West's Ann.Const. art. 4, § 25, subds. 1-33, 11.

6. Constitutional Law ⇨82

Schools and School Districts ⇨141(4)

Statute requiring that school employees answer questions concerning past or present membership in Communist Party, but not providing for any discharge for past membership in party or any organization and permitting the teacher who is a party member to retain job upon disassociation from party is not a bill of attainder. West's Ann. Education Code, §§ 12601, 12602.

7. Constitutional Law ⇨318

Where teachers who were questioned by Board of Education concerning relationships with Communist Party sat each at the elbow of his counsel, consulting him privately and frequently, they could not complain of denial of due process because of lack of counsel.

8. Schools and School Districts ⇨141(5)

School district employees who were summoned before Board of Education for

interrogation as to their connections with Communist Party were not entitled to have attorney speak for them. West's Ann. Education Code, §§ 8275, 12600-12607, 13521, 13526, 14130.5.

Wirin, Rissman & Okrand, and William B. Esterman, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Clarence H. Langstaff, Baldo Kristovich, James W. Briggs, Deputy County Counsels, Los Angeles, for respondents.

McCOMB, Justice.

These six actions are appeals by defendants following trials without a jury, from judgments in favor of plaintiffs, Board of Education of the City of Los Angeles in five of the actions, and Board of Education of the Norwalk City Elementary School District in one action, adjudging that plaintiffs may dismiss defendants as certificated employees of the respective school districts governed by said Boards of Education.

Facts: The California Legislature in 1953, added Chapter 2 to Division 7 of the Education Code, comprising sections 12600 to 12607, also section 14130.5, and amended sections 13521 and 13526 of said code. All of these provisions related to school district employees.

This statute, commonly called the Dilworth Act, provides:

(1) Legislative findings as to the nature, extent and objectives of the world-wide Communist movement, the presence in California of active disciplined Communist organizations, the objective of such organizations to place their members in public school system positions, and the clear and present danger that Communist organizations in California and their members will seek to hamper the efforts of local school boards to comply with and enforce Section 8275, Education Code. (Sec. 12600, Education Code.) Section 8275 prohibits the teaching of Communism so as to undermine a pupil's patriotism for and belief in the government of the United States and of this State.

(2) After September 9, 1953, no person knowingly a member of the Communist Party shall be employed or retained in employment by a school district (Secs. 12601, 12603 and 12606, Education Code). It permitted continuance of employment upon disavowal of Communist Party membership. (Sec. 12602, Education Code.)

(3) It is the duty of school district employees to answer under oath before legislative committees or before their employing school boards certain questions set forth in Sections 12604 and 12605. A failure or refusal to answer such questions is ground for suspension and dismissal. (Secs. 12604, 12605, last paragraph of 12600, 12607, 13521(a) and (j) and 13526, Education Code.)

Sections 12604, 12605, 12600 (last paragraph) and 12607, Education Code, read as follows:

"12604. It shall be the duty of any employee of any school district who may be subpoenaed by a United States Congressional Un-American Activities Committee or a subcommittee thereof or a California Legislative Un-American Activities Committee or a subcommittee thereof or any other committee or subcommittee of the United States Congress or the California Legislature or of either house of either thereof to appear before said committee or subcommittee and specifically to answer under oath a question or questions propounded by any member or counsel of the committee or subcommittee relating to:

"(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state or political subdivision.

"(b) Present knowing membership in any organization which, to the knowledge of such employee, advocates the forceful or violent overthrow of the Government of the United States or of any state or political subdivision.

"(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the force-

ful or violent overthrow of the Government of the United States or of any state or political subdivision.

"(d) Past knowing membership of such employee in the Communist Party at any time since September 10, 1948.

"(e) Present knowing membership of such employee in the Communist Party.

"Any employee who fails or refuses to answer under oath on any ground whatsoever any such question propounded by any member or counsel of any such committee or subcommittee shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law.

"12605. It shall be the duty of any employee of any school district who is ordered to appear before the governing board of the employing school district to appear and specifically to answer under oath a question or questions propounded by a member or counsel of the governing board or by the superintendent of schools relating to any of the matters specified in Section 12604.

"Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such question propounded by a member or counsel of the governing board or by the superintendent of schools shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law.

"12600. * * * The Legislature further specifically finds that an indirect or evasive answer to a question relating to any of the matters specified in Section 12604 or 12605, or an answer which neither affirms nor denies shall, for the purposes of this act and chapter, be considered as a failure and refusal to answer, regardless of the ground or explanations given for any such answer. [Last paragraph of Sec. 12600.]

"12607. Any certificate employee of a school district who violates any of the provisions of Sections 12601 to 12606, in-

clusive, of this code shall be guilty of unprofessional conduct and shall be suspended and dismissed in the manner provided by law."

Sections 13521 and 13526 of the code, which set forth the causes for dismissal and immediate suspension of a certificated employee, were amended by adding to such causes violation of any provisions of Sections 12601 to 12607, inclusive, and knowing membership in the Communist Party.

Pursuant to the above provisions, appellants were ordered to and did appear before their respective governing boards, were duly sworn, and the following questions asked of each of them by counsel for the respondents:

"Are you now knowingly a member of the Communist Party?"

"Were you knowingly a member of the Communist Party at any time during the year 1953?"

"Were you knowingly a member of the Communist Party at any time during the year 1952?"

"Were you knowingly a member of the Communist Party at any time during the year 1951?"

"Were you knowingly a member of the Communist Party at any time during the year 1950?"

"Were you knowingly a member of the Communist Party at any time during the year 1949?"

"Were you knowingly a member of the Communist Party at any time during the year 1948 subsequent to the date of September 10th of that year?"

"Were you at any time since September 10, 1948, knowingly a member in any organization which, to your knowledge during the time of your membership, advocated the forceful or violent overthrow of the Government of the United States, or of any state or political subdivision?"

"Are you now knowingly a member in any organization which, to your knowledge advocates the forceful or violent overthrow of the Government of the United States, or of any state or political subdivision?"

"Do you now personally advocate the forceful or violent overthrow of the Government of the United States, or of any state or political subdivision?"

Appellants refused to answer any of said questions (appellant Cooper refused to answer only the first 7 questions) but instead launched into indirect and evasive statements of more or less length which neither affirmed nor denied the questions asked. Each of said appellants was accompanied by his or her own counsel, with whom each was permitted to and did freely confer.

Typical of the refusals to answer is the following testimony of appellant Kaye in the Los Angeles transcript:

"Mr. Lamoreaux: Were you knowingly a member of the Communist Party at any time during the year 1953?"

"Mrs. Kaye: I refuse to answer that question.

"Mr. Lamoreaux: Were you knowingly a member of the Communist Party at any time during the year 1952?"

"Mrs. Kaye: I refuse to answer that question.

"Mr. Lamoreaux: Were you knowingly a member of the Communist Party at any time during the year 1951?"

"Mrs. Kaye: I refuse to answer that question.

"Mr. Lamoreaux: Were you knowingly a member of the Communist Party at any time during the year 1950?"

"Mrs. Kaye: I refuse to answer that question.

"Mr. Lamoreaux: Were you knowingly a member of the Communist Party at any time during the year 1949?"

"Mrs. Kaye: I refuse to answer that question.

"Mr. Lamoreaux: Were you knowingly a member of the Communist Party at any time during the year 1948, after September 10th of that year?"

"Mrs. Kaye: I refuse to answer that question.

"Mr. Findlay: You can't be heard down here very well, I'm sorry.

"Mrs. Kaye: It is the same answer. I refuse to answer on any grounds—any questions that concern my political beliefs or affiliations or associations * * *.

"Mr. Lamoreaux: Mrs. Kaye, were you at any time since September 10, 1948, knowingly a member in any organization which, to your knowledge during the time of your membership, advocated the forceful or violent overthrow of the Government of the United States or any state or political subdivision?"

"Mrs. Kaye: I refuse to answer that question on the same basis.

"Mr. Lamoreaux: Are you now knowingly a member of any organization which, to your knowledge, advocates the forceful or violent overthrow of the Government of the United States or any state or political subdivision?"

"Mrs. Kaye: I refuse to answer that question.

"Mr. Lamoreaux: Do you now personally advocate the forceful or violent overthrow of the Government of the United States, or of any state or political subdivision?"

"Mrs. Kaye: I refuse to answer that on the basis that my opinions, ideas and beliefs are my own.

"Mr. Lamoreaux: I have no further questions, Doctor.

"President Willett: Thank you, Mr. Lamoreaux.

"Mr. Wirin: She has not quite completed.

"Mr. Lamoreaux: Oh, pardon me. I thought she had.

"Mrs. Kaye: In further answer to that last question—

"Mr. Findlay: You can't be heard. I'm sorry.

"Mrs. Kaye: In further answer to that last question, I feel that I am loyal to the Constitution of this State and of the United States and will uphold them.

* * * * *

"Mrs. Kaye: In regard to the last three questions that were asked of me, I would like to extend on my answer. I am aware of what the questions are. I think you are,

too, because of their repetition, so if it is all right with you, could I state my—

"Mr. Lamoreaux: Yes, indeed, Mrs. Kaye.

"Mrs. Kaye:—extension? When I came into the Los Angeles City School District, I took the Levering oath, which stated that I do not belong to any organizations or parties that believe in, or advocate the forceful or violent overthrow of the government—something like that. I am doing it in effect. I don't have this oath before me. This oath stands of today, because it said in it that I will not, and that is what I swore before, and since it said in there I will not, it stands today. I think that the oath, in itself, would have been enough for you to know the answer to those questions, my taking of that oath."

After said proceedings had been completed the respective governing boards took action suspending appellants and notifying them of their intention to dismiss, in conformance with the provisions of Section 13522 of the Education Code, as a result of which the proceedings below were instituted. The trial court found in each case that the defendant therein failed and refused to answer the questions asked, and concluded that each defendant was guilty of violating Section 12605 of the Education Code, of unprofessional conduct and evident unfitness for service, and that sufficient grounds existed for the suspension and dismissal of said defendant.

Questions: First: Does refusal of a public school teacher to answer under oath, before the Board of Education by which he or she is employed, specific questions as to his or her membership in the Communist Party and allied questions constitute cause for dismissal under sections 12604 and 12605 of the Education Code?

[1] Yes. From the above statement of facts it is apparent that these actions in all essential aspects are identical with the situation presented in *Board of Education v. Eisenberg*, 129 Cal.App.2d 732, 277 P.2d 943 (hearing denied by the Supreme Court), and *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 285 P.2d 617, except that the later case was based upon the Luc-

kel Act (Chap. 1646, Stats. of 1953), which was modeled after and is of similar import to the Dilworth Act (Chap. 1632, Stats. 1953), both having been enacted by the same legislature. Section 1028.1, added to the Government Code by the Luckel Act, is substantially identical to Sections 12604 and 12605, added to the Education Code by the Dilworth Act, making the public employee's refusal to answer certain questions a ground for his suspension and dismissal. The last section of the Luckel Act provides:

"Sec. 4. The provisions of this act shall not be applicable to school district employees, it being the intent of the Legislature that similar provision be made in the Education Code for such employees by other acts."

The Dilworth Act is the "other act" applicable to school district employees. The Dilworth Act and the Luckel Act, together, cover all public employees in California subject to control of the state legislature.

Defendants contend as follows:

1. The Dilworth Act on its face violates due process of law under the holding in *Wieman v. Updegraff*, 344 U.S. 183, 193, 73 S.Ct. 215, 97 L.Ed. 216.
2. It constitutes special legislation.
3. It is a bill of attainder.
4. It offends the principle of separation of powers.
5. It is unconstitutional as applied to appellants.
6. The appellants complied by answering the questions.

All these contentions have been resolved against defendants by the appellate courts of this state in the case of *Board of Education v. Eisenberg*, supra, and *Steinmetz v. California State Board of Education*, supra. In the *Eisenberg* case the dismissal of a Los Angeles County school teacher was upheld. The teacher, who, while appearing as a sworn witness before a legislative fact-finding committee, refused to answer the question, "Are you a member of the Communist Party of Los Angeles County?" At the time of her appearance before the committee, a board rule adopted by the Board of Education of the City

of Los Angeles required employees of the Los Angeles City School Districts, when testifying before such committees, to answer questions pertaining to membership in the Communist Party. The rule further provided that a teacher who refused to answer such questions would be guilty of insubordination and unprofessional conduct and was to be dismissed in the manner provided by law. The board rule was, in all respects which are material to these appeals, the same as the Dilworth Act here involved. The trial court entered judgment authorizing her dismissal. On her appeal to this court from that judgment she urged substantially the same arguments as numbers 1, 5 and 6 of those which are summarized above. Mr. Presiding Justice Moore, in holding that these arguments were without merit and that her dismissal was justified, made the following pertinent comments [129 Cal.App.2d 732, 277 P.2d 947]:

"In view of the findings that there is a present, imminent danger, that communist organizations in the District will engage in a concerted undertaking to hamper the efforts of the Board to comply with section 8275 of the Education Code and in view of appellant's obligation to inform the Board whether she is a member of a Communist organization whose tenets she was forbidden to impart to her students, it cannot with reason be said that the adoption of its rule on September 22, 1952, was unreasonable or that it conflicts with the appellant's constitutional guaranties."

The court in 129 Cal.App.2d at page 738, 277 P.2d at page 948, distinguished the case of *Wieman v. Updegraff*, supra, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, strongly urged by appellant in support of her contentions. On the question of due process, this court said on the same page:

"In the case at bar, the question was whether appellant was a member of an organization which is proscribed in the Board's Rule. She knew the Rule's contents. The incidents of due process had been meticulously observed, notwithstanding former holdings that due process of law does not require that a teacher must

have had knowledge of the activities or purposes of the Communist Party. (*Wieman v. Updegraff*, supra; *Galvan v. Press*, 347 U.S. 522 [74 S.Ct. 737, 98 L.Ed. 911].)"

In the *Eisenberg* case, as here, it was argued, in effect, that because the appellant had previously taken the Levering Oath of Allegiance she could not be compelled to answer questions respecting her Communist Party affiliations. The court answered this argument in 129 Cal.App.2d at page 737, 277 P.2d at page 947, as follows:

"A public school teacher's refusal to answer before a legislative committee whether she is a member of the Communist Party is the only question involved in this action. Neither the Board nor the Legislature itself deemed a compliance with the Levering Act sufficient protection for the public. A teacher must answer directly that she is or is not a member. Past pledges or oaths of loyalty are not sufficient for the School Board which has jurisdiction over a vast empire of wealth, pupils and teachers. Its responsibility impels it to require every teacher to stand and be counted. * * *"

Inasmuch as the Dilworth Act is practically identical in its aims, purposes and wording with the board rule there involved, and since it cannot be successfully argued that the Legislature has less power than the Board of Education in prescribing qualifications for public school employees, the *Eisenberg* case is controlling here.

In *Steinmetz v. State Board of Education*, supra, a mandamus proceeding was instituted to compel reinstatement of an associate professor at San Diego State College who had been dismissed for his refusal to answer two questions as to whether he was or had been a member of the Communist Party at a hearing before the State Board of Education. The proceeding before the State Board was conducted pursuant to Section 1028.1 of the Government Code, which is part of a statute known as the Luckel Act. That section provides that it is the duty of any public employee, when required, to appear

before the governing board of the public entity employing him and answer under oath questions relating to the identical matters set forth and referred to in Sections 12604 and 12605 of the Education Code. The same arguments were there presented with respect to the Luckel Act as have been urged by appellants in the instant cases with respect to its parallel legislation, the Dilworth Act, to wit:

1. That the Act on its face violated due process of law under the holding in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216.

2. That the Act constituted special legislation.

3. That it was a bill of attainder.

4. That it offended the principle of separation of powers.

5. That it was unconstitutional as applied to petitioner.

6. That petitioner had complied by answering the questions.

In holding that these arguments were without merit and in denying the writ of mandate, the Supreme Court, in *Steinmetz v. California State Bd. of Educ.*, 44 Cal.2d 816, at page 822 et seq., 285 P.2d 617, at page 620, speaking through Mr. Chief Justice Gibson, made the following pertinent remarks which are fully applicable to the Dilworth Act:

[2] "Section 1028.1, considered as a whole, shows on its face that the Legislature, in using the words 'knowing membership,' was referring to a person's knowledge of his membership, rather than to his knowledge of the character of the organization. * * * It thus was proper, under the terms of subdivision (d), to question petitioner as to the fact of membership without reference to his knowledge of the character of the organization, and the questions on this point which he refused to answer were not covered by his denials that he was knowingly a member with knowledge of the nature of the party.

[3] "The statute under which petitioner was dismissed is not rendered invalid by the fact that it requires an employee to answer questions as to his membership in

the Communist Party without regard to his knowledge of the nature of the party. Petitioner's discharge was not because of membership in a proscribed organization but because of his refusal to answer questions as to whether or not he held membership in the Communist Party. A governmental body may, of course, make reasonable inquiries into matters pertaining to the fitness of its employees. Loyalty on the part of those in public employment is important to orderly and dependable government and is, therefore, relevant to fitness for such employment. (*Pockman v. Leonard*, 39 Cal.2d 676, 687, 249 P.2d 267.) An employee's associates, as well as his conduct, are factors which may be considered by a state agency in determining his loyalty, and information on that subject may properly be elicited from him. (*Adler v. Board of Education*, 342 U.S. 485, 492-493, 72 S.Ct. 380, 385, 96 L.Ed. 517; *Pockman v. Leonard*, 39 Cal.2d 676, 685-687, 249 P.2d 267.) In this connection, it has been held that a public employer may constitutionally require its employees to disclose any past or present membership in the Communist Party. (*Garner v. Board of Public Works*, 341 U.S. 716, 720, 71 S.Ct. 909, 95 L.Ed. 1317.)

[4] "Statutes, such as the one involved here, which compel disclosure of information concerning a public employee's membership in proscribed organizations, must be distinguished from those which provide for discharge or disqualification because of membership or refusal to take an oath denying membership. Under the latter type of statute, knowledge of the character of the organizations has been held essential (*Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216), and the legislation has been sustained only when it expressly or impliedly required such knowledge (*Adler v. Board of Education*, 342 U.S. 485, 494, 72 S.Ct. 380, 96 L.Ed. 517; *Garner v. Board of Public Works*, 341 U.S. 716, 723-724, 71 S.Ct. 909, 95 L.Ed. 1317; *Gerende v. Board of Supervisors*, 341 U.S. 56, 57, 71 S.Ct. 565, 95 L.Ed. 745; *Pockman v. Leonard*, 39 Cal.2d 676, 685, 249 P.2d 267; *Hirschman v. County of Los Angeles*, 39 Cal.2d 698, 702, 249 P.2d 287, 250 P.2d

145). On the other hand, where the statutes provide merely for the disclosure of information, a requirement that the employee have knowledge of the nature of the organizations is not necessary. (See *Garner v. Board of Public Works*, 341 U.S. 716, 719-720, 71 S.Ct. 909, 95 L.Ed. 1317; *Adler v. Board of Education*, 342 U.S. 485, 492-493, 72 S.Ct. 380, 96 L.Ed. 517.)"

[5] On the argument that the Luckel Act constituted a special law, the Chief Justice, 44 Cal.2d at page 825, 285 P.2d at page 622, said:

"Section 1028.1 does not violate the provision of the California Constitution which prohibits the passage of special laws in certain enumerated cases and 'in all other cases where a general law can be made applicable.' (See Cal.Const., art. IV, § 25, subds. 1-33.) This section does not fall within any of the enumerated categories, and, insofar as any of its provisions are specific, no general law could have been made applicable. The Legislature, desiring to authorize inquiry as to membership in the Communist Party, could do so only by naming it. The designation of that organization was not arbitrary, but was reasonably related to the purpose of the legislation, since, as we have seen, information as to membership in the party is pertinent to fitness for public employment. The case of *Communist Party v. Peek*, 20 Cal.2d 536, 127 P.2d 889, is readily distinguishable. The statute there held invalid denied the Communist Party a place on the ballot, and regulation of elections is listed in the Constitution as one of the areas where a special law is prohibited. (Cal.Const., art. IV, § 25, subd. 11.) The basis of the decision in that case was that, in the absence of evidence, the court would be required to take judicial notice of the subversive character of the Communist Party in order to uphold the statute as reasonable and that judicial notice to that effect could not be taken under the conditions then existing."

Although the majority opinion in the Steinmetz case did not discuss the bill of attainder argument, the dissenting opinion makes it clear that the point was fully urged upon the court. Not only is it clear that

the majority in the Steinmetz case rejected the bill of attainder argument; it is also clear that the United States Supreme Court has fully refuted that argument in the case of *American Communications Association v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925.

[6] Under the Dilworth Act, any teacher could have been a member of the Communist Party on the date of the passage of the statute and would suffer no penalty therefor. He had 90 days in which to terminate membership in the Communist Party. After terminating membership, he would be completely eligible to remain in his position as a public school teacher. (Sections 12601 and 12602, Education Code.)

Obviously, this statute operates prospectively. Teachers may be removed solely for:

(1) Future membership in the Communist Party after the 90 days has passed;

(2) present personal advocacy after September 9, 1953 of the overthrow of the government by force or violence;

(3) present knowing membership in an organization after September 9, 1953 which at the time of his membership he knows advocates overthrow of the government by force or violence.

There can be no discharge for past membership in the Communist Party.

There can be no discharge for past membership in *any* organization.

The discussion by Chief Justice Vinson in *American Communications Association v. Douds*, supra, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, regarding the bill of attainder conclusively establishes that the Dilworth Act does not constitute a bill of attainder. At 339 U.S. 413, 70 S.Ct. 691, 94 L.Ed. 952, the court said:

"The unions' argument as to bill of attainder cites the familiar cases, *United States v. Lovett*, 1946, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252; *Ex parte Garland* [U.S.] 1866, 4 Wall. 333, 18 L.Ed. 366; *Cummings v. Missouri* [U.S.] 1866, 4 Wall. 277, 18 L.Ed. 356. Those cases and this also, according to the argument, involve the proscription of certain occupa-

tions to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for past actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into future conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) [29 U.S.C.A. § 159(h)] is intended to prevent future action rather than to punish past action.

"This distinction is emphasized by the fact that members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See *United States v. Lovett*, supra (328 U.S. at page 314, 66 S.Ct. [1073] at page 1078, 90 L.Ed. 1258; *Cummings v. Missouri*, supra [U.S.] 4 Wall. at page 287, 18 L.Ed. 356). Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

It is clear that the *Eisenberg* and *Steinmetz* cases constitute a full and complete answer to the above arguments urged by defendants.

Second: *Were defendants deprived of the right to counsel at the hearing before the Board of Education?*

[7] No. I: The record shows that each defendant had his counsel with him when being interrogated by his employing board; sat at the elbow of his counsel, consulting

him privately and frequently. Therefore, since defendants were at all times fully advised by private counsel of their own selection, there was no denial of due process because of lack of counsel.

[8] II: Assuming for the purpose of argument that one or more of the defendants were deprived of an alleged right to have their attorney speak for them when they were being interrogated by their employers, they were not entitled to such a right.

The six employee-teachers were appearing before plaintiff boards as employees for interview by their employers. These were not adversary proceedings or judicial trials between parties, but were merely interviews between employers and employees. If a public employer calls in an employee to ask whether it is true, as he has heard, that the employee was out fishing on days which the employee reported as having been at work, the question arises, could the employee demand the right to counsel before answering such a question? To ask the question is to answer it. The answer is "No!" There would be no ground to object in a later civil service proceeding that he had been deprived of right to counsel in that employer-employee interview.

That this was the true nature of the interrogations by the plaintiff boards is amply evidenced by the *Dilworth* Act itself, the provisions of which were followed in conducting the interrogations. For instance, Education Code, section 12605, makes it "the duty of any employee of any school district who is ordered to appear before the governing board of the employing school district to appear and specifically to answer under oath a question or questions * * *."

People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180 and *Hallinan v. Superior Court*, 74 Cal.App. 420, 240 P. 788, relied on by defendants, are criminal trials, while *Nicholson v. Nicholson*, 174 Cal. 391, 163 P. 219, also relied on by defendants, was a divorce action where the trial judge refused to permit one of counsel to argue his case after he had presented his authorities. In this case the Supreme Court held there was no prejudicial error in refusing him this

permission. The court, speaking through Mr. Justice Sloss, 174 Cal. at page 394, 163 P. at page 220, said:

"Finally, it is urged that the court erred in refusing to allow plaintiff's counsel to argue the case. It appears, however, that the court did permit the presentation of the authorities upon which plaintiff relied. Ordinarily, a party to an action has the right to be heard by counsel. But the extent to which argument shall go, especially in civil cases tried without a jury, is largely in the discretion of the court. In the present case, where the issue was a simple one of fact, and only one of the parties was in court, no substantial prejudice was suffered, nor was a 'miscarriage of justice' occasioned, by the refusal of the court to listen to a discussion of the effect of the evidence. (Const., art. 6, § 4½.) It is perfectly apparent from the record that an indulgence of counsel's desire to argue the case would have been fruitless. 'Even if the inferior court erred in refusing to let the attorney speak, yet, if the cause has been decided correctly, we will not reverse it merely to give an opportunity to make a speech.' (Harrison v. Park, 24 Ky. (1 J.J.Marsh.) 170, 174.)"

A case similar in principle to the cases before us is *People v. Cochrane*, 307 Ill. 126, 138 N.E. 291. In this case a witness refused to answer certain questions asked by the grand jury in connection with its investigation of suspected criminal violations by other persons. He also refused to answer the same questions in open court where the court refused his request to be permitted to consult with counsel. The Supreme Court held that he had no right to counsel as he was not being prosecuted for a crime and his relation to the investigation was only as a witness, the court saying at page 294 of 138 N.E.:

"One occupying that relation to a criminal prosecution is not entitled to have an attorney at his elbow to advise him whether he shall answer a question or to have proceedings suspended until he can find and consult an attorney. Plaintiff in error never intimated that he would answer the questions if he was advised by counsel that it was his duty, and it is perfectly apparent

that his only object was to obtain advice to aid him in obstructing the administration of justice."

No case has been called to our attention guaranteeing the right to counsel in proceedings such as are here involved, whereas, in fact, in other types of proceedings before a court such right has been denied. In the case of *Ex parte McCarthy*, 29 Cal. 395, a habeas corpus proceeding where the petitioner had been cited for contempt by the California State Senate, it appeared that he had been summoned to appear as a witness before that body. The court directly held that a witness before the Legislature does not have a right to counsel, and such decision was based upon the ground that he was not accused of any crime but was present merely as a witness. In that connection the court said at page 399:

"Hence the petitioner did not stand before the Senate accused of any offense, but as an accuser of other persons against whom charges of bribery and corruption had been indirectly if not directly made by himself. His real attitude was that of a witness. And we may here remark that that fact alone is a complete answer to all that was said at the argument touching the refusal of the Senate to allow him counsel, and fully explains and justifies the conduct of the Senate in that respect, and relieves it from all just criticism on the score that the course pursued was unusual and arbitrary."

For the foregoing reasons the defendant employees were not denied due process of law by the alleged denial of "effective" right to counsel at their interrogations by their employers. Defendants have wholly failed to show that their "case" was prejudiced by the action of the board. The only claim to prejudicial effect is that counsel might have clarified the meaning of the questions, particularly the meaning of the word "knowing." The record shows several instances when counsel stopped the proceedings to advise their clients; in fact several instances when the proceedings awaited the availability of counsel for a defendant or a conference between a defendant and his counsel. Had counsel wished to "clarify" their questions to their

clients, counsel had full opportunity to do so, and since the attorneys representing defendants are recognized as able counsel, the presumption is that they in fact did do so.

III. The trials and judicial proceedings as to these defendants have occurred in the superior court. Each defendant was represented by counsel of his own selection. It was in such trials that the parties were appearing as adversaries and entitled to counsel, which they had.

An examination of the record discloses that defendants had a full, fair and complete trial before an able and conscientious trial judge.

The judgments are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.



136 Cal.App.2d 665

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Karl R. JOHNSON, Defendant and
Appellant.
Cr. 5410.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1955.

Defendant was convicted of grand theft. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and an order denying a new trial, and the defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law Ⓒ308

When two inferences reasonably may be drawn from the evidence, one pointing to innocence of accused and the other to his

guilt, that pointing to innocence is a rule for guidance of the duly constituted arbiter of the facts.

2. Criminal Law Ⓒ260(11)

On appeal, reviewing court is bound by findings of trial court, if there is substantial evidence, contradicted or uncontradicted, to support conclusion arrived at in trial court. West's Ann.Code Civ.Proc. §§ 1847, 2061.

3. Criminal Law Ⓒ554

In grand theft prosecution, trial judge was authorized, if he conscientiously felt warranted in so doing, after full and fair consideration of the testimony, to disbelieve the testimony of defendant and to accept that of witnesses for the prosecution as to what occurred. West's Ann.Code Civ.Proc. §§ 1847, 2061.

4. Larceny Ⓒ14(1)

Finding of guilt in grand theft prosecution could be sustained on theory of larceny, and it was not necessary that complainant be shown to have parted with his money in reliance on false pretenses. Pen. Code, § 484.

5. Criminal Law Ⓒ1044

Objection that there was no reasonable or probable cause shown at preliminary examination of defendant to hold him to answer information charging him with grand theft, could only be raised by motion to set aside the information in accordance with the Penal Code, and defendant, having failed to make such a motion, could not successfully raise the objection on appeal from judgment of conviction. Pen.Code, § 995.

6. Larceny Ⓒ1

The four elements necessary to constitute theft by larceny are a taking of thing, which is the subject of the crime, from owner into possession of the thief, without consent of owner, asportation of the thing, ownership of the thing by another, and a taking and carrying away with an intent, without claim or pretense of right or justification, to deprive owner of his property wholly and permanently. Pen.Code, § 484.

7. Larceny Ⓒ65

Evidence sustained grand theft conviction.

William J. F. Brown, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with grand theft of \$1,200 from Jesse Gartmon and with having been previously convicted of the crime of grand theft. Following entry of a plea of not guilty and denial of the prior conviction, the cause proceeded to trial before the court sitting without a jury. By stipulation the cause was submitted upon the testimony adduced at the preliminary examination with the reservation that additional evidence might be submitted. At the commencement of the trial defendant admitted the prior conviction. He was found guilty, his motion for a new trial was denied and he was sentenced to State Prison. From the judgment and the order denying his motion for a new trial defendant prosecutes this appeal.

The complaining witness Jesse Gartmon met a man called "Red" at the stockyards in Vernon, County of Los Angeles, when the latter introduced himself. During the ensuing few weeks Gartmon assisted "Red" in transporting live stock to various places.

On June 17, 1954 the complainant was at the stockyards as were "Red" and a man with a Jamaican accent. The Jamaican said that he had given a woman \$50 and she had gone to the whiskey store but had not returned. He asked Mr. Gartmon and "Red" if they would show him how to have some fun with girls, and said that he had plenty of money. There was some conversation about a car, and "Red" said that he had one. The man with the Jamaican accent promised them some money if they took him somewhere where he could have some fun.

The man with the Jamaican accent said that he had \$3,000 or \$4,000 "on him" and had a good bit of money on his ship, which money his Captain was keeping for him. He said that the Captain wanted to take about twenty-five cents on the dollar. The defendant, who had joined them, said,

"That's too much", and asked him why he didn't put his money in the bank. The man with the Jamaican accent said, "You mean to tell me I can put my money in the bank and draw it out when I get ready?" The defendant said, "Sure, you can."

It was suggested that the man with the Jamaican accent let Mr. Gartmon put his money in the bank, but Mr. Gartmon said that the Jamaican could put his own money in and get it out. After some more conversation the defendant said, "Fellow, you better give it to him or give it to some of the guys to keep it for you because then it will be safe, because wherever you are going to have fun you might have it all taken away."

The defendant opened his billfold and said, "Probably some of you guys got a bank account or something like that. They are honest fellows."

Mr. Gartmon opened his billfold and said that he had a dollar or two. "Red" said, "Well, I have a bank account but I can't draw no money, nothing like that, out of the bank, because my wife is in Alaska and I couldn't draw it without her." He suggested that Mr. Gartmon show him his bank book. Mr. Gartmon said, "I have a bank book. I have a little money in the bank." The Jamaican said, "Well, I bet you don't have no money in the bank. You can't draw no money out of the bank." "I bet you \$750.00."

Mr. Gartmon said, "No, I wouldn't go through drawing it out."

"Red" said, "Go ahead, draw it out. What have you got to lose? The guy has plenty of money. If you take yours out and show it to him, you can put it right back."

The defendant, the Jamaican, "Red" and Mr. Gartmon got into a car and went to the latter's home, where he got his bank book. The defendant took the bank book and said, "Here, you got \$1,200 in the bank."

He said, "Well, now, in my country that's a ration book." "Do you mean to tell me the white people in this country allow negroes to have that kind of money? I don't believe he can draw it out." Then he said, "Well, if he can draw it out, so I

will give him \$750.00. I've got plenty of money." He added, "Well, negroes in this country don't even have a flag."

They went to the California Bank at 57th and Central, where Mr. Gartmon had a savings account. Mr. Gartmon and "Red" entered the bank and Mr. Gartmon drew out \$1,100, taking it in the form of a cashier's check. Then they went to the Bank of America at 47th and Broadway, where Mr. Gartmon cashed the check, receiving therefor hundred dollar bills, which he added to \$100 which he had in his pocket.

Mr. Gartmon showed the money to the Jamaican, who said, "Well, you can't keep that money because you have got to take it back to the bank. The people won't trust you in this country with that kind of money." He continued, "You don't even have a flag." "They don't allow Negro people to have that kind of money in this country."

Mr. Gartmon said, "This is mine. I don't want to fool around with the fellow. If he doesn't want to give me the \$700, let's forget about it." Some one suggested that they ride, and they went to the west side. The defendant said that he had to make a telephone call to let them know he wouldn't be at work that day, and he and "Red" got out of the car and left Mr. Gartmon with the Jamaican. They returned in fifteen or twenty minutes, and when they did, the defendant had a paper bag in his hand. The defendant said, "Well, look, I'm going to take this guy where he can have some fun." "You have got too much money to take with you. Why don't you put all your money in this paper bag and give it to that fellow to keep?"

The Jamaican said, "O.K." and unbuttoned his belt, saying that he had a money belt. The defendant said, "Don't take your clothes off here in the car. Let's go in the men's room." They got out and went to the filling station. When they returned, the Jamaican had a paper bag about a foot high. The defendant said, "Well, here it is—".

They got into the car and the defendant said, "Let me see it." "Look here, all the money here." Mr. Gartmon looked in the bag and it appeared to have a lot of money in it. It was suggested that Mr. Gartmon keep the money, and he refused. The defendant suggested that Mr. Gartmon put his money in the sack, and that he could keep it. Mr. Gartmon had his money in his hand, but didn't know whether to put it in or not. The defendant pulled it out of his hand and put it in the bag. Mr. Gartmon asked for his money, and he said, "No. Here, you keep it." The Jamaican said, "I will show you how to keep it." He pulled his coat off, put it on his arm and said, "You keep it like this." He handed it to Mr. Gartmon and said, "Wait, put it on under your arm. Under your shirt. Put it like this." Mr. Gartmon asked to see in the bag and when he looked in the money was there. The defendant said, "Well, let me keep it." "Red" said, "I am going to move out, because the police might come." Mr. Gartmon said, "I haven't done nothing. This is my money." The defendant said, "Yes, but they might think these guys are trying to start some stuff like a fight, you guys talking so loud."

The defendant held the bag on the way back to Los Angeles, and Mr. Gartmon told "Red", who was driving, to take the money back before the bank closed.

"Red" said, "Look out, police." Mr. Gartmon looked back, and when he turned around again the Jamaican had what looked like the bag. The Jamaican said, "I'm going to let you keep it. Put it in the glove compartment and lock it up." "Red" opened the glove compartment and said that he would keep it and it would be safe in the glove compartment. The Jamaican put the bag in the glove compartment. "Red" took the key off the key ring and locked it.

The defendant said, "I'm going along with him. We will be back in a few minutes." "Red" stopped the car at Sixth and Los Angeles. The defendant and the Jamaican got out. The former whispered something to "Red" and dropped something

by "Red". Mr. Gartmon asked if it was the key and "Red" said that it was. "Red" started the car, and when they had gone about a block Mr. Gartmon opened the glove compartment, took out the bag, and opened it. In it there was a lot of tissue paper, eleven \$1 bills and three \$5 bills. He told "Red" to turn around quickly. The latter drove around for several blocks, saying that the streets were all one-way streets, and when they got to Sixth and Los Angeles again, Mr. Gartmon got out, looked around, but didn't see anybody that looked like the men.

Police Officer Burkland and Narcotic Inspector King arrested the defendant on July 9, 1954. Officer Burkland told him that the Sheriff's Office had a "want" on him for a bunco deal. While Officer Burkland was talking to the defendant, the latter's father entered the room. The father said, "Well, what's the matter?" The defendant answered, "Well, it's about that job down at Vernon where we took that sucker for eight bills."

As a witness in his own behalf, defendant testified that on the day here in question he met the complaining witness and three or four other men at the stockyards. He knew the other men as "Red", "Big Boy", and "Chink". That this group were talking about girls and gambling. That the complaining witness and one of the other men engaged in a discussion as to who could put his hands on the most money and who was the best gambler. Defendant then narrated how the group engaged in a gambling game. That the complaining witness lost all his money and asked to be taken home to get his bank book. That he was taken home, obtained the bank book, was driven to the bank, made a withdrawal, and returned with \$400 in his hand. The gambling game was resumed and again the complaining witness lost his money. That an argument ensued and defendant walked away. That the complaining witness, "Red" and "Chink" got into an automobile and drove away without defendant accompanying them. The latter further testified that it was the last time he saw the complainant until four

days prior to the former's arrest. Defendant further testified that while the gambling was in progress, the complaining witness gave "Big Boy" a check for \$1,200 and said he would make it good. That at no time was anybody known as "the Jamaican" in the automobile. Defendant also testified that at no time while he was present was any money placed in a paper bag.

Appellant's first contention seems to be that the court erred in failing to find as true, the facts which were consistent with his innocence and inconsistent with his guilt. Appellant's statement of the evidence is inaccurate and incomplete. As an instance thereof, there is no mention in appellant's brief of the evidence showing that after the complaining witness withdrew the money from the bank defendant took it from the former's hand, placed it in a paper sack, and put the sack into the glove compartment of the auto. Only the first point urged by appellant is supported by anything resembling argument. The remaining three grounds urged for reversal contain only an assertion of error and citation of cases without any indication as to how such cases support the claimed error. Although it was not incumbent upon the attorney general to supply the deficiencies he has, in the interest of justice and to aid this court, done so. Counsel should at all times be mindful of the provisions of Rule 18 of Rules on Appeal and keep in mind the warning given by the court in *Goldring v. Goldring*, 94 Cal.App.2d 643, 645, 211 P.2d 342. While we might very well pass the claims made by appellant without consideration, nevertheless, with the aid rendered by the attorney general we have seen fit to make a thorough study of the evidence instead of affirming the judgment summarily, in the hope that in the future when insufficiency of the evidence is relied upon for a reversal, counsel will not fail to make a satisfactory statement in the opening brief, or a supplement thereto, of the evidence claimed to be "insufficient" with transcript references.

[1-3] With reference to the aforesaid first claim of appellant that the trial court

was bound to accept as true evidence consistent with innocence and to disregard evidence inconsistent therewith, it has long been the rule in this state that when two inferences reasonably may be drawn from the evidence, one pointing to innocence of the accused and the other to his guilt, that pointing to innocence is a rule for the guidance of the duly constituted arbiter of the facts. On appeal, the court is bound by the findings of the trial court, if there is substantial evidence, contradicted or uncontradicted, to support the conclusion arrived at in the court below. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. As has often been repeated, it is for this reason that our constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. In consonance with the spirit and intent of this constitutional provision, the legislature has ordained that the jury are the exclusive judges of the credibility of witnesses, Code Civ.Proc. § 1847, and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates. Code Civ.Proc. § 2061. And as a necessary corollary of the rules above noted, the trial judge in the case at bar was authorized, if he conscientiously felt warranted in so doing, after full and fair consideration thereof, to disbelieve the testimony of appellant and accept that of witnesses for the prosecution as to what occurred during the transactions here under consideration, *People v. Newland*, 15 Cal.2d 678, 684, 104 P.2d 778; *People v. Crawford*, 41 Cal.App.2d 198, 205, 106 P.2d 219; *People v. Rubio*, 75 Cal.App.2d 697, 707, 171 P.2d 737; *People v. Stanhope*, 37 Cal.App.2d 631, 634, 635, 99 P.2d 1075.

[4] Appellant next insists that "There was no showing that Mr. Gartmon parted with any money on any false pretense made

to him by the defendant and he is entitled to benefit of the presumption of innocence and reasonable doubt". Since the 1927 amendment to section 484 of the Penal Code, an accused may be convicted of grand theft upon proof showing larceny, larceny by trick and device, and embezzlement, as well as theft by false pretenses. *People v. Cannon*, 77 Cal.App.2d 678, 688-689, 176 P.2d 409; *People v. Frazier*, 88 Cal.App.2d 99, 102, 198 P.2d 325; *People v. Fewkes*, 214 Cal. 142, 149, 4 P.2d 538. Since the finding of guilt may be sustained on the theory of larceny, it was not necessary that the complainant be shown to have parted with his money in reliance upon false pretenses. *People v. Gerundo*, 112 Cal.App.2d 797, 803, 804, 247 P.2d 374.

[5] Appellant's next complaint is that there was no reasonable or probable cause shown at the preliminary examination to hold him to answer. This objection may be raised only by a motion to set aside the information in accordance with section 995 of the Penal Code. Having failed to make such a motion, appellant's contention is unavailing, *People v. Parry*, 105 Cal.App.2d 319, 322, 232 P.2d 899.

It would serve no useful purpose to here set forth the evidence above narrated. Suffice it to say that it shows clearly and convincingly that the money was taken from the complaining witness by appellant with intent to deprive him of it wholly and permanently. *People v. Darnell*, 97 Cal.App.2d 630, 218 P.2d 172.

[6,7] The evidence establishes the existence of the four elements necessary to constitute theft by larceny, viz. (1) a taking of the thing which is the subject of the crime from the owner into the possession of the thief, without the consent of the owner; (2) asportation of the thing which is the subject matter of the offense; (3) the thing which is taken and carried away must be the property of another; and (4) the taking and carrying away must be with an intent, without claim or pretense of right or justification, to deprive the owner of his property wholly and permanently. *People v. Edwards*, 72 Cal.App.

102, 112-116, 236 P. 944; *People v. Cannon*, 77 Cal.App.2d 678, 692, 176 P.2d 409.

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.



136 Cal.App.2d 368

Richard J. BICE and Lella M. Bice,
Plaintiffs and Appellants,
v.

James STEVENS and Mabel Stevens, husband and wife, William F. Thompson, Earl L. Morrison and Florence E. Morrison, doing business under the fictitious firm name and style of Keystone Realty Company, Roland W. Hoagland, and Farmers and Merchants Bank of Long Beach, California, a corporation, Defendants and Respondents.

Civ. 20477.

District Court of Appeal, Second District,
Division 3, California.

Oct. 18, 1955.

Hearing Denied Dec. 14, 1955.

Action wherein plaintiffs sought rescission and damages for fraud in exchange of their property for property of two of defendants, who were represented by four other defendants, real estate brokers, wherein defendant bank was sued as escrow holder alleged to be guilty of negligence, not fraud. The Superior Court of Los Angeles County, Joseph M. Maltby, J., rendered order granting defendants' motion to exclude all evidence, denied plaintiffs' motion to amend to cure alleged defects in their complaint, and rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where complaint was sufficient despite imperfect showing of fact of damage, proposed amendment remedying defect would not have injected new issue into case and had been withheld in belief

that complaint was sufficient, and defendants were not shown to have been prejudiced by delay, refusal to grant leave to amend was error amounting to abuse of discretion, but that bank's failure to disclose information as alleged was not negligence.

Judgment affirmed as to defendant bank and reversed as to all other defendants.

See also, 129 Cal.App.2d 342, 277 P.2d 106.

1. Pleading ⚡428(4)

Objection to introduction of any evidence on ground that complaint fails to state cause of action is in nature of general demurrer or motion by defendant for judgment on pleadings.

2. Pleading ⚡428(4)

Objection by defendant to introduction of any evidence may only be sustained where complaint fails to state cause of action, and that is sole question presented to court.

3. Pleading ⚡428(6)

On objection to introduction of any evidence on ground that complaint fails to state cause of action, allegations of complaint must be accepted as true.

4. Pleading ⚡428(4)

Objection by defendant to introduction of any evidence on ground that complaint fails to state cause of action will lie only where admitted averments justify judgment for defendant, that is, where no material issue is joined which it is necessary to prove.

5. Pleading ⚡428(6)

On objection by defendant to introduction of any evidence on ground that complaint fails to state cause of action, nothing dehors complaint and no defense set up in answer may be considered.

6. Fraud ⚡47

In complaint seeking rescission and damages for fraud, facts must be alleged which show existence of damage, but if that is done and prayer for specific sum is inserted in pleading, it is sufficient even though there is no specific allegation of

damage in any stated sum, or if pleading states facts invoking wrong measure of recovery. West's Ann.Civ.Code, § 3343.

7. Pleading ⚡428(4)

Where complaint seeking rescission and damages for fraud in exchange of plaintiffs' property for property of two of defendants, who were represented in transaction by four other defendants, real estate brokers, alleged facts tending at least inferentially to show that actual value of property purchased was less than price paid, granting of defendants' motion to exclude all evidence was error whether action was one at law for damages or one in equity to adjudge effectiveness of plaintiffs' alleged unilateral rescission. West's Ann.Civ.Code, § 3343.

8. Evidence ⚡43(2)

Affidavit of plaintiff which was in file was proper subject of judicial notice.

9. Pleading ⚡229

Where amendment to pleading is designed to cure technical defect in pleading otherwise adequate to put other party on notice of true basis of pleader's case, amendment must be allowed in furtherance of trial upon merits.

10. Pleading ⚡428(6)

After granting of motion to exclude all evidence, leave to amend must be granted unless it appears to certainty that no basic right of action can possibly exist or no relief can possibly be granted.

11. Pleading ⚡428(6)

In action for rescission and damages for fraud in exchange of property, wherein defendants' motion to exclude all evidence for failure of complaint to allege damages under theory and method of computation authorized by statute, had been granted, but complaint was sufficient despite imperfect showing of fact of damage, proposed amendment remedying defect would not inject new issue into case, but had been withheld in belief that complaint was sufficient, and defendants were not shown to be prejudiced by delay, refusal to grant leave to amend was error amounting to abuse of discretion. West's Ann.Civ.Code, § 3343.

12. Pleading ⚡381(2)

Allegation in complaint against escrow holder in property exchange that escrow instructions were so carelessly and negligently drawn as to fail to disclose facts either as to true ownership of property to be exchanged for plaintiffs' property or true terms of deed of trust on such property, was specific charge of negligence, and where there was no general allegation, plaintiffs would be held to proof of that specific averment.

13. Escrows ⚡3

Where bank which held escrow between plaintiffs and defendants also held escrow between defendants and third party from whom defendants were to acquire property to be conveyed to plaintiffs, failure of instructions drawn by bank in plaintiffs' escrow to disclose true ownership of property to be conveyed to plaintiffs, or true terms of second deed of trust thereon, which facts bank had allegedly learned from the third party escrow, was not negligence on part of bank, since disclosure would have been violation of bank's duty to defendants and third party, and fact that bank held first trust deed on property, as plaintiffs knew, was immaterial.

Philip E. Poppler, Long Beach, and Glen A. Duke, Los Angeles, for appellants.

Walker & Horn, Long Beach, for respondent Farmers and Merchants Bank of Long Beach.

Reynolds, Painter & Cherniss, Los Angeles, for respondents James Stevens and Mabel Stevens, Earl L. Morrison and Florence E. Morrison, Individually Doing Business under the Fictitious Firm Name and Style of Keystone Realty Co., Keystone Realty Co., a Co-partnership and Roland W. Hoagland.

ASHBURN, Justice pro tem.

Plaintiffs Richard J. Bice and Leila M. Bice, appeal from a judgment for defendants rendered pursuant to an order granting defendants' motion to exclude all evidence, followed by a denial of plaintiffs'

motion to amend to cure the alleged defects in their complaint.

The complaint is captioned "Re[s]cission—damages—injunction." It alleges fraud in an exchange of plaintiffs' Glendora property known as the Daniel B. Motel for certain Ocean Boulevard property in Long Beach which the defendants James Stevens and Mabel Stevens claimed to own and which they did acquire and convey to plaintiffs. Defendants Thompson, Morrison and Hoagland were sued as real estate brokers representing the Stevenses and making the alleged false representations. Defendant Farmers and Merchants Bank of Long Beach was sued as escrow holder alleged to be guilty of negligence, not fraud. The issues as to the Bank require separate discussion. Those relative to the Stevenses and the brokers turn upon the same legal proposition and will be considered together.

The complaint alleges that plaintiffs were owners of the Daniel B. Motel and were induced to exchange it for the Ocean Boulevard property through false representations made by or on behalf of each of the defendants other than the Bank; that this was accomplished through an escrow at defendant Bank. All of the elements of deceit are alleged; also that plaintiffs learned before close of escrow of the falsity of representations made to them and gave notice of rescission prior to occurrence of that event; that after service thereof and before suit defendants Stevens sold the motel and that they thereby made it impossible to bring about a rescission and restoration of the positions occupied by the respective parties before the close of escrow. Then follows an allegation that the Long Beach property would have been worth \$180,000 if the representations had been true, but in fact same had a value of no more than \$100,000; that plaintiffs had been damaged in a sum not less than

\$80,000, for which sum they prayed judgment together with further and other relief. The complaint was plainly drawn upon the theory that plaintiffs had a right of rescission which they had exercised, but that same had been rendered fruitless by defendants' conveyance of the motel to third persons, and that therefore they were entitled to the alternative remedy of damages. But the complaint did not allege the value of plaintiffs' motel, and counsel for defendants moved to exclude evidence upon the ground that plaintiffs' allegation of damages based on loss of the bargain was incorrect, that section 3343 Civil Code¹ prescribes out-of-pocket loss as the exclusive measure of damages and absence of any such allegation rendered the complaint fatally defective. Counsel relied upon Bagdasarjian v. Gragnon, 31 Cal.2d 744, 759-762, 192 P.2d 935 and Oliver v. Benton, 92 Cal.App.2d 853, 855, 208 P.2d 375 as establishing out-of-pocket loss as the exclusive measure of damages in an action for damages for deceit, and they do so hold. There were also cited certain authorities to the effect that it is necessary to plead the precise amount of such damage. Counsel for plaintiffs met that argument with quotation from Warfield v. Basso, 62 Cal. App. 47, 216 P. 48 to the effect that a complaint which shows that plaintiff is entitled to damages of some sort is not fatally defective because the pleader has mistaken the rule by which the damages are to be determined. In the present case the court observed that the complaint did not show that plaintiffs were entitled to any damages, emphasizing the fact that there was no allegation of the value of the motel. Thereupon plaintiffs' attorney requested a recess and at its conclusion remarked that the complaint as drafted contemplated a rescission and prayed for rescission and damages, but it probably would have been better if

1. "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

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"Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

damages in accordance with section 3343 Civil Code had been stated; referring again to *Warfield v. Basso*, supra, he moved to amend the complaint by alleging that the value of the motel was \$110,000, and the equity therein \$40,000. The complaint showed that the Long Beach property worth \$100,000, was encumbered by two trust deeds aggregating \$94,800. Counsel also offered other amendments which are copied in the margin² and which were based on *Feckenschner v. Gamble*, 12 Cal.2d 482, 500, 85 P.2d 885. The court said that "there isn't even a remote shadow of a doubt that the objection made by the defendants is well taken, that the complaint does not state a cause of action, for the simple reason that no damages have been alleged" and granted the motion to exclude evidence. The matter of amendment was then discussed and leave was denied for reasons which will be mentioned later.

[1-5] Concerning the nature of a motion to exclude evidence, more properly known as an objection to introduction of evidence, this court said in *Miller v. McLaglen*, 82 Cal.App.2d 219, 223, 186 P.2d 48, 50: "An objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action is in the nature of a general demurrer to the complaint or a motion by a defendant for judgment on the pleadings. [Citing cases.] An objection by a defendant to the introduction of any evidence may only be sustained where the complaint fails to state a cause of action, and that is the sole question presented to the court. [Citing cases.] Upon such an objection the allegations of

the complaint must be accepted as true for the purposes of the objection. [Citing cases.] Such an objection by a defendant will only lie where the admitted averments of the complaint justify a judgment for the defendant, i. e., where no material issue is joined which it is necessary to prove. 21 Cal.Jur. 234, sec. 163. Nothing dehors the complaint may be considered. No defense set up in the answer may be considered. The truth of the allegations of the complaint must be assumed. If the complaint states a cause of action the objection must be overruled. [Citing cases.]"

[6] Appellants now insist that the ruling excluding evidence was erroneous even if the action be considered one at law (which they do not concede), because the complaint shows the fact of damage and an averment of the wrong measure is not fatal to statement of a cause of action; that that goes to the remedy and not the right of recovery. This is the established rule. Facts must be alleged which show the existence of damage, *King v. Mortimer*, 37 Cal.2d 430, 436, 233 P.2d 4, but if that is done and a prayer for a specific sum inserted in the pleading it is sufficient even though there is no specific allegation of damage in any stated sum, or if the pleading states facts invoking a wrong measure of recovery. Referring to a claim that a complaint was defective for failure to meet the requirement of section 3343, the court in *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525, 534, 170 P.2d 898, 903, 167 A.L.R. 271, said: "Certainly it cannot be doubted that there is a sufficient showing of injury to plaintiffs. Whether the precise

2. The complaint alleged a representation that the second trust deed on the Long Beach property was payable at the rate of \$5,000 per annum with first payment due on July 1, 1950 and that in fact the sum of \$5,000 was payable semi-annually, the next one being due on September 9, 1949. The proffered amendments were these. "That if the representations and warranties made by the defendants as aforesaid were true, that said property would reasonably have been worth the sum of \$180,000, and that the payments on the aforementioned second trust deed were in fact due on July 1, 1950, plaintiffs would have been able to maintain

said payments and would have been able to have readily sold said property at the reasonable market value which defendants alleged said property to have." * * *

"That as a direct and proximate result of the false and fraudulent representations as aforesaid, the said plaintiffs were foreclosed of any and all rights to the Long Beach property by foreclosure sale, and that plaintiffs herein suffered loss, injury and damage, in that they have lost their equity in the aforementioned Daniel B. Motel, which plaintiffs allege to be worth the sum of \$90,000." (Later corrected to \$40,000.)

and correct measure of damages was pleaded is not important in the face of a general demurrer." *Warfield v. Basso*, supra, 62 Cal.App. 47, 49, 216 P. 48, 49: "In support of the judgment, one of the objections which is urged against the complaint is that the damages claimed therein are not such as are provided by the statutes covering a transaction of the nature outlined in the complaint; but the rule of law is that where the facts stated in the complaint show that the plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be determined." *W. C. Cook & Co. v. White Truck & Transfer Co.*, 124 Cal.App. 721, 726, 13 P.2d 549, 551: "If respondent is entitled to recover, the fact that he seeks damages according to the wrong measure is inconsequential and does not preclude the court from according him the damages to which he is entitled according to their true measure." Numerous cases exemplifying this rule are collected in *Eatwell v. Beck*, 41 Cal.2d 128, 136, 257 P.2d 643, 648, where it is said: "Our conclusion that the amendment should have been allowed is in accord with the general rule that where 'the facts stated in the complaint show that the plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be determined.' (*Warfield v. Basso* (1923), 62 Cal.App. 47, 49, 216 P. 48; see also *Gallagher v. California Pac. T. & T. Co.* (1936), 13 Cal.App.2d 482, 486, 57 P.2d 195; *Bonde v. Bishop* (1952), 112 Cal.App. 2d 1, 5, 245 P.2d 617; *Barr v. Southern Calif. Edison Co.* (1914), 24 Cal.App. 22, 25, 140 P. 47; *Riser v. Walton* (1889), 78 Cal. 490, 21 P. 362; *Sutter v. General Petroleum Corp.* (1946), 28 Cal.2d 525, 532-533, 170 P.2d 898, 167 A.L.R. 271.)" And it was there held error to refuse leave to amend where plaintiff in a fraud case had alleged items of non-recoverable damage and sought upon motion for nonsuit to amend to conform to section 3343. To the effect that failure to plead according to the correct rule of damages is not fatal see also *Hartzell v. Myall*, 115 Cal.App.2d 670, 677, 252

P.2d 676; *Breakers Holding Co. v. Josebra Co.*, 122 Cal.App.2d 741, 747-748, 265 P.2d 938; 23 Cal.Jur.2d § 71, p. 176; 2 *Witkin on California Procedure*, § 475, p. 1461; 15 *Am.Jur.* § 310, p. 752.

The complaint at bar did show imperfectly the fact of damage. The buildings on the Ocean Boulevard property were represented to have been erected at a cost of \$350,000, whereas they cost only \$75,000; the property was stated to have been bought for \$180,000, but was in fact being acquired contemporaneously by defendant for \$100,000 and was worth no more than that sum; the furnishings (included in the exchange) were represented to have a market value of \$20,000 but were worth not over \$11,500; plaintiffs were told that the property had yielded net income of \$2254 for April 1949; \$4035 for May 1949, and \$4550 for June 1949 (the exchange escrow was opened on July 7, 1949) but in fact it was operated at a loss in each of those months; also that the property was zoned for business and usable for sale of liquor but that representation was untrue. That allegations such as these tend "at least inferentially to show that the actual value of the property purchased was less than the price paid" is recognized in the *Eatwell* case. At page 134 of 41 Cal.2d, at page 647 of 257 P.2d, it is said: "As contended by [plaintiffs], they had already introduced evidence tending to show certain elements which go toward the ascertainment of 'actual' or 'market' value of the motel. (See page 754 of 31 Cal.2d, pages 940, 941 of 192 P.2d of *Bagdasarian v. Gragnon*, supra.) For example, there was evidence that during the four months just prior to plaintiffs' purchase of the property the income therefrom 'would average between \$300.00 and \$450.00 actually \$438.00 per month * * *, never * * * any more than \$438.00.' Also, plaintiff Mrs. *Eatwell* testified that 'As far as income was concerned I don't think it was worth a dime.'

"It has been held that although 'anticipated revenue from the property is not "additional damage" within the meaning of section 3343 * * *. It is an element to be considered in determining the actual

value of the property * * * (Oliver v. Benton (1949), 92 Cal.App.2d 853, 856, 208 P.2d 375.) There was also evidence that defendants Thomas, from whom plaintiffs purchased the motel for \$43,000 on October 19, 1948, had themselves purchased it only the previous day (October 18, 1948), for the sum of \$40,000. Evidence of 'sales of the *identical* property in question, whether realty or personalty' is also a proper indicium of value. (Bagdasarian v. Gragnon (1948), supra, 31 Cal.2d 744, 758, 192 P.2d 935.)" At page 136 of 41 Cal.2d, at page 648 of 257 P.2d: "By the complaint on file it is clear that plaintiffs were attempting to state a cause of action for damages for fraud. Their allegations as to the fact and substance of the fraud, and their reliance on it to their actual detriment, were adequate. They did not specifically allege damages under the theory and method of computation authorized by section 3343 but even under the limitations held to be imposed by that section the facts alleged tended at least inferentially to show that the actual value of the property purchased was less than the price paid. The defendants do not appear to have been misled or in any wise prejudiced by the failure of the plaintiffs to have earlier pleaded the more specific facts. Under these circumstances, and in accordance with the rule that amendments shall be liberally allowed in the interests of justice, we are satisfied that plaintiffs' request for leave to amend in the particulars noted should have been granted." Hefferan v. Freebairn, 34 Cal.2d 715, 721, 214 P.2d 386, 390: "It is obvious that receiving a business earning less than \$10,000 a year constitutes a substantial injury to a buyer to whom it was represented as earning \$20,000."

[7] The foregoing discussion proceeds upon the assumption that this is an action

at law, which was the basis of the exchange of views between counsel and court. But appellants now argue further that the complaint sounds in rescission, belongs on the equity side, and that therefore the rule of section 3343 is inapplicable. There is considerable ground for this contention. It is unnecessary for us to decide this question, for, whether the action is one at law for damages or one in equity to adjudge the effectiveness of plaintiffs' unilateral rescission, it was error to grant the motion to exclude evidence.

Counsel for defendants contend, however, that the court has broad discretion in the matter of allowing amendments presented for the first time at the trial and that there was no abuse of that discretion in denying leave to amend in this case. The proffered amendments would have cured the defect which the court deemed to exist in that they showed an equity of \$40,000 belonging to plaintiffs had been exchanged for one of \$16,700, thus working damage of \$23,300.³ Defense counsel claimed that this would inject a new issue which they were not prepared to meet and that plaintiffs had inexcusably delayed any amendment after being apprised of the necessity of one. He stated, without contradiction, that plaintiffs' attorney had asked him a year or more before trial for a stipulation consenting to an amendment of the complaint and that he had said he would give one upon condition that he receive the amendment at least thirty days before trial, but that plaintiffs' counsel had never presented one until the argument upon motion to exclude evidence. Plaintiffs' attorney upon his presentation gave no explanation of the delay and relied principally upon the proposed amendments quoted in footnote 2, supra, and the asserted applicability of *Feckenschner v. Gamble*, supra, 12 Cal.2d 482, 500,⁴ 85 P.2d 885.

[8] It further appeared from an affi-

3. Value of Long Beach property \$100,000 plus furnishings with \$11,500, total \$111,500, less trust deeds aggregating \$94,800, leaves equity of \$16,700, to be compared with plaintiffs' equity of \$40,000.

4. Counsel for defendants asserted without denial that one of plaintiffs testified upon deposition that she had the money and

could have made the trust deed payment. The transcript is a bit obscure at this point but the matter is clarified by the affidavits on motion for new trial. The judge seemed to pay little attention to this proposed amendment, probably reasoning that it was a synthetic plea born of the exigencies of the lawsuit.

davit of plaintiff Leila M. Bice, which was in the file and a proper subject of judicial notice, that the present attorneys were substituted into the case on October 7, 1954, depositions were taken and thereupon "a serious question arose as to the sufficiency of the complaint as to the mode of pleading the element of damages, and therefore by agreement of counsel in open court, the matter was put off calendar, the first delay occasioned at the instance of Plaintiffs and affiant for the purpose of giving this problem further study, with a possible view to amendment of the complaint; That such a study was given, and after a perusal of the facts, it was decided that the complaint was sufficient;" An affidavit of Mr. Poppler, one of the attorneys, was presented on motion for new trial; it said that after taking of depositions he and Mr. Devitt weighed the problem of inadequacy of the pleadings, researched the law on the question of pleading damages for fraud, consulted other attorneys, and, relying on *Feckenschner v. Gamble*, supra, 12 Cal.2d 482, 85 P.2d 885, "concluded that the pleadings filed by plaintiffs' original counsel of record sufficiently pleaded the elements of damages for fraud and negligence and were adequate to bring the cause to trial on the merits * * *." Counsel for plaintiffs insist upon this appeal that the complaint is good as an equity action for rescission and that section 3343 is not the applicable measure of damages. It does not appear that their failure to amend prior to the judge's ruling at the trial was due to negligence or mere obduracy. Counsel then seemed to believe, and now to believe, that the complaint is sufficient to state a cause of action. And it does not appear that counsel for defendants were surprised, misled or prejudiced in any way.

The court ruled as follows: "The Court: That much is true. Even if I permitted the amendment, I couldn't try the case because it raises some new and different issues upon which we could not expect the defendants to be prepared for trial at this time; namely, the value of the property traded by the plaintiffs and, secondly, the foreclosure of the trust deed, nothing about

which is alleged in the complaint as it now stands.

"Weighed over and against that is the fact that if the plaintiffs had been injured or damaged they should have their day in court at some time or other and be permitted to present their evidence to the Court. However, we come up some four years after the complaint is filed with a complaint that does not state a cause of action and then we want to interject some entirely new and different elements into the case that are not set up at all in the original complaint. The motion to amend is denied."

[9-11] Defendants seek to justify the ruling upon the authority of cases such as *Vogel v. Thrifty Drug Co.*, 43 Cal.2d 184, 272 P.2d 1; *Moss Estate Co. v. Adler*, 41 Cal.2d 581, 586, 261 P.2d 732. Appellants rely upon *Eatwell v. Beck*, supra, 41 Cal.2d 128, 135, 257 P.2d 643; *MacIsaac v. Pozzo*, 26 Cal.2d 809, 815, 161 P.2d 449 and similar cases. The Moss Estate case involved a belated amendment to an answer; the ruling is summarized in this language, 41 Cal.2d at page 586, 261 P.2d at page 735: "The trial court was thus presented with a situation wherein defendant sought to file an amended answer alleging a new defense based on different facts on the eve of the trial more than a year after the original answer was filed and more than two months after she had notice of the date set for trial. Defendant was aware of the facts at the time the original answer was filed, but she gave no excuse for her delay. The original answer gave no inkling of the facts alleged in the proposed amended answer, and a continuance would have been required had leave to file been granted. Under these circumstances we cannot say that the trial court abused its discretion in denying defendant leave to file her proposed amended answer." Numerous cases are then cited in support of the holding. The Vogel case presented an attempt to inject into a negligence action a new count alleging breach of warranty. Denial of leave to amend was affirmed because of long delay in asserting known facts followed by an attempt to inject new issues

into the case at the trial. There was also the element that the proposed amendment did not state a good cause of action for breach of warranty. The basis for differentiation of the two lines of cases—those holding it to be error to deny leave to amend and those holding the contrary—seems to lie in this language, 41 Cal.2d at page 585, 261 P.2d at page 734, of the Moss Estate case: "In the present case we are not confronted with an amendment designed to cure a technical defect in a pleading otherwise adequate to put the other party on notice of the true basis of the pleader's case. See, *Eatwell v. Beck*, 41 Cal.2d [at pages 128, 135-136], 257 P.2d 643; *Burns v. Scooffy*, 98 Cal. 271, 276, 33 P. 86; *Chatfield v. Williams*, 85 Cal. 518, 520-521, 24 P. 839; *Hopkins v. Hopkins*, 116 Cal.App.2d 174 [180-185], 253 P. 2d 723. Defendant's original answer was apparently based on the theory that a landowner may have an interest in a well located on adjoining land if that well taps a pool underlying both properties. At the trial, however, defendant abandoned this theory, see, *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 925-926, 207 P.2d 17, and sought instead to set up an entirely different defense." The *Eatwell-Beck* case is classified as one involving "an amendment designed to cure a technical defect in a pleading otherwise adequate to put the other party on notice of the true basis of the pleader's case." In such instances the amendment must be allowed in furtherance of trial upon the merits. The *Eatwell* case is controlling here. It presents a situation similar to an order excluding evidence and the rule is well established that after such a ruling leave to amend must be granted "unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted." *Miller v. McLaglen*, 82 Cal.App.2d 219, 228, 186 P.2d 48, 53. See also *Perry v. Futch*, 119 Cal.App.2d 556, 559, 259 P.2d 971; *Ser-Bye Corp. v. C. P. & G. Markets*, 78 Cal.App.2d 915, 917, 179 P.2d 342; *MacIsaac v. Pozzo*, supra, 26 Cal.2d 809, 815, 161 P.2d 449; *Gallagher v. California Pac. T. & T. Co.*, 13 Cal.App.2d 482, 486, 57 P.2d 195. And

cases such as *Vogel v. Thrifty Drug Co.*, supra, 43 Cal.2d 184, 272 P.2d 1 and *Moss Estate Co. v. Adler*, supra, 41 Cal.2d 581, 261 P.2d 732, do not involve any question of right or leave to amend after order sustaining motion to exclude evidence or motion for nonsuit. Examination of the numerous cases cited, 41 Cal.2d at page 586, 261 P.2d 732 of the Moss Estate opinion, in support of the holding that there was no abuse of discretion in denying leave to amend, discloses that none of them deals with such a situation. It does not appear that defendants at bar were prejudiced by plaintiffs' delay; the proposed amendment alleging plaintiffs' equity to be worth \$40,000 would not inject any new issue into the case (the question of damages was already there). It was error to reject that proposed amendment, an error which in law amounts to an abuse of discretion.

[12] The plaintiffs' charge against Farmers and Merchants Bank of Long Beach is negligence, not fraud. It is averred that it was the escrow holder and it drew the instructions; that it was also acting as holder of an escrow between defendants Stevens and one Naomi N. Conover, from whom they were acquiring the Ocean Boulevard property; that the Bank knew at all times that the Stevenses did not own that property, were in default in the Conover escrow and unable to complete the same, that the second trust deed for \$43,000 was payable at the rate of \$5,000 semi-annually, not annually, and that the next payment would be due on September 9, 1949. The negligence charge is "that the said escrow instructions were so carelessly and negligently drawn as to fail to disclose and they did not in fact disclose the foregoing facts either as to the true ownership of the said property or the true terms of the said Deed of Trust, all of which were well known to the said Farmers and Merchants Bank of Long Beach * * *." This is a specific charge of negligence; there is no general allegation; and plaintiffs would be held to proof of that specific averment. *O'Connor v. Mennie*, 169 Cal. 217, 222, 146 P. 674; *Preston v. Hubbell*, 87 Cal.App.2d 53, 61, 196 P.2d 113. If there

was no duty or right to make the disclosure there could be no negligence in failing to call for it in the instructions prepared by the Bank.

[13] The averment is that the Bank was acting as escrow agent of an existing escrow, opened March 9, 1949, between Stevens and Conover and the plain inference of the allegations is that the facts which defendant failed to disclose, or to call for in the instructions prepared by it, were learned from the Stevens-Conover escrow. The revealing to plaintiffs of information contained in that escrow would have been a violation of the escrow holder's duty, *Blackburn v. McCoy*, 1 Cal.App.2d 648, 654, 37 P.2d 153; it would also have been a breach of defendant's obligation to Stevens and Conover for it to contract (by escrow instruction in the Bice-Stevens deal) to disclose such confidential information; by the same token it could not be negligence merely to fail to call for such disclosure when preparing the Bice instructions. Appellants seek to avoid the effect of the *Blackburn-McCoy* case by urging that defendant Bank had an interest in the subject matter of the escrow and as trustee had a duty of full disclosure. This hinges upon the allegation that one of the representations made to plaintiffs was that a first trust deed "in favor of the Farmers and Merchants Bank of Long Beach, California, with an unpaid principal balance of approximately \$51,800.00" was a lien upon the property. This representation is not alleged to be untrue. It appears that plaintiffs were purchasing subject to that lien and also a second lien of \$43,000. There was no point to disclosing to plaintiffs what they already knew, a fact which in ordinary course would appear in the escrow instructions. That was the extent of the Bank's interest in the property; and it was not a conflicting interest because everybody recognized it and agreed to sell and purchase subject to it. The complaint of non-disclosure relates to the second trust deed in which the Bank had no interest so far as appears. There is no merit in this contention of appellants. The objection to introduction of evidence was properly sustained as to defendant Bank.

The judgment is affirmed as to defendant Farmers and Merchants Bank of Long Beach and reversed as to all other defendants.

SHINN, P. J., and VALLÉE, J., concur.



136 Cal.App.2d 689

AMERICAN SURETY CO. OF NEW YORK,
Plaintiff and Appellant,

v.

E. C. HEISE, Edgar Loren Helse, et al.,
Defendants and Respondents.

Civ. 5064.

District Court of Appeal, Fourth District,
California.

Nov. 1, 1955.

Hearing Denied Dec. 28, 1955.

Action by automobile liability insurer to void policy. Defendants sought reformation of policy. The Superior Court, San Bernardino County, John G. Gabbert, Judge assigned, rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that where fact that automobile liability policy was erroneously issued in form indicating that father was sole owner of automobile, while in fact father and son owned it jointly, was due solely to acts of insurer's agent, insurer could not rely on the mistake to void policy.

Judgment affirmed.

I. Declaratory Judgment $\S$ 347

In action by automobile liability insurer to have policy declared void on ground that named insured was not sole owner of automobile, evidence sustained findings that father and son, who intended to purchase automobile jointly, had not represented that automobile belonged only to father, and that issuance of policy in form indicating that father was sole owner was due to agent's negligence or mistake.

2. Insurance ⇨388(5)

Where fact that automobile liability policy was erroneously issued in form indicating that father was sole owner of automobile, while in fact father and son owned it jointly, was due solely to acts of insurer's agent, insurer could not rely on the mistake to void policy.

3. Principal and Agent ⇨178(1)

Knowledge of an agent obtained while negotiating transactions within scope of his authority is imputed to principal.

4. Insurance ⇨143(3)

Reformation of an insurance policy may be had, in general, where, by reason of fraud, inequitable conduct or mutual mistake, policy as written does not express actual or real agreement of parties.

5. Insurance ⇨143(8)

Suit for reformation of an insurance policy may be maintained after a loss which would fall within policy as reformed.

6. Insurance ⇨143(8)

Receipt and retention of an insurance policy without examination to ascertain whether or not it conforms to application made does not necessarily defeat insured's right to reformation.

7. Insurance ⇨143(8)

Where insurance agent was called to automobile lot where minor, accompanied by his father, was buying automobile, and there took application for liability policy which, when issued, erroneously denominated father as sole owner of automobile, that minor accepted policy and had not yet, at time of accident, complained of mistake did not estop minor from seeking reformation where mistake, if any, was due to negligence of agent.

Edgar Loren Heise, and others, seeking to have it declared that an automobile liability policy issued on January 15, 1952, covering a 1946 Mercury, in which E. C. Heise, the father, was named as the sole owner, was void from its inception because, contrary to the declaration in the policy, he was not such sole owner. The claim is that it was defendant E. C. Heise's minor son who furnished the money, was the owner and only user of the automobile, and that it was registered in the son's name. Defendant E. C. Heise and his son filed a cross-complaint seeking reformation to include Edgar Loren Heise as named insured, and sought other declaratory relief.

It appears that on February 9, 1952, the Mercury car, while being driven by the son, was involved in a collision causing injury to its passengers and others. The complaint alleged that these other named defendants intended to assert claims against Heise and his son for damages sustained.

The answer of the Heises admits the issuance of the policy as alleged but avers that its issuance in that form was due to mutual mistake or to fraud by the surety company's agent; that the correct information was given to the agent and the policy referred to contains the name of the father because of such mutual mistake or fraud.

The court found generally: (1) That although the declaration in the policy states that E. C. Heise is the sole owner of the Mercury such declaration is untrue and that the son, a minor, is its true owner and user; (1-a) That it is not true that the company believed and relied upon the declaration that the father was the sole owner of the Mercury, and not true that the company first learned of the falsity of the declaration after the collision.

(2) It then found that the son purchased the automobile in question, and that because he was not of age the seller required the father's name on the contract. (2-a) That the son applied to the company for the insurance in question. (2-b) That the facts of the purchase and of the ownership of the Mercury were known to the company. (3) That the policy was specially rated and

Robert A. Cushman, Los Angeles, for appellant.

Robert G. Beloud, Ontario, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant Surety Company instituted this action against defendants and respondents E. C. Heise, his minor son

issued as a "Class two risk" requiring the highest premium then in effect, and that this premium was charged for persons operating automobiles who were under the age of 21 years, and that the premium was paid by the son. (3-a) That the false information inserted in the declaration above mentioned was inserted by the plaintiff and that neither defendant made any false representations or warranty in applying for said policy, but on the contrary, the information that was brought to the plaintiff's agent at the time application was made for such insurance was true. (4) That one Levenson was the agent and employee of the company and the Heises relied upon the plaintiff and its agent for the issuance of a policy protecting them and each of them from loss or damage by reason of injury or death to any person or persons and damage to property to the limits of any financial responsibility described in said policy. (5) That at the time of making the application for automobile insurance coverage above described, they and each of them understood that the policy of insurance, when issued, would be in the names of E. C. Heise and Edgar Loren Heise and would correctly designate Edgar Loren Heise as the owner of said automobile and would provide complete coverage within the financial policy limits requested to both Edgar Loren Heise and E. C. Heise; that due to the mistake or inadvertence of the plaintiff the policy when issued contained a declaration which incorrectly designated E. C. Heise instead of Edgar Loren Heise, as the sole owner of the insured automobile, and failed to include the name of Edgar Loren Heise as the named insured; that said policy was delivered to E. C. Heise by mail, who immediately turned it over to Edgar Loren Heise, who in turn intended within a few days thereafter to discuss the omission and error in said policy with the plaintiff's agent, but was prevented from doing so by reason of the intervention of the automobile accident. (6) It then found that the company, knowing well that the son was the owner of the automobile and that the same would be in his charge, accepted the premium paid by the son at the highest rate that could be charged.

Judgment upon these findings recited that the company should reform its policy by an endorsement adding the name of Edgar Loren Heise as the named insured from the time of its inception; that it was valid and in full force and effect at the time of the accident; and that the company has to defend the suits which may be brought against defendants and pay any judgment within the limits of the policy.

It is plaintiff's contention on this appeal that the evidence does not support findings 1-a, 2-a, a portion of 2-b reciting "that the facts of the purchase and of the ownership of the Mercury were known to the company", and findings 4, 5 and 6.

The evidence shows that Edgar Loren Heise, a school boy aged 19, on December 18, 1951, attempted to purchase an automobile from a used-car lot. He picked out the Mercury and made a deposit on it. The sales manager told him that because of his age it would be necessary for his father to come to the lot and sign the contract with him. He came the next day and with his son signed the conditional sales contract dated December 19, 1951. It had been completely filled out by the car salesman from information given by the son. The son claims he told the salesman he was to be shown as the registered owner in the application to the Motor Vehicle Department. A portion of this contract included an application for liability insurance reading: "The undersigned make joint application and order for the following insurance for six months". It then set forth the charge for such insurance and indicated "Percy Levenson, Insurance Agent or Broker". It authorized the seller to obtain such insurance.

The testimony further shows that immediately, Levenson, the agent of plaintiff, was called to the lot. Although the father was present at all times, Levenson chose to take the necessary information for the issuance of the insurance policy from the sales contract which he admitted was his practice. Apparently, the only question propounded to the father was whether any one under 21 years of age would be driving the car and he was told that Heise's son would be driving it. Levenson did not see

the son on this occasion. He stated that if [Edgar] Loren Heise's name appeared as "buyer", which it admittedly did, he overlooked it. After taking his notes from this contract, he informed the father that there was immediate coverage on the car from that moment, and departed for his office. He wrote up some form of application from his notes and said he destroyed his notes at that time; that he attempted to place this insurance with another company first, but was turned down and he subsequently wrote it on plaintiff company, with its consent, based on the application presented. Two or three weeks later E. C. Heise received the policy, effective as of January 15, 1952. The boy said he casually read it and some questions arose in his mind as to the effective date, etc.; that he noticed it gave E. C. Heise as the owner, but since he had never obtained insurance before and was a minor he assumed that it had to be issued that way because of the fact that his father had to sign the contract of purchase with him; that it was his intention to take the policy back to Levenson on February 12, 1952, a school holiday, and have Levenson explain it to him but the accident happened before that date; that he reported the accident to Levenson and Levenson told him he was covered.

The claim of plaintiff is that under the provisions of the policy, i.e., "by its acceptance", the named insured agrees "that the statements in the declaration are his agreements and representations" and that "this policy is issued in reliance upon the truth of such representations" and that it embodies all agreements existing between himself and the company or any of its agents; that it is an express warranty and that the terms of the policy cannot be waived or changed except by endorsement, duly authorized; that the company is not estopped from claiming these rights and that accordingly, since the sole ownership of the car is stated to be in the named insured, the policy is void ab initio, if, in fact, it is owned by another. Secondly, that there was no meeting of the minds as to any claimed reformed policy, and accordingly the Heises did not make out a case for the reformation of the policy as issued, citing such authority

as *Trinity Universal Insurance Co. v. Woody*, D.C., 47 F.Supp. 327; 29 Am.Jur. [Insurance] secs. 132, 140 and 241; *Craig v. United States Fidelity & Guaranty Co.*, 11 Cal.App.2d 644, 54 P.2d 486; and *Restatement of the Law of Contracts*, secs. 504 and 508-a.

It is further argued that when a policy of insurance is delivered pursuant to an application therefor, the insured has the duty to examine it and, in the absence of fraud or mistake, when he accepts and retains it without protest, he is bound by its terms, citing such cases as *Mutual Life Ins. Co. of New York v. Hilton-Green*, 241 U.S. 613, 36 S.Ct. 676, 60 L.Ed. 1202; and *Telford v. New York Life Ins. Co.*, 9 Cal.2d 103, 69 P.2d 835.

It is further argued that since there was no evidence of fraud practiced on the part of the agent or the company, defendants may not prevail in seeking reformation of the policy; that even though the insurance agent may have been negligent in overlooking the fact that the contract showed both Heises as owners, the principal, plaintiff company, is not necessarily responsible since the principal is not liable for failure of its agent to obtain knowledge of that which he could have found out, which knowledge may have been relevant, citing *Restatement of the Law of Agency*, sec. 277; and *Ambrose v. Indemnity Insurance Co. of North America*, 124 N.J.L. 438, 12 A.2d 693.

[1] The evidence set forth sufficiently establishes the fact that it was the intention of the Heises that they should be considered as joint owners of the automobile which was being purchased; that plaintiff's agent took the required information from the contract agreement, as written, which clearly set forth these facts; that neither the father nor the son made any other representations to the agent, and that it was solely the agent's negligence or mistake which led to the issuance of the policy in the form indicated, which policy erroneously showed E. C. Heise as the sole owner of the car. It may well be inferred that this agent did, in fact, take the information from the contract as written, present the

policy to one insurance company under the given facts and the application was turned down, and that it was subsequently rewritten in the form submitted to plaintiff company. The notes of the agent and the application to this former company were destroyed by him and obviously were not obtainable to refute the inference. The judgment and the supporting findings decreeing that plaintiff company was not entitled to have the policy of insurance declared void and of no effect because of claimed misrepresentation of the insured or any other person acting for them is supported by the evidence. *Mercer Casualty Co. v. Lewis*, 41 Cal.App.2d 918, 108 P.2d 65. See also *Cooley's Briefs on the Law of Insurance*, Vol. 3, p. 2594, which reads:

"From an examination of the cases the following propositions may be regarded as established by the weight of authority. Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy."

This rule is cited with approval in *Bass v. Farmers Mutual P. Fire Ins. Co.*, 21 Cal. App.2d 21, 68 P.2d 302, and cases cited therein, including *Allen v. Phoenix Assurance Co.*, 12 Idaho 653, 88 P. 245, 8 L.R.A., N.S., 903, which latter case (quoting from the syllabus) held that:

"Where it is shown that the insured truthfully and correctly stated the nature and condition of his title in making his application for insurance, he will not be precluded from recovering in case of loss on account of a contrary statement as to title inserted in the policy by the underwriter."

The *Bass* case also cited *Phipps v. Union Mutual Insurance Co.*, 50 Okl. 135, 150 P. 1083, which held that although ordinarily a mere soliciting agent had no authority to waive any of the terms or provisions of the contract of insurance, yet if by a course of conduct he was clothed with power in taking

the applications and procuring the company to issue policies thereon, and to do anything necessary to take the application, he had the right to fill it out and it was his duty to do so honestly. See also *Maxson v. Llewelyn*, 122 Cal. 195, 54 P. 732.

[2] Since the insurer, through its agent, is responsible for the omissions and/or falsity of the declarations in the policy, it cannot now directly or indirectly assert the contents of the policy against the insured to rectify its own wrong. *Byrd v. Mutual Benefit Health & Accident Ass'n*, 73 Cal. App.2d 457, 464, 166 P.2d 901, quoting with approval from *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall, U.S., 222, 20 L.Ed. 617; *Ames v. Employers Casualty Co.*, 16 Cal.App.2d 255, 266, 60 P.2d 347.

[3] In the instant case it has been stipulated that Levenson was the agent of the plaintiff; that at all times herein mentioned he was acting within the scope of his authority and the trial court found that knowledge of ownership of the vehicle had been made available to the agent; that he was charged with that knowledge and that it was imputed to the plaintiff. Knowledge of an agent obtained while negotiating transactions within the scope of his authority is imputed to the principal. *Mercer Casualty Co. v. Lewis*, supra.

The only remaining question of importance is the sufficiency of the evidence to support the finding that the policy should be reformed as sought by the cross-complaint to include the son as one of the assured.

[4-7] It appears to be the rule that reformation of an insurance policy may be had, in general, where, by reason of fraud, inequitable conduct or mutual mistake, the policy as written does not express the actual and real agreement of the parties. More particularly, if by inadvertence, accident, or mistake the terms of a contract of insurance are not fully or correctly set forth in the policy, it may be reformed in equity so as to express the actual contract intended by the parties, if the mistake is mutual or if there has been fraud or inequitable conduct by one of the parties to the contract. A suit for a reformation may be and usually is

maintained after a loss which would fall within the policy as reformed. 29 Am. Jur. p. 237, sec. 241, and p. 238, sec. 242; *Snell v. Atlantic Fire & Marine Ins. Co.*, 98 U.S. 85, 25 L.Ed. 52. The greater weight of authority is to the effect that under the facts involved the receipt and retention of an insurance policy without an examination to ascertain whether or not it conforms to the application made does not necessarily defeat the insured's right to a reformation. (29 Am. Jur. p. 244, sec. 253.) In the instant case the automobile dealer and plaintiff's agent were dealing with a minor school child whose father was called to the lot so as to permit the sale to the minor through the father. The minor was the one intended to be protected by the insurance, as well as the father. They made no other representations to the agent. When dealing with a minor under the circumstances here related, plaintiff may not claim that the clause set forth in the policy in relation to reading and retention of the policy by such minor is a complete estoppel by him from thereafter seeking reformation according to the agreement of the parties participating, where the mistake, if any, was due to the carelessness or negligence of plaintiff's agent.

The general principles above mentioned were considered in *Hunt v. Century Indemnity Co.*, 58 R.I. 336, 192 A. 799, 112 A. L.R. 902. There a Miss Loyer applied to the company agent for liability insurance "on my Chrysler car". The agent asked for her automobile registration slip and from it he obtained all the information for filling in the blanks in the printed policy. The policy contained a declaration of *complete ownership* of the car by the insured although Miss Loyer did not at any time make any such representation other than to refer to the automobile as her car. The agent admitted he did not ask her if she had

complete ownership, and nothing was said about it. The company later attempted to deny liability on the policy because of the claimed misrepresentation as to complete ownership in that it later appeared that she was purchasing said automobile on contract. The appeal was from a decree ordering reformation to express the true agreement of the parties. There the court said, 192 A. at page 804:

"* * * it is clear to us from the evidence that the minds of the agent of the respondent and Miss Loyer met on the agreement to issue to her a liability policy as the owner of the automobile registered in her name and described on the official registration card. The fact of *complete ownership* did not enter into the negotiations, and the agent so testified. That the policy was issued with such a term included therein was, in our opinion, clearly a mutual mistake."

It cited as authority *Houlden v. Farmers' Alliance Co-operative Fire Ins. Co.*, 188 App.Div. 734, 177 N.Y.S. 286, affirmed in 231 N.Y. 636, 132 N.E. 919, stating:

"* * * where, under a somewhat similar situation, with reference to a fire insurance policy, the court decreed reformation and went on further to say that, even if the mistake were not mutual, the plaintiff would be entitled to recover without reformation on the ground that the company would be estopped to deny the validity of the policy."

The particular findings about which plaintiff complains are adequately supported by the evidence.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

136 Cal.App.2d 600

LIBERTY MUTUAL INSURANCE COMPANY and **Merritt-Chapman and Scott Corporation** and **The Savin Corporation**,
a Joint Venture, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION
OF The State of CALIFORNIA and
John C. Lawrence, Respondents.

Civ. 8828.

District Court of Appeal,
Third District, California.

Oct. 28, 1955.

Workmen's Compensation proceeding. The Industrial Accident Commission awarded employee benefits for an injury he received when struck on head by a rock thrown by a fellow employee. The insurer and employer petitioned to review and annul the order granting compensation. The District Court of Appeal, Schottky, J., held that where employee had been injured by rock thrown by fellow employee, whom employee had just accused of allowing him to take severe censure of superior for having agitated about union matters on job, when, in fact, fellow employee had been agitator, injury arose out of and was proximately caused by employment.

Award affirmed.

Workmen's Compensation 681

Where employee was injured by rock thrown by fellow employee whom employee had just accused of allowing him to take severe censure of superior for having agitated about union matters on job, when, in fact, fellow employee had been agitator, injury arose out of and was proximately caused by employment. West's Ann.Const. art. 20, § 21; Labor Code, §§ 3202, 3600.

Leonard, Hanna & Brophy, Sacramento, for petitioners.

Thomas W. Loris and Burt Lancaster, Sacramento, for respondents.

Everett M. Corten and Daniel C. Murphy, San Francisco, for Industrial Acc. Comm.

SCHOTTKY, Justice.

This is a proceeding to review and annul an order of respondent Industrial Accident Commission awarding workmen's compensation benefits to respondent John C. Lawrence for an injury received when he was hit on the head by a rock thrown by a fellow workman. The question to be determined by this court is: Did the Industrial Accident Commission exceed its jurisdiction in holding, on the evidence, that the injury arose out of and in the course of the employment?

The facts as shown by the record are not in substantial dispute and may be summarized as follows:

Respondent Lawrence, hereinafter referred to as "applicant," and one Ingram were fellow employees employed as drivers of Euclid trucks by certain joint venturers engaged in work at Folsom Dam. They were of equal rank in their employment and their duties were confined to the driving of these Euclid trucks.

Some time shortly before August 29, 1954, Ingram had made complaints to a driller foreman on the job about the latter's workmen doing certain work which Ingram claimed should have been done by members of his craft union, the Teamsters, which other work was not connected with Euclid driver work, however. These complaints reached the ears of one "Bino" who was main superintendent of heavy equipment and the boss of applicant and Ingram. On August 28, 1954, during working hours and on the job, Bino, in the presence of Ingram, accused applicant of agitating about union matters on the job and severely reprimanded him for it, and threatened to fire applicant. Ingram at that time made no comment. The next day at about 20 minutes to 4:00 a. m. applicant and Ingram came into contact again as they met with several fellow workmen at an automobile in which they were all to ride home from work. The shift ended at 4:00 a. m., but because of the impossibility in the time remaining for the drivers to make another round trip with their Euclid trucks, they had gathered at the car, waiting for the shift to end. Ap-

plicant asked Ingram why the latter had not spoken up "like a man" and accepted blame for what he had done. Ingram cursed applicant and assaulted him without warning, but applicant obtained the upper hand before the two were parted by some of the other men. Applicant then got into the front seat of the car and Ingram remained on the ground on the far side. The other men tried to persuade him to ride home in the same car with applicant, which he refused to do. Ingram then called applicant several foul and obscene names and as a result applicant started to get out of the car to renew the argument with Ingram. Ingram then sprang up from the ground, seized a large rock, and ran around the back of the car toward applicant. At this time applicant had just gotten out of the car and, being warned by one of the others, attempted to run, but Ingram threw the rock. It struck applicant's forehead and fractured his skull, causing the injury in question.

Petitioners first contend the injury to applicant did not arise out of the employment because it resulted from a fight between employees of equal rank over a matter not connected with their duties. They point out that it was over a labor union matter not connected with their duties for their employer, and that neither fought with a superior but with one another in a personal quarrel the day after the applicant's superintendent reprimanded him.

In this connection petitioners cite *Metropolitan Redwood Lumber Co. v. Industrial Accident Commission*, 41 Cal.App. 131, 182 P. 315, in which the court held that an injury suffered by an employee by an assault by a fellow employee of equal rank during a quarrel between themselves was not compensable under the Workmen's Compensation Act; but that there were two exceptions to this general rule, (1) where the fellow employee causing the injury did so due to a condition of temperament which made it unsafe for him to be around other employees and this condition was known to the employer, or (2) where the injured employee was the superior of the other and was injured by an assault in the course of an attempted exercise of discipline by the

superior. The court said in that case it was unable to distinguish in principle between the case before it and *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 P. 212, L.R.A.1916F, 1164, and *Fishing v. Pillsbury*, 172 Cal. 690, 158 P. 215, in which cases it was held that injuries resulting from the playful acts, or "horseplay", of fellow employees, in which the applicants had not participated, were not compensable.

Respondent commission asserts the injury arose out of the course of the employment inasmuch as the quarrel was a direct outgrowth of the applicant's concern for tenure on his job and an amicable relationship with his superiors, and the desire that his fellow employee, Ingram, not interfere with them, and that such factors were certainly connected with and an outgrowth of the employment. *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5, and *Kaiser Co. v. Industrial Accident Commission*, 65 Cal. App.2d 218, 150 P.2d 562, are cited for the legal theories upon which they were based. In the *Kaiser* case, an injury was held compensable when suffered by the employee in intervening in a purely personal quarrel between two other fellow employees. The court said it was a fair inference from the evidence that she was engaged in the service of the employer in attempting to stop the fight so work could go on; that to hold otherwise would be to follow the discarded theory that any voluntary act was an assumption of the risk. In the *Carr* case, a non-workmen's compensation case, an employer was held liable to a third person for the wilful and malicious tort of his employee committed in the scope of the employment. The employee had gotten into a quarrel over the doing of certain construction work with the victim, an employee of an independent contractor, and struck the victim with a hammer. The court said it was sufficient that the injury resulted from a dispute arising out of the employment in order to say the assailant was acting within the scope of his employment, and it was not necessary to determine that the act in fact furthered the employer's interests. The court did say the doctrine of respondeat superior would not apply if the

employee inflicted an injury arising out of personal malice not engendered by the employment.

Respondent commission says these two cases rely on the principle expressed in *Hartford Accident and Indemnity Co. v. Cardillo*, 1940, 72 App.D.C. 52, 112 F.2d 11, 17, that an injury caused by assault is compensable if "the work of the participants brought them together and created the relations and conditions which resulted in the clash." In that case Justice Rutledge said:

"This view recognizes that work places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences."

This rule was followed, claims respondent commission, in *Mutual Implement & Hardware Company v. Pittman*, 1952, 214 Miss. 823, 59 So.2d 547, where the assault apparently was the culmination of "horseplay" between the assailant and applicant, and the injury was held compensable. Respondent concludes by saying that under the view of the Carr, Kaiser, and Cardillo cases the assault arose out of the work because it came as a result of the two men being brought together on the job, whether we take as the source (1) Ingram's original contentions regarding union regulations or (2) applicant's expressing to Ingram his objection to being blamed for them by their boss.

The referee in his report on the order denying the petition for reconsideration stated that he was bound by the decision of the Supreme Court in *State Compensation Insurance Fund v. Industrial Accident Commission and Hull*, 38 Cal.2d 659, 242 P.2d 311. In that case the applicant took exception to the manner in which his foreman gave certain work orders on the job, cursed the latter, to which language he took exception, and the applicant assaulted the foreman, and in the course of the altercation received injuries. In affirming the award the court said, 38 Cal.2d at page 660, 242 P.2d at page 312:

"The workmen's compensation law as declared in the Constitution and statutes compels affirmance of the award. The Constitution confers upon the Legislature power to establish a system of workmen's compensation and create and enforce a liability on employers to compensate their workmen for injury sustained in the course of their employment 'irrespective of the *fault of any party*.' (Italics added.) Cal. Const., art. XX, § 21. The only requirements of the statute are, that to be compensable, an injury must 'arise out of' and 'occur in the course of' the employment. Labor Code, § 3600. That is to say the employee must be engaged in some activity growing out of and incidental to his employment at the time he suffers an injury in order to be entitled to compensation under the workmen's compensation law. It cannot be doubted that a dispute between an employee and his superior in regard to the latter's treatment of the former in their relations as boss and worker is incidental to the employment. There is no doubt that the injury occurred in the course of the employment, for that has reference ordinarily to time and place. Hull has satisfied both aspects. The crucial issue is whether it 'arose out of' the employment, and that poses the question of whether there is a causal connection between the employment and the injury. That that is the only issue follows from the Work-

men's Compensation Act which excludes fault and contributory negligence of the employee and assumption of risk as defenses. That is the *express* declaration of the Constitution and statutes relating to workmen's compensation. Indeed the statute compels that result inasmuch as it declares that 'serious and wilful misconduct' on the part of the employee does not defeat his recovery; it merely cuts it in half, and not even that under certain conditions (Labor Code, § 4551), thus indicating clearly that misconduct on his part is not a defense. Hence the charge of aggressor cannot be a defense, for it is nothing more than an assertion that the employee was at fault—was to blame—brought it on himself.

"These principles, including the negation of a requirement that the employee is doing something for his employer's benefit were clearly stated by this court in the recent case of *Pacific Emp. Ins. Co. v. Industrial Acc. Comm.*, 26 Cal. 2d 286, 158 P.2d 9, 159 A.L.R. 313, where we abandoned the long standing rule in this state that the victim of 'horseplay' was not entitled to compensation. The logic of that case is here compelling. We said: 'As grounds for annulling the award, the insurer contends that, although the applicant's injury occurred in the course of her employment, it did not arise "out of" her employment and, accordingly, is not a compensable injury within the jurisdiction of the Industrial Accident Commission. * * * *"It is not indispensable to recovery, however, that the employee be rendering a service to his employer at the time of the injury.* [Citations.] The essential prerequisite to compensation is that danger from which the injury results be one to which he is exposed as an employee in his particular employment.'"

The court stated further that fault and contributory negligence are not defenses, and hence the charge of aggression could not be a defense. The court quoted with approval the following language of Justice

Rutledge in *Hartford Accident & Indemnity Co. v. Cardillo*, supra:

"Nor is it necessary, as these cases show, that the particular act or event which is the immediate cause of the injury be itself part of any work done for the employer by the claimant or others. * * * "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business." Not that the act is in the line of duty, or forwards the work, or creates special risk, but that the work brings the employee within its peril makes it, for purposes of compensation, "part of the work.""

Petitioners seek to distinguish the *Hull* case by pointing out that the case decided that an aggressor could recover compensation, but that on the facts the dispute arose out of the giving of orders to an employee by a superior in the course of his duties, and thus it does not change the rule that as between employees of equal rank injuries suffered in a personal quarrel are not compensable, citing *Metropolitan Redwood Co. v. Industrial Accident Commission*, supra.

Petitioners also argue that the activity of Ingram or respondent Lawrence or both in attempting to see that certain union regulations or rules were being followed as far as the drillers on this job were concerned was an activity which was no part of their duties and of no benefit to their employer, and that an injury resulting from an argument based on this activity is not compensable. They cite the case of *Pacific Indemnity Co. v. Industrial Accident Commission*, 27 Cal.App.2d 499, 81 P.2d 572, which involved an injury to an employee while attending a union meeting on the employer's premises. In that case the court held that the injury was not compensable, stating in 27 Cal.App.2d at page 503, 81 P.2d at page 574:

"* * * At the time respondent Kendall was injured she was not acting for her employer nor engaged in his service. She was exercising a personal

privilege for her own personal benefit in attending a meeting of an organization of which she was a member and the purposes of which were clearly for her own interests and not necessarily in any way for the benefit of her employer."

We believe that, in view of the later decisions of our Supreme Court hereinbefore cited, the statement in *Metropolitan Redwood Co. v. Industrial Accident Commission*, supra, to the effect that an injury suffered by an employee through an assault by a fellow employee of equal rank during a quarrel between themselves was not compensable under the Workmen's Compensation Act, must be considered as out of harmony with later decisions.

In the case of *Pacific Indemnity Co. v. Industrial Accident Commission*, supra, cited by petitioners, the employee, while attending a union meeting on the employer's premises, was injured while attempting to sit on a table. The court held that the meeting was one relating only to union activities with which the employer was prohibited by law from interfering and was not compensable under the Workmen's Compensation Act. We believe that the case is clearly distinguishable on its facts from the instant case, but that if it is construed to support petitioners' position it is out of harmony with the later decisions hereinbefore cited.

There is no merit in petitioners' further contention that the fight between Ingram and applicant resulting in injury to applicant arose over foul name calling and was in fact a second fight between these two men; and, therefore, even if it is assumed the first fight arose out of an incident of their employment, the second fight was purely a personal quarrel unrelated to the employment; and so the injury did not arise out of the employment. The second encounter, coming so soon after the first, must properly be regarded as a part of the same quarrel and resulting from the same cause.

We are satisfied that the cases of *Pacific Employers Insurance Co. v. Industrial Acci-*

dent Commission, 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313; *Carr v. Wm. C. Crowell Co.*, supra, and *State Compensation Insurance Fund v. Industrial Accident Commission*, supra, require an affirmance of the award where, as in the instant case, there is ample evidence to support the inferences that the quarrel between Ingram and applicant, resulting in applicant's injury, originally arose out of the employment because it concerned the work relationship between the superintendent on the job and applicant, and the latter's tenure on the job, for which applicant rightly or wrongly blamed certain on-the-job activities of Ingram, and that the rock-throwing incident was simply a continuation of and part of this work dispute, and could not be logically isolated as a separate, unrelated matter. Here the applicant feared for his job, was under threat of discharge for the act or acts of a fellow worker. Certainly the dispute did in fact arise from the "crowded contacts of the factory"; did arise from and was incident to the employment. The assault occurred on the premises of the employer, during working hours and at the hand of an employee for whom the employer was responsible under the holding of the *Carr* case and authorities cited.

Article XX, section 21, of the California Constitution, as amended in 1918, provides: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability * * * sustained by the said workmen in the course of their employment, irrespective of the fault of any party."

The Legislature has declared that in the determination of controversies arising under the statutes governing workmen's compensation, their provisions "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Labor Code, sec. 3202.

In view of the statute, the constitutional provision and the decisions hereinbefore cited, we conclude that the injury sustained by the applicant arose out of and was "proximately caused by the employment" within the meaning of section 3600 of the Labor Code.

The award is affirmed.

VAN DYKE, P. J., and PEEK, J.,
concur.



136 Cal.App.2d 661

**Thomas F. SEWARD, Plaintiff and
Respondent,**

v.

**William R. WILKERSON, Defendant and
Appellant.**

Civ. 21136.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1955.

Rehearing Denied Nov. 22, 1955.

Hearing Denied Dec. 28, 1955.

Action by former partner against partner continuing business for money had and received and for an accounting following dissolution of partnership pursuant to an agreement. The Superior Court, Los Angeles County, Allen W. Ashburn, J., gave judgment for former partner, and defendant appealed. The District Court of Appeal, Doran, J., held that under dissolution agreement, defendant was not entitled to charge former partner's share of accounts receivable for legal services rendered partnership and for commissions paid to salesmen for collection of said accounts.

Judgment affirmed.

See also, Cal.App., 285 P.2d 704,

1. Partnership ⇨296(1)

In action for money had and received by former partner against partner continuing business after dissolution of part-

nership pursuant to an agreement, parties to whom money was owed by business were not necessary parties.

2. Partnership ⇨311(1)

Under a dissolution settlement, partner continuing business was not entitled to charge former partner's share of accounts receivable for legal services rendered partnership and for commissions paid to salesmen for collection of said accounts.

3. Appeal and Error ⇨1010(1)

Where defendant's arguments relate to sufficiency and weight of evidence, and there is sufficient evidence to support findings of trial court, they will not be disturbed on appeal.

Bautzer, Grant & Silbert, Beverly Hills,
for appellant.

Max Fink, Cyrus Levinthal, Leon E.
Kent and Emmet G. Lavery, Jr., Los
Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The action is for money had and received and an accounting. The court gave judgment for plaintiff in the sum of \$7,704.19.

As recited in appellant's brief,

"On or about July 1, 1944, plaintiff and defendant entered into a written agreement of partnership (hereinafter referred to as 'the partnership') for the ownership and operation of a publishing business under the firm name and style of The Hollywood Reporter. Thereafter, differences arose between plaintiff and defendant and in August of 1951, plaintiff commenced an action (not the one involved herein) against defendant in the Superior Court of the State of California in and for the County of Los Angeles, Case No. 589425, for declaratory relief, dissolution of the partnership, an accounting thereon, a receiver thereof and damages. On or about December 30, 1952, plaintiff and defendant entered into a certain written agreement for the purpose of dissolving and terminating the partnership and for the settlement of disputes and claims between them.

"Under Exhibit I, the partnership was to be dissolved and terminated on January 15, 1953. Upon dissolution, defendant was to acquire all of plaintiff's right, title, interest and estate in and to the assets of the partnership excepting only a certain automobile not herein involved and all accounts receivable of the partnership, and the proceeds thereof, existing as of the close of the month of November, 1952, said accounts receivable being hereinafter referred to as 'the accounts receivable'.

* * * * *

"The Findings of Fact and Conclusions of Law and the Judgment entered thereon purported to determine the amount of money owing by defendant to plaintiff as of August 31, 1954, under sub-paragraph (4) of Paragraph Third of Exhibit I.

"The total amount of money collected by defendant from the accounts receivable to and including August 31, 1954, was not in dispute. The dispute between plaintiff and defendant concerned two deductions which defendant claimed should be made from the total amount of collections from the accounts receivable in computing the amount of money, if any, owing from defendant to plaintiff under sub-paragraph (4) of Paragraph Third.

"The first disputed deduction involved sub-paragraph (2) of Paragraph Third. Defendant claimed that under sub-paragraph (2) of Paragraph Third, the sum of Eighteen Thousand (\$18,000) Dollars should be deducted from the total monies collected from the accounts receivable as of August 31, 1954, in computing the amount which should be disbursed in accordance with the provisions of sub-paragraph (4) of Paragraph Third.

"The second disputed deduction involved the question of whether defendant was entitled to deduct from the total amount of collections from the accounts receivable as of August 3, 1954 the amount of certain commissions in the sum of Seventy-One Hundred Thirty-Two and thirty-one/100 (\$7132.31) Dollars, which sum defendant claimed was payable and paid out of the proceeds of the accounts receivable to salesmen of the partnership for having

obtained the accounts receivable and for having collected the same."

The court found,

"That defendant has failed to prove that all or any specific portion of the \$18,000 charged to said partnership by said firm of Bautzer, Grant, Youngman & Silbert, or any predecessor thereof, was a charge for services rendered to or for said partnership; and no portion of the sum of \$18,000 which was paid by defendant to said attorneys is to be credited to defendant in the accounting which has been taken and stated herein.", and "That except for the sum of \$1,292.41 (which, together with the sum of \$3,707.59 heretofore paid on account of accounts payable, falls within the \$5,000.00 maximum limitation of paragraph Third (1) of said Dissolution and Settlement Agreement), all remaining commissions to salesmen on account of collections of said accounts receivable were and are an obligation to be borne solely by defendant and no portion thereof is chargeable to plaintiff or deductible from plaintiff's share of the collections of said accounts receivable."

It is contended on appeal that, I. Defendant is, as a matter of law, entitled to credit in the sum of \$18,000 for monies paid to said law firms; II. Finding of Fact VII is against the weight of the evidence which showed that defendant is entitled to a credit in the sum of \$18,000 for monies paid to said law firms; III. Defendant is entitled, as a matter of law, to a credit in at least the sum of \$10,800 for monies paid to said law firms; IV. The judgment is based upon an erroneous conclusion of law that defendant had the burden of proving the existence and amount of a partnership debt to said law firms; V. Defendant is entitled to an additional credit (as a matter of law) in the sum of \$5,839.90 for commissions paid to salesmen; VI. The lower court erroneously failed to consider extrinsic evidence in construing Exhibit I with reference to the right of defendant to an additional credit in the sum of \$5,839.90 for commissions paid to salesmen; and VII. The judgment is void for want of jurisdiction by reason of the absence of indispensable parties.

From the foregoing it is obvious that the dispute relates to certain deductions which as contended by appellant should have been made, one of \$18,000 and one of \$7,132.31.

[1] Appellant's contention No. VII is without merit. The other parties are unaffected by the action and are not necessary parties.

[2, 3] It is also obvious from the foregoing that appellant's arguments relate to the sufficiency and weight of the evidence. A review of the record supports respondent's contention in this regard; that the evidence is sufficient there is no question. Although the evidence may be conflicting, it is well settled that when there is sufficient evidence to support them, the appellate court is without power to disturb the findings on appeal. *Overton v. Vita-Food Corp.*, 94 Cal.App.2d 367, 210 P.2d 757.

A review of the record reveals no prejudicial errors.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



136 Cal.App.2d 631

HARRY CORSETTO and Minnie Corsetto,
Plaintiffs, Appellants and Cross-
Respondents,

v.

PACIFIC ELECTRIC RAILWAY, a California corporation, Defendant, Respondent and Cross-Appellant.

Civ. 20922.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1955.

Action by truck passengers against streetcar company for injuries sustained in collision. The Superior Court, Los Angeles County, Harold P. Huls, J., granted de-

fendant a new trial, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that evidence of streetcar operator's lack of experience was improperly admitted.

Order affirmed.

1. Appeal and Error ⇐933(4)

Where insufficiency of evidence is not specified in order granting new trial, it is conclusively presumed that order was not based on that ground. *West's Ann.Code Civ.Proc.* § 657.

2. Appeal and Error ⇐854(6), 933(1)

Upon appeal from order granting new trial, all presumptions favor order as against the judgment, and order will be affirmed if it may be sustained on any ground.

3. Master and Servant ⇐330(2)

In an action against employer for employee's negligence, wherein employer is not charged with negligence in employing or training employee, evidence of competency of employee, or his reputation for care, is not admissible.

4. Street Railroads ⇐113(1)

In action against streetcar company for injuries sustained by truck passengers in collision with streetcar, wherein company was not charged with negligence in training or employing operator, evidence of streetcar operator's lack of experience was improperly admitted.

5. Negligence ⇐124(1)

Where a defendant is held liable for injuries resulting from slightest negligence, evidence of lack of competence on part of person charged with negligence is admissible.

6. Street Railroads ⇐90(1)

In respect to collision between streetcar and truck, wherein truck passengers were injured, street railroad could be held liable only for failure to exercise ordinary care.

Alvin E. Honoroff, Leonard G. Ratner, Los Angeles, for appellants.

C. W. Cornell, San Pedro, O. O. Collins, Clyde C. Berry, E. D. Yeomans, Los Angeles, for respondent.

WHITE, Presiding Justice.

A jury awarded plaintiffs, husband and wife, damages for personal injuries sustained by them as the result of a collision between an automobile in which they were riding, driven by plaintiff husband, and a streetcar operated by defendant Pacific Electric Railway. Defendant moved for a new trial upon the grounds, (1) excessive damages appearing to have been given under the influence of passion and prejudice; (2) insufficiency of the evidence to justify the verdict, and (3) errors of law occurring at the trial prejudicial to said defendant. The motion was granted solely on the last-named ground. From that order plaintiffs prosecute this appeal while defendant has filed a cross-appeal from the judgment in favor of plaintiffs.

By their complaint plaintiffs alleged that their injuries were the result of negligence on the part of defendant and its employee who was operating the streetcar. Defendant's answer denied negligence and affirmatively pleaded contributory negligence on the part of plaintiffs and unavoidable accident.

The record reflects that the accident occurred on May 11, 1953, at about 1:15 p.m. when plaintiffs were driving east on Palo Alto Street in the City of Los Angeles in a light pick-up truck. Mr. Corsetto was then 74 years of age and Mrs. Corsetto was 55 years old. Harry Corsetto, the driver, made a complete boulevard stop when he reached the intersection of Palo Alto and Glendale Boulevard. Plaintiffs both looked to the south and observed the traffic on Glendale Boulevard, including a northbound streetcar, was stopped at the intersection of Glendale Boulevard and Temple Street. They looked to the north toward Bellevue and saw only a small truck some distance away driving south on Glendale Boulevard. They then proceeded to drive into the intersection of Palo Alto and Glendale for the purpose of making a left turn into Glendale. Glendale Boulevard

at this point has two sets of parallel streetcar tracks running down the middle of the street. As plaintiffs approached the middle of the intersection they noticed that the northbound traffic on Glendale Boulevard had begun to move north from Temple Street. Harry Corsetto thereupon stopped his truck in the middle of the intersection on the southbound streetcar track to permit the northbound traffic to pass in front of them.

As he reached the middle of the intersection, he saw, for the first time, a streetcar on the southbound tracks of Glendale Boulevard at Bellevue about 550 feet away. This streetcar made a full stop at Bellevue to discharge passengers. The northbound traffic, including the streetcar, proceeded to pass in front of the plaintiffs, and they were then struck by the southbound streetcar which had proceeded south from Bellevue. The southbound streetcar came to a stop 50 to 75 feet south of the point of impact. The force of the impact spun plaintiffs' truck completely around and hurled it across the intersection, over the curb, up a ten- or fifteen-foot embankment, through a fence and into a tree. Plaintiff, Harry Corsetto, was dragged this distance half in and half out of the truck. The truck moved a distance of 120 to 150 feet.

[1] As to these and other surrounding facts and circumstances occurring immediately prior and up to the moment of impact the evidence was in conflict, but since insufficiency of the evidence is not specified in the order granting a new trial, it is conclusively presumed that the order was not based on that ground, Code Civ.Proc. § 657, and because of the conclusion at which we have arrived as to the correctness of the order on the ground therein stated we deem it unnecessary to set forth in detail the evidence adduced at the trial.

[2] Upon an appeal from an order granting a new trial all presumptions favor the order as against the judgment, and the order will be affirmed if it may be sustained on any ground. *Mazzotta v. Los Angeles Railway Corp.*, 25 Cal.2d 165, 169, 153 P.2d 338.

We are satisfied that the order granting a new trial was proper because of erroneous rulings by the court in admitting evidence, over objection, of the inexperience of respondent's motorman.

During the cross-examination of the motorman Bair, who was operating the streetcar involved in the accident, the following questions were propounded and answers thereto given:

"Q. And you had started on your own about ten days before that?

"Mr. Yeomans (Attorney for defendant): I object to the question as incompetent, irrelevant and immaterial.

"The Court: Well, it may be relevant. The objection is overruled.

"The Witness: Approximately two weeks.

"Q. By Mr. Honoroff (Attorney for plaintiffs): You had begun to work for the Pacific Electric the end of March as a trainee? A. Yes.

"Mr. Yeomans: I would like to object to that, too, and ask to have it stricken, and I wonder if I can have an understanding that to all these questions I have a running objection?

"The Court: What is your objection?

"Mr. Yeomans: That it is incompetent, irrelevant and immaterial.

"The Court: The objection is overruled. Your objection on that ground may be deemed denied.

"Q. By Mr. Honoroff: Your experience driving alone on the date of this accident, then, was about two weeks in total? A. On my own, yes.

"Q. Prior to your employment with the Pacific Electric, you had never operated a streetcar before that time? A. No."

In the argument to the jury, appellants' attorney made the following comments as to this evidence:

"I believe that one of the witnesses, Miss Bruce, said that he put up a card

'Take the Next Car' but whether it was because he was in a hurry, or whether it was because the Pacific Electric Company had let a man work possibly a little too soon without having another employee there with him—he had only been alone for about two weeks—whether he had been going possibly a little too fast, or was inattentive, these are the possibilities. We know from the statements of the witnesses that he had ample opportunity, if he was being careful, to bring his streetcar to a stop."

"With regard to the fact that this streetcar weighs 32 tons, I agree with that. It is a tremendous amount, and certainly the company, the defendant company, is aware of that when they entrust it alone to a man who has had two weeks of experience by himself."

[3-6] The complaint herein contained no allegation as to negligence of respondent in the training or employment of the motorman. The great weight of authority supports the rule that in actions of this kind the competency of the person claimed to have acted negligently, or his reputation for care, is not a subject of inquiry. The ultimate question was whether the motorman exercised ordinary care to avoid the accident and injuries to appellants. No matter how wanting the motorman may have been in general competency, if he did on the occasion here involved, exercise ordinary care, plaintiffs could not recover, while if he did not exercise such care, then, even though the motorman was possessed of the utmost degree of efficiency and skill in the control and operation of a streetcar, plaintiffs were entitled to recover. Therefore, the sole question was the conduct of the motorman at the time of the accident in question. *Towle v. Pacific Imp. Co.*, 98 Cal. 342, 343, 344, 33 P. 207; *Cunningham v. Los Angeles Railway Co.*, 115 Cal. 561, 564, 47 P. 452; *Langford v. San Diego Elec. Ry. Co.*, 174 Cal. 729, 732, 733, 734, 164 P. 398; *Strandt v. Cannon*, 29 Cal.App.2d 509, 520, 85 P.2d 160. Appellants insist that in the cases just cited it

was held error to *instruct* the jury that the general competency of a driver may be considered in determining his negligence in a particular case, while in the present proceeding the jury was in no way instructed that the general competency of the motorman, the extent of his previous experience, or the length of his service should be considered in determining his negligence in this particular case. That in the case at bar the instructions clearly advised the jury that the appellants were burdened with the duty of proving that the conduct of the motorman *at the particular time and place* was negligent. But the answer to this suggestion is that the natural effect of testimony of incompetency is to lead the jury to infer that the person whose conduct is in question failed to act properly at the time and in the very matter under investigation. Regardless of the instructions, the jury had before it and was entitled to consider the foregoing evidence improperly admitted. Whether they did or not, we are of course unable to say, but under the law, respondent was entitled to have the evidence limited to an examination of the conduct of the motorman at the very time in controversy. The challenged evidence in the case now engaging our attention was no more admissible than would be evidence that a motorman was experienced and commonly a careful and skillful operator of streetcars, to show that when the accident occurred he was exercising due care. While evidence of the character here complained of would be admissible in cases where the *utmost* care is required and where the defendant is held liable for injuries resulting from the *slightest* negligence, such a rule does not apply to cases like the one at bar, where the defendant can be held liable only for a failure to exercise ordinary care. *Towle v. Pacific Imp. Co.*, supra, 98 Cal. at page 345, 33 P. 207. Other grounds urged to justify the order need not be discussed.

For the foregoing reasons the order is affirmed.

DORAN and DRAPEAU, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Joseph Paul CATO, Defendant and
Appellant.
Cr. 3140.

District Court of Appeal, First District,
Division 2, California.

Oct. 25, 1955.

Hearing Denied Nov. 23, 1955.

Defendant was convicted of second degree murder, and judgment of conviction was entered. Over two years after the ten-day statutory time for appeal had expired he applied for an order allowing his appeal. The Superior Court, San Francisco County, Orla St. Clair, J., denied the application, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that where defendant made no effort to file appeal except to deliver it to a man working in the jail who returned it to him in half an hour, did not mail instructions to his attorneys to appeal, and waited over two years to seek to file same, subsequent attempt to appeal could not be considered as a constructive timely appeal.

Order affirmed.

1. Criminal Law ⇐1031

An exception to the general rule that in criminal cases a reviewing court is without jurisdiction to consider an appeal after expiration of the ten-day statutory time, may be made where: 1. The defendant is free of all fault or lack of diligence contributing to the tardiness of the notice of appeal and 2. The tardiness was caused by fault, negligent or intentional, of the public officials having custody of defendant. West's Ann.Rules on Appeal, rule 31.

2. Criminal Law ⇐1081

Where defendant seeking to appeal from his conviction over two years after ten-day statutory time for appeal had expired made no timely effort to file the appeal except to deliver it to a man working in the jail who returned it to him in half an hour, and did not mail instructions to his

attorneys to appeal, attempt to appeal could not be treated as a constructive timely appeal. West's Ann.Rules on Appeal, rule 31.

3. Criminal Law ⇨1068½

State did not have obligation to assist defendant, who was restrained, in perfecting a timely appeal. West's Ann.Rules on Appeal, rule 31.

4. Criminal Law ⇨1081

Where defendant knew no notice of appeal had been filed during ten-day statutory time for appeal, his complete lack of diligence in not mailing notice he had prepared for over two years after leaving jail could not be overlooked in consideration of allowing appeal on basis it was a constructive timely appeal. West's Ann.Rules on Appeal, rule 31.

5. Criminal Law ⇨1089(1)

Theory of constructive timely filing of a notice of appeal cannot justify an unlimited postponement of the actual institution of the appeal.

James D. Hadfield, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerney, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order denying an application made by defendant in propria persona to the San Francisco Superior Court, dated December 15, 1954, with respect to his appeal from a judgment of conviction of second degree murder entered by said court on December 19, 1951. No notice of appeal of said judgment had previously been filed. In 1953 appellant had petitioned the California Supreme Court for a writ of habeas corpus, which was denied without opinion. Appellant then petitioned the United States Supreme Court for a writ of certiorari stating among other grounds: "XI That petitioner was deprived of his rights to give notice of appeal and the arrest of judgment of conviction by actions

of his jailors." On October 14, 1954 said petition was denied in the following terms: "Petition for writ of certiorari to the Supreme Court of California denied without prejudice to the petitioner's rights under the facts alleged to prosecute an appeal in the California state courts in accordance with principles announced in *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868." 348 U.S. 850, 75 S.Ct. 61. Appellant's above application to the Superior Court stated in substance that appellant appealed from the judgment of December 19, 1951 on the basis of the above order of the United States Supreme Court and prayed for an order allowing such appeal and for an order for a transcript on appeal, designating the parts of the reporter's transcript he desired. His petition for writ of certiorari, containing his grievances against the original judgment, was appended. On February 24, 1955 the matter was heard in the Superior Court, appellant and a witness for the People testified and the motion was denied, the court holding that the facts, even those testified to by appellant, did not bring him under the *Slobodion* case. The transcript shows that when on December 19, 1951 appellant was sentenced to San Quentin a stay of execution was granted to and including January 2, 1952. Appellant's testimony was in substance to the following effect. During that period he was kept in the San Francisco County Jail No. 1. On December 19th his attorneys visited him there. They advised against appeal, but he said that he thought he would continue. He had an arrangement with them that for the amount paid by him they would defend his case in full including, if necessary, an appeal. The result of their conversation was that appellant and the attorneys would think the question of appeal over, and that one of the attorneys would be back in a day or so. When he did not come, even after appellant wrote to them asking why they did not show up, appellant himself wrote out a document intended as a notice of appeal, and gave it to a man, he knew as Mr. Jule. After about half an hour Mr. Jule brought the document back saying: "Captain Smith wants to know who you

think you are, anyhow, around here * * Do you think we are your servants?" Appellant kept the document and did not do anything further about it, except trying to contact his attorneys through his sister. He did not mail the notice of appeal. Mr. Jule said later it was useless to mail the thing; it would not be given privilege, because most of his mail was confiscated by Mr. Smith. Mr. Jule "practically" told him that he would not be able to get it out unless he got it out through his attorneys. Appellant insisted on it being notarized, hoping to have the notary take it to court, but he was refused that privilege. He was sending out mail at that time. Some of it was confiscated, some reached his sister or his wife. He did not try to mail the notice or to contact anybody else to file it because he was afraid that if he was too insistent, there would be retaliation by putting him in the "black hole" where he had been for four days prior to his trial. On January 3, 1952 he was taken to San Quentin and he took the papers he had prepared with him. He kept them in his locker where they were eventually confiscated. He remained in San Quentin for four months and was then taken to Folsom. Because of restrictions on study he took eighteen months of research in Folsom before he filed his petition to the California Supreme Court.

Mr. Smith, who at that time was captain of the day watch in charge of County Jail No. 1 testified for the People that mail was censored but that no mailing was refused except when it was obscene or derogatory. He did not recall any conversation about appellant's mail or any of appellant's mail being refused. Appellant had the normal mailing privileges.

Counsel for appellant, appointed by this court to assist him on this appeal, has diligently urged that the above facts can be brought under the rule of the Slobodion case, *supra*. Both parties have concentrated on this point and have abstained from treating the formal adequacy of appellant's application or motion. We also think it advisable to decide this appeal solely on the merits as to the matter suggested by the United States Supreme Court, and have

concluded that on that basis the order must be affirmed.

In the Slobodion case the defendant incarcerated in San Quentin had four days after judgment placed his notice of appeal in the prison mailbox. Three days later it had been returned to him without explanation. The next day he went to the mailing department where the sergeant in charge could find no explanation for the return. Defendant explained the nature of the document and the importance of having it mailed at once, but, notwithstanding a promise to take care of it, the mailing was delayed some days so that it reached the clerk's office a few days too late. The Supreme Court held that nevertheless the appeal should be considered timely.

[1] In its opinion the court upheld the general rule that in criminal cases the appellate courts are without jurisdiction to consider an appeal taken after the expiration of the 10 day period of Rule 31 of the Rules on Appeal, but recognized that an exception should be made in the case of a defendant who was in custody, who had taken every step allowed by the officials in whose custody he was which he could possibly take to perfect his appeal, but who was unable to have the clerk of the Superior Court timely receive his notice of appeal because of the negligence of said authorities in forwarding it. Cases in which the defendant was without negligence prevented from timely noticing his appeal by other circumstances than the fault of public officials were expressly distinguished. The exception was rationalized as a constructive timely appeal. From the above it appears that there are two requirements for the applicability of the exception: 1. The defendant must be free of all fault or lack of diligence contributing to the tardiness of the notice of appeal and 2. The tardiness must have been caused by the fault, negligent or intentional, of the public officials in whose custody the defendant was.

[2] In our case these requirements are evidently not fulfilled. The only step which appellant took to effectuate his appeal within the statutory period was to hand the notice to a man whose exact capacity at the

jail does not appear, but who was not the person in charge. It is conceded on appeal that no jail attendant was under duty to act as appellant's messenger. Nevertheless when appellant was so told within half an hour, he did not try to effect the filing of the document in any other manner. No endeavor was made to mail it, although appellant had sent out other mail which at least in part had reached the addressees. Although he testified that he had paid for services of his attorneys with respect to an appeal, if that should become necessary, he did not instruct them by mail to file notice of appeal. Even if it should be believed that his conversations with Mr. Jule had convinced him that the jail officials did not wish him to appeal without the assistance of his attorneys, that could not reasonably prevent him from instructing these attorneys. With respect to the alleged fear of retaliation it must be noted that appellant did not testify to any threat. The vague conversations with Mr. Jule to which he testified cannot be considered to have prevented timely filing of the appeal, even if we assume that Mr. Jule was employed at the jail in such a capacity that his acts would be those of the authorities in whose custody appellant was.

[3] Appellant urges that it is not enough that the State did not prevent the timely appeal but that it had a duty to take positive action to assist appellant, who was restrained, in timely perfecting it. The failure to do so is said to bring appellant's case under the rule of the Slobodion case. This contention disregards the very exceptional nature of the rule and would extend it beyond its reasonable limits.

[4, 5] Moreover, as appellant knew that no notice of appeal whatever was forwarded during the statutory period for appeal, his complete lack of diligence after he left the jail cannot be overlooked. When on January 3, 1952 he came to San Quentin he was still in possession of the papers he had prepared but he did not mail them and instead he took nearly two years to prepare a petition for writ of habeas corpus. The theory of the Slobodion case, based on a constructive timely filing of notice of appeal

cannot justify an unlimited postponement of the actual institution of the appeal. In all cases in which the applicability of the rule was accepted the statutory period had been exceeded by a few days only.

Order affirmed.

DOOLING and KAUFMAN, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



136 Cal.App.2d 588

ESTATE of Sara Maud KINGDON, also known as Sara M. Kingdon, Deceased.

Ernest KINGDON, Frank Kingdon, Betty Oughtred, and Henry B. Nathan, as sole surviving executor of the Estate of Frank W. Kingdon, Plaintiffs and Appellants,

v.

ESTATE of Sarah Maud KINGDON and Berry D. Brown, as Executor of the Estate of Sarah Maud Kingdon, Defendants and Respondents.

No. 16462.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1955.

As Corrected on Denial of Rehearing

Nov. 25, 1955.

Hearing Denied Dec. 21, 1955.

'Action against deceased's estate consolidated with proceedings on objections to first and final account of executor. From a judgment of the Superior Court, County of San Mateo, Murray Draper, J., in favor of the defendants and from an order overruling objections to the account the plaintiffs and objectants appealed. The District Court of Appeal, Bray, J., held that where there had been a partnership between husband and wife, the widow's estate was entitled to apply in payment of Federal excess profits taxes, joint income taxes and surtax credits of the partners and was not required to pay to the other partner's estate one-half of that credit.

Judgment and order affirmed.

1. Husband and Wife ⇨42

Where there had been a partnership between husband and wife, executor of the wife's estate as part of winding up business of partnership terminated by death of husband was entitled to offset the husband's share of tax credit against the partnership tax debt and was not required to pay to husband's estate one-half of the tax credit. West's Ann.Corp.Code § 15037; 26 U.S.C.A. § 1481.

2. Property ⇨7

A Federal tax credit is an asset of the person so credited.

3. Husband and Wife ⇨42

Where executor of wife's estate as part of business of winding up of husband and wife partnership terminated by husband's death, made settlement agreement with government that he would pay tax liability less tax credit without expressly mentioning that the husband's share of tax credit was to be so used, the agreement did not preclude the use of the husband's share of tax credit, but such provision was implied in the statement that tax liability would be paid less tax credit. West's Ann.Corp.Code, § 15037; 26 U.S.C.A. § 1481.

Edward J. Bloom, Dorothy E. Handy, San Francisco, for appellants.

Boekel, Moran & Morris, San Francisco, for respondents.

BRAY, Justice.

Two proceedings brought by appellants were consolidated for trial on stipulated facts and additional documentary evidence. One was an action against the Estate of Sara Maud Kingdon and Berry D. Brown, as executor thereof. The other was objections filed in that estate to the first

and final accounting of the executor. From the judgment in the first proceeding in favor of respondents, and from the order in the second proceeding overruling objections to the said account, appellants appeal.

Question presented.

In view of the confusion between statements made in appellants' brief and the issue raised by the pleadings and considered by the trial court, it is difficult to determine the exact contention of appellants. As nearly as we can judge, it is (other than the fact that appellants want the Sara Kingdon Estate to pay them a total sum of \$13,760.78): Where there was a partnership of husband and wife, is the estate of the surviving partner (the wife) entitled to apply in payment of federal excess profits taxes joint income tax and surtax credits of the partners, or is the estate required to pay to the other partner's estate one-half of that credit? ¹

Facts.

The United Service Company, owned by Frank and Sara, became indebted to the United States Maritime Administration in the sum of \$35,889.50 for excess profits taxes for 1944 and 1945. The Administration's invoice charged the company with the total tax liability. In its credit memoranda it named the company as debtor but in showing the charges and debits it showed one-half the charge as against Frank and one-half as against Sara. Likewise a total credit of \$27,521.56 for income tax and surtax overpaid was shown as one-half (\$13,760.78) in favor of Frank and a similar sum in favor of Sara. However, it is clear from the record that both the charge and the credit were jointly in Sara and Frank as owners of the company.² Frank died. The probate of his estate was com-

1. Appellants will probably dispute this statement of the question on two grounds: (1) They vacillate between claiming that the United Service Company, the business subject to the tax, may have been a partnership or may have been the separate property of the husband. However, it is clear that the business was the partnership of Frank and Sara Kingdon. In the Estate of Frank Kingdon

it was mentioned as such and the court so found in an order confirming sale of certain personal property and in the decree of distribution. The court so found in this proceeding. (2) Appellants contend that the tax credit was not a joint, but a several one. This will be discussed later.

2. See *United States v. Sarkozy*, D.C., 99 F.Supp. 736, for holding that a partner-

menced August 31, 1947. No reference was made in the probate of his estate to this tax liability or credit. The court in that estate ordered the executors (Sara was one) to continue the operation of the company and found that it was the partnership of Sara and Frank. In February, 1948, the partnership business was sold for \$10,000, one-half of which the court ordered paid to Sara as her share of the partnership. In the decree of distribution (March 11, 1949) the court found that the company had been operated at a net loss of \$6,043.01; that Sara as partner was entitled to half of its remaining assets; that Sara was willing to absorb from her private resources the losses of the business; that she waived all moneys due her for family allowance. In Frank's will appellants Ernest Kingdon, Frank Kingdon and Betty Oughtred were bequeathed \$10,000 each. The decree found that the total remaining asset of the estate was a sum which could pay each legatee only \$4,402.58 and such sum was distributed to each. Sara died in December, 1949. Respondent executor in 1952 petitioned the court in her estate to permit him to compromise and pay the government's tax claim. The petition set forth the government's claim of \$35,889.50, the credits of \$27,521.56, and asked permission to pay the difference, \$8,367.94 from the moneys in Sara's estate. The court approved the petition and the executor settled the government's claim accordingly.

Pleadings.

The complaint charges that Brown as executor of Sara's estate received from the United States a credit for \$13,760.78 tax refund that belonged to Frank's estate and asked that the said sum be paid to plaintiffs because they had not received their full legacies under Frank's will. Also, in Sara's estate they filed objections to the final account. These objections referred to the last mentioned complaint and stated that the executor had received the above

mentioned sum belonging to Frank's estate and asked that the final account in Sara's estate be not approved until the complaint was heard on its merits.

Offset.

[1] Thus, the sole question to be considered by both the trial court and the probate court was whether the executor of Sara's estate as part of the winding up of the partnership business was entitled to offset Frank's tax credit against the partnership tax debt. To ask the question is practically to answer it. The partnership owed the government \$35,889.50. Each of the partners was liable jointly for this amount. The husband and wife made joint tax returns, and the tax credit was a joint one. Neither partner could have collected any portion of the credit without first paying the liability. In the administration of Frank's estate no claim was made that the tax credit was an asset of the estate. Moreover, in the decree of distribution in that estate, the court found that the business had been operated by the executors at a loss, which loss of \$6,043.01 Sara had assumed personally. Had the tax credit been considered as an asset of the estate separate and apart from its being an offset on the tax liability, the court would not have found a loss to have existed.

[2] Appellants cite cases holding that a tax credit is an asset of the person so credited. There can be no question but that it is such asset. However, the asset here was of a type which required that it either be used in offset of the liability or that the liability be paid before the credit could be received in cash.

[3] Appellants stress the fact that in the settlement agreement with the government the executor of Sara's estate agrees that he as such executor will pay the government the \$35,889.50 "less the tax credit, if any, applicable * * *" They contend that because no mention was made in so many words that Frank's share of the tax credit was to be used, the executor was

ship tax liability and tax credit of the type here, are both joint as to the partners, and that the tax credit up to an

amount equal to the tax liability can only be used as an offset and cannot be withdrawn in whole or in part.

agreeing to use only Sara's share. This overlooks, first, that the agreement was made by the executor as the representative of the estate of the surviving partner in closing up the affairs of the partnership as it was his duty to do. (See Corp. Code § 15037.) Secondly, the agreement itself recites the incurring of the tax liability by Frank and Sara as partners, and that the payment of said sum less the tax credit would release the estates of both Frank and Sara from said tax obligation. It was unnecessary to state in such agreement expressly that Frank's share in the tax credits was being used. It was implied in the statement that the tax liability would be paid less the tax credits. Both of the parties to the agreement so understood it, and it was made pursuant to court order in Sara's estate which expressly showed that the entire tax credit was to be offset. Actually, Sara's estate paid the balance of \$8,367.94 out of its funds. (There were no assets of the partnership left.) Of this sum Frank's estate, were it in existence, would have been liable for one-half.

As pointed out hereinbefore, appellants are asking for a specific sum which they claim belongs to Frank's estate and which they claim the executor of Sara's estate has failed to account for. The evidence supports the court's findings that Sara's estate did not receive "from the United States a credit for a \$13,760.78 tax refund that in fact belonged to the estate of said Frank

W. Kingdon, Deceased; but in fact said estate of Frank W. Kingdon, Deceased, received the full benefit of said tax credit in the amount of \$13,760.78 upon the joint liability of said estate and of said estate to Sara Maud Kingdon, Deceased, in the amount of \$35,889.50 due the United States of America for excess profits under applicable United States statutes for renegotiation of excess profits upon war contract work; said tax credit having been allowed and the benefit thereof having been received by said estate of Frank W. Kingdon, Deceased, under the applicable provisions of Internal Revenue Code, Section 3806 [26 U.S.C.A. § 3806³]. Said tax credit was not obtainable by or available to said estate of Frank W. Kingdon, Deceased, except in the sense and to the extent it was available by the provisions of Internal Revenue Code Section 3806, as a credit upon said joint liability of said estate for repayment of said excess profits to the United States of America."

We have not discussed appellants' reference to the properties held by Frank and Sara in joint tenancy and which were treated in both estates as such, as we fail to see any relevancy of such properties to the issue here.

The judgment and the order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

3. Now 26 U.S.C.A. § 1481.

45 Cal.2d 440

A. G. KEATING, Petitioner,

v.

The SUPERIOR COURT of The CITY AND COUNTY OF SAN FRANCISCO, and Honorable Samuel F. Finley, as Judge Thereof, Respondents.

Harry E. Foster, Real Party in Interest.

S. F. 19259.

Supreme Court of California.

In Bank.

Nov. 1, 1955.

Original proceeding was brought for writ of prohibition to prevent judge of the Superior Court of the City and County of San Francisco from hearing the retrial of an action to recover damages for alleged fraudulent conversion of assets of a business. The Supreme Court, Gibson, C. J., held that where judge stated that defendant had given false testimony, and judge rejected books of account with the statement that he had no confidence in defendant's integrity or veracity, and, on appeal by defendant from adverse judgment, it was held that issue of liability was correctly determined but that action was required to be remanded for retrial on issue of damages, judge was disqualified from sitting at the retrial.

Writ granted.

Opinion, 278 P.2d 510, vacated.

1. Prohibition ☞3(5)

Where facts are without substantial conflict, prohibition is a proper remedy to test whether trial judge is disqualified, since order striking petition for change of judge is not immediately reviewable by appeal, and since an appeal from a subsequent judgment is not an adequate remedy. West's Ann.Code Civ.Proc. § 170, subd. 5.

2. Judges ☞51(4)

If written statement under the Code of Civil Procedure setting forth facts allegedly constituting ground of disqualification of trial judge is timely and states sufficient facts, it is judge's duty to file answer within

five days or be disqualified from sitting until the matter of his bias is passed on by another judge, but where statement is legally insufficient, judge may ignore it or strike it from the files. West's Ann.Code Civ.Proc. § 170, subd. 5.

3. Judges ☞49(1)

The mere fact that trial judge rejects the testimony of a party, does not disqualify the judge. West's Ann.Code Civ.Proc. § 170, subd. 5.

4. Judges ☞49(2)

A judge is not disqualified from proceeding to try and decide a case or pass on a motion for new trial because he states during the course of the trial that in his opinion a party has deliberately given false testimony, provided that judge's opinion is based on a consideration of the evidence produced. West's Ann.Code Civ.Proc. § 170, subd. 5.

5. Judges ☞49(2)

Judge, when acting as the trier of the facts, has duty to pass on the credibility of witnesses, and, if he believes that a party had testified falsely and chooses to say so rather than remain silent, he is not disqualified from proceeding to render judgment. West's Ann.Code Civ.Proc. § 170, subd. 5.

6. Judges ☞49(2)

Where a judge has stated during the course of a prior trial that he believes that a party has wilfully sworn falsely, though judge's belief is founded on the evidence before him, he is disqualified from retrying the case. West's Ann.Code Civ.Proc. § 170, subd. 5.

7. Judges ☞49(2)

Where trial judge, in action for damages for alleged fraudulent conversion of assets of a business, stated that defendant had given false testimony, and judge rejected books of account with the statement that he had no confidence in defendant's integrity or veracity, and, on appeal by defendant from adverse judgment, it was held that issue of liability was correctly determined but that action was required to be remanded for retrial on issue of damages,

judge was disqualified from sitting at the retrial. West's Ann.Code Civ.Proc. § 170, subd. 5.

8. Judges §51(2)

Where statement by defendant of disqualification of trial judge to sit on retrial met the purposes of the statute and was presented by defendant, promptly after learning that the case was to be set for trial, application for disqualification was timely. West's Ann.Code Civ.Proc. § 170, subd. 5.

Dan L. Garrett, Jr., San Francisco, for petitioner.

Morris Lowenthal, Juliet Lowenthal and Karl D. Lyon, San Francisco, for respondents and real party in interest.

GIBSON, Chief Justice.

Petitioner is the defendant in an action brought to recover damages for fraudulent conversion of the assets of a business. *Foster v. Keating*, 120 Cal.App.2d 435, 261 P.2d 529. The case was tried without a jury, and after the conclusion of testimony the trial judge, Honorable Samuel F. Finley, said with reference to defendant's testimony, "I know some of those statements he made were untrue and palpably false; and I think a situation of this kind to a certain extent is a situation that the grand jury ought to investigate * * * because people shouldn't be permitted to take the stand and give testimony that is false." He then orally announced that judgment would be given against defendant in the sum of \$35,000.

The plaintiff in the action applied to the court to increase the award of damages, and at the hearing defendant sought to reopen the case for the purpose of introducing certain books of account. The judge stated that it was unnecessary to go into the books since they would not show anything to alter his conclusion. He added, "Of course I make the further observation that the figures in the books were placed there either by the hand of or under the direction of Mr. Keating, and I have no confidence at all in Mr. Keating's integrity and veracity, and I wouldn't have any confidence in the figures

* * * in those books." The award was then increased to \$50,000 but was later set at \$40,940. Findings and judgment were thereafter filed.

On appeal by defendant from the adverse judgment, it was held that the issue of liability was correctly determined but that the action must be remanded for retrial of the issue of damages. *Foster v. Keating*, 120 Cal.App.2d 435, 451-455, 261 P.2d 529.

Some months later plaintiff filed notice that he would make a motion in the department where Judge Finley was presiding to set the action for further proceedings. Defendant filed a petition and affidavit for change of judge on the ground that the judge's statements showed him to be disqualified by reason of bias and prejudice against defendant. No answering affidavit was filed by the judge, but after argument he reaffirmed his opinion that defendant had not told the truth at the trial, although he denied any disqualification and said that he did not feel he had "any prejudice, any more than any judge would have against someone who doesn't tell the truth." He struck the petition from the record, asserting that it was not timely and that the evidence was not sufficient to support a charge of disqualification.

Petitioner then brought this proceeding in prohibition to restrain Judge Finley from hearing the retrial of the issue of damages, claiming that a fair and impartial trial could not be had before him.

[1] Prohibition is a proper remedy to test whether a judge is disqualified where, as here, the facts are without substantial conflict. *Briggs v. Superior Court*, 215 Cal. 336, 341, 10 P.2d 1003; *Miller & Lux, Inc., v. Superior Court*, 19 Cal.App.2d 628, 66 P.2d 689; *Chastain v. Superior Court*, 14 Cal.App.2d 97, 104, 57 P.2d 982; see *Kreling v. Superior Court*, 25 Cal.2d 305, 153 P.2d 734. The order striking the petition for a change of judge is not immediately reviewable by appeal, and an appeal from a subsequent judgment is not an adequate remedy. See *Briggs v. Superior Court*, *supra*, 215 Cal. at page 341, 10 P.2d 1003; 1 Witkin, *California Procedure* (1954), p. 177.

[2] Section 170 of the Code of Civil Procedure provides in part that "No justice or judge shall sit or act as such in any action or proceeding: * * * 5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him", that any party may file "a written statement * * * setting forth the fact or facts constituting the ground of the disqualification of such judge", that within five days thereafter the judge may file an answer admitting or denying the allegations of the statement, and that "No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own qualification * * *." Under this section, if the written statement is timely and states sufficient facts, it is the duty of the judge to file an answer within five days or be disqualified from sitting until the matter of his bias is passed upon by another judge. In *re Harrington*, 87 Cal. App.2d 831, 834-835, 197 P.2d 783; *Rosenfield v. Vosper*, 70 Cal.App.2d 217, 221-223, 160 P.2d 842; 1 Witkin, *California Procedure* (1954), pp. 173-176. Where, however, the statement is legally insufficient, the judge may ignore it or strike it from the files. *Neblett v. Pacific Mut. Life Ins. Co.*, 22 Cal.2d 393, 401, 139 P.2d 934; *Fishbaugh v. Fishbaugh*, 15 Cal.2d 445, 457, 101 P.2d 1084; *People ex rel. Department of Public Works v. McCullough*, 100 Cal.App.2d 101, 108 et seq., 223 P.2d 37.

[3-5] In deciding questions of fact a judge may often reject the testimony of a party, but this does not necessarily indicate that he believes that the party was guilty of deliberate falsification. The rejection of the testimony may have been the result of a consideration of the ability of the party to observe or remember, and in such a situation failure to accept a party's version of the facts does not show that the judge is biased or prejudiced against him. Nor is a judge disqualified from proceeding to try and decide a case or pass on a motion for new trial because he states during the course of the trial that in his opinion a party has deliberately given false testimony, provided the opinion of the judge is based

upon a consideration of the evidence produced. Cf. *Fishbaugh v. Fishbaugh*, 15 Cal.2d 445, 456-457, 101 P.2d 1084; *Chastain v. Superior Court*, 14 Cal.App.2d 97, 101 et seq., 57 P.2d 982. It is the duty of a judge when acting as the trier of the facts to pass upon the credibility of witnesses, and if he believes that a party has testified falsely, and chooses to say so rather than remain silent, he is not disqualified from proceeding to render judgment.

[6] The rule is different, however, where a judge is about to retry a case after having stated during the course of the prior trial that he believes a party has wilfully sworn falsely. Such is the situation here, as there must be a complete new trial on the issue of damages. *Foster v. Keating*, 120 Cal.App.2d 435, 451-455, 261 P.2d 529. When a judge has stated that a party has given false testimony, even though his belief is founded on the evidence before him, he is disqualified from retrying the case. *Briggs v. Superior Court*, 215 Cal. 336, 343 et seq., 10 P.2d 1003; *Chastain v. Superior Court*, 14 Cal.App.2d 97, 101 et seq., 57 P.2d 982; *Evans v. Superior Court*, 107 Cal.App. 372, 380-384, 290 P. 662; see 1 Witkin, *California Procedure* (1954), p. 168 et seq.

In *Evans v. Superior Court*, supra, the judge, at the close of the trial, stated that in his opinion two of the defendants had been guilty of deliberately falsifying while under oath. Later another case in which these two persons were parties was assigned to the same judge for trial, and prohibition was sought to prevent the judge from trying the case. It was held that the judge was biased and prejudiced against the defendants and that a fair and impartial trial could not be had before him. 107 Cal.App. 372, 380-384, 290 P. 662. The *Evans* case was expressly approved in *Briggs v. Superior Court*, supra, which involved a retrial. The court there stated, "As the trier of the facts [the judge] will be called upon to pass on the credibility of these petitioners as the principal witnesses in their own behalf. Is it humanly possible or probable that a judge who has stated under oath that it is his

opinion that these petitioners have deliberately falsified under oath can pass upon their credibility with that impartial judicial mind which should exist in the trier of the facts? We think it not probable." 215 Cal. at page 345, 10 P.2d at page 1007. The Chastain case also involved a retrial, and the court held that it is "the right of a litigant to have his cause tried by one who has no preconceived opinion against his veracity which may preclude a full and a fair consideration of the facts and the law which are involved therein. * * *

When there is uncontradicted evidence that the trial judge entertains a fixed opinion that a party to an action has deliberately perjured himself upon a material issue or that he is unworthy of belief, and frankly admits he possesses that frame of mind, the law entitles the litigant to the privilege of a trial before some other judge. Under such circumstances the question regarding the existence of bias or disqualifications becomes one of law." 14 Cal.App.2d 103, 104, 57 P.2d 985.

The cases of *Kreling v. Superior Court*, 25 Cal.2d 305, 310 et seq., 153 P.2d 734; *Fishbaugh v. Fishbaugh*, 15 Cal.2d 445, 456-457, 101 P.2d 1084, and *McEwen v. Occidental Life Ins. Co.*, 172 Cal. 6, 10-11, 155 P. 86, are in accord with the rules set forth above. In the *McEwen* case the judge was held not disqualified to pass on a motion for a new trial by reason of his statement "I do not see how the jury could possibly have reached this verdict." 172 Cal. at page 10, 155 P. at page 87. The judge did not charge a party with perjury or even express a view with respect to the credibility of witnesses, and his statement may have been based on his opinion of the law or the weight of the evidence. In the *Fishbaugh* case the judge was held not disqualified to continue with the trial or to pass on a motion for new trial by reason of his statements, made at the conclusion of the taking of the evidence, that defendant "'took the law into his own hands'" and "'misrepresented his financial condition'" to the other party. 15 Cal.2d at page 456, 101 P.2d at page 1090. The claim of disqualification was not made

in connection with a retrial of the action. The *Kreling* case involved four connected actions set for trial before the same judge, in each of which the identical affirmative defense was interposed, and it was stipulated by the parties that the decision on the affirmative defense in the first case "should be accepted and govern the decision of that same issue in all the other cases." 25 Cal.2d at page 313, 153 P.2d at page 738. After the judge had indicated what his decision would be on the affirmative defense in the first case an effort was made to disqualify him from continuing with the trial of the other cases, and it was held that there was no basis for the disqualification. The qualification of the judge to retry the case was not involved since there had in effect been a consolidation of the cases and a partial trial of each of them. Moreover, the judge did not charge that a party had given perjured testimony.

[7] It thus appears that the cases which have dealt directly with the problem have held that where a judge has stated that he is of the belief that a party has wilfully given false testimony, he is disqualified from hearing a retrial of the case, and we are of the opinion that the same rule is equally applicable whether the subsequent trial be of the whole case or a retrial of a single issue such as damages. The existence of grounds for the disqualification of Judge Finley is particularly apparent since he not only charged petitioner with having given false testimony but also stated, in rejecting the books of account, that he had no confidence in petitioner's integrity or veracity and that he would have no confidence in the books because they were kept by petitioner or under his direction. The refusal to admit the books was one of the main grounds of petitioner's appeal, and they will no doubt be important evidence in the retrial of the issue of damages. This attitude of the judge toward petitioner apparently still existed at the time he struck out the statement of disqualification, since he then said he did not feel any more prejudice against petitioner "than any judge would have against someone who doesn't tell the truth."

Under these circumstances it would appear probable that a fair and impartial trial cannot be had before Judge Finley.

[8] The remaining question to be determined is whether the application for disqualification was timely. Subdivision 5 of section 170 of the Code of Civil Procedure provides in part: "The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge." The reason for requiring a prompt claim of bias is that a party should not be allowed to play fast and loose with the administration of justice by deliberately refraining from raising an objection, on the chance that he might get a favorable decision and still be free to urge the objection as grounds for upsetting an unfavorable judgment. *Woolley v. Superior Court*, 19 Cal.App.2d 611, 619, 625, 66 P.2d 680; see *Rohr v. Johnson*, 65 Cal.App.2d 208, 212, 150 P.2d 5. Insofar as the retrial is concerned, it is clear that the statement of disqualification met the purposes of the statute and was timely because it was presented promptly after petitioner learned that the case was again to be set for trial before the same judge.

Let a peremptory writ of prohibition issue restraining the Honorable Samuel F. Finley from hearing a retrial of the action.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I reluctantly concur in the judgment, but because of the rule set forth in *Chastain*

v. Superior Court, 14 Cal.App.2d 97, 57 P. 2d 982; *Briggs v. Superior Court*, 215 Cal. 336, 10 P.2d 1003, and *Evans v. Superior Court*, 107 Cal.App. 372, 290 P. 662, I can see no escape from the conclusion reached by the majority.

I feel, however, that when a trial judge, sitting without a jury, decides a case in favor of one of the parties litigant as indeed he must, the only inference to be drawn therefrom is that he believed one side and disbelieved the other. This court, or an appellate court, later reverses the judgment and the cause is remanded for a new trial. In such a situation, I believe that the same trial court should not be permitted to sit in the matter since the implication is clear that once having determined in his own mind, if not publicly, that one or the other of the parties was telling the truth he might, in the absence of entirely new and different evidence, be biased and prejudiced against the opposing litigant. In my opinion it would be better in all such cases to have the retrial proceed before a judge to whom the cause was a new one. This, however, is not the law either by legislative enactment or case law.

It is true that here Judge Finley openly and frankly stated his views with respect to the integrity of one of the parties who had been a witness before him. For this I believe he is to be commended. If he had entertained the same opinion but had remained silent, he would have been subject to no criticism even under the majority opinion and could have retried the cause without subjecting himself to a charge of bias and prejudice. So the moral appears to be, that if a trial judge does not wish to be disqualified in the event of a new trial, he should keep his opinions to himself.

45 Cal.2d 388

**R. H. FLICKINGER, Plaintiff and
Respondent,**

v.

**SWEDLOW ENGINEERING CO., Inc., a
corporation, and Fireman's Fund Indemnity Co., a corporation, Defendants and Appellants.**

L. A. 23534.

**Supreme Court of California.
In Bank.**

Oct. 28, 1955.

Rehearing Denied Nov. 23, 1955.

Action by subcontractor against general contractor and surety on general contractor's bond for work performed under subcontract and payment allegedly due under bond. The Superior Court, Los Angeles County, J. F. Moroney, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, Spence, J., held that action was barred under compulsory counterclaim statute, West's Ann.Code Civ.Proc. § 439, by failure of subcontractor to assert claim on which action was based by way of counterclaim in prior action by general contractor to recover damages for breach of subcontract.

Judgment reversed.

Opinion, 284 P.2d 521, vacated.

1. Set-Off and Counterclaim ⇐44(2)

Any claim which subcontractor, his copartner, or partnership, to which subcontractor had assigned the benefits of subcontract to perform part of highway construction contract, had against general contractor arising out of subcontract could and should have been presented by way of counterclaim in action by general contractor against subcontractor and copartner, individually and as copartners, to recover damages for breach of subcontract. West's Ann.Code Civ.Proc. §§ 438, 439.

2. Set-Off and Counterclaim ⇐1

The law abhors a multiplicity of actions, and the legislative intent in enacting counterclaim statutes was to provide for the settlement, in a single action, of all conflicting claims between the parties arising out

of the same transaction. West's Ann.Code Civ.Proc. §§ 438, 439.

3. Set-Off and Counterclaim ⇐60

Under compulsory counterclaim statute, a party cannot by negligence or design withhold issues and litigate them in successive actions. West's Ann.Code Civ.Proc. §§ 438, 439.

4. Action ⇐12, 53(1) Trial ⇐3

A party may not split his demands or defenses or submit his case in piecemeal fashion. West's Ann.Code Civ.Proc. §§ 438, 439.

5. Principal and Surety ⇐66(2)

Any right of subcontractor to recover upon general contractor's bond for work performed under subcontract and payment alleged to be due under terms of bond was necessarily dependent upon subcontractor's right to recover upon subcontract with general contractor. West's Ann.Code Civ.Proc. § 1192.1; West's Ann.Gov.Code, §§ 4204, 14371 et seq.

6. Pleading ⇐149

In action by general contractor against subcontractor to recover damages for breach of subcontract, subcontractor, having a claim against general contractor for work performed under subcontract and payment allegedly due under terms of general contractor's bond, could file a cross-complaint on bond and thereby bring in surety as a party to action. West's Ann.Code Civ.Proc. §§ 389, 1192.1; West's Ann.Gov.Code, §§ 4204, 14371 et seq.

7. Set-Off and Counterclaim ⇐60

Where subcontractor in action by general contractor to recover damages for breach of subcontract filed a counterclaim based on alleged account stated without directly asserting claim for work performed under subcontract and payment allegedly due under general contractor's bond, subcontractor was barred by compulsory counterclaim statute from thereafter asserting such claim under contract in action against general contractor and surety on its bond. West's Ann.Code Civ.Proc. §§ 389, 438, 439,

1192.1; West's Ann.Gov.Code, §§ 4204, 14371 et seq.

8. Principal and Surety ⇨143

Defense available to general contractor, that action by subcontractor for work performed under subcontract and payment allegedly due under general contractor's bond was barred under compulsory counterclaim statute by failure of subcontractor to assert such claim in prior action by general contractor for breach of subcontract, was also available to surety on general contractor's bond. West's Ann.Code Civ.Proc. §§ 389, 438, 439, 1192.1; West's Ann.Gov.Code, §§ 4204, 14371 et seq.

9. Principal and Surety ⇨143

Sureties on a bond are entitled to avail themselves of all defenses that would be allowed the principal, and are generally in no worse position than principal would be if sued separately.

10. Set-Off and Counterclaim ⇨60

Where action on claim which should have been asserted by way of counterclaim in prior action between the parties was ordered off calendar by agreement of the parties pending disposition of prior action and, when plaintiff in action based on such claim indicated intent to bring it to trial, defendants therein acted with reasonable promptness in amending answer so as to allege that action was barred by compulsory counterclaim statute, evidence failed to show any laches, waiver or estoppel which would preclude defendants from relying on bar of counterclaim statute. West's Ann.Code Civ.Proc. §§ 438, 439.

Laurence J. Rittenband, Anderson, McPharlin & Connors and Kenneth E. Lewis, Los Angeles, for appellants.

C. J. Walker, Los Angeles, for respondent.

SPENCE, Justice.

Defendants appeal from a judgment for plaintiff in this action arising out of a contract for the performance of work on a state-highway project. As grounds for reversal, defendants contend: (1) that plain-

tiff is precluded from maintaining this action because of failure to comply with the state licensing requirements, Bus. & Prof. Code, §§ 7025-7031; (2) that a prior judgment which has now become final is res judicata on the claim here asserted; and (3) that plaintiff's present action is barred by section 439 of the Code of Civil Procedure. Since defendants' third point is well taken and is determinative of this appeal, it will be unnecessary to consider the first two contentions above recited.

On January 29, 1948, plaintiff Flickinger, a licensed contractor, entered into a written contract with defendant Swedlow Engineering Co., Inc., to perform a portion of the latter's contract with the state for the construction of a public highway. Defendant Fireman's Fund Indemnity Co. is the surety on Swedlow's contractor's bond. Gov. Code, §§ 4204, 14371 et seq. By an oral agreement on March 15, 1948, Flickinger assigned the benefits of the contract to a partnership composed of himself and another licensed contractor, Ralph Welker. Thereafter the partnership entered upon the performance of Flickinger's obligations under the contract, except that portion of the work that Swedlow, the general contractor, thereafter agreed to complete. Periodic payments were made to the partnership of Flickinger & Welker as the work progressed. The partnership at no time during performance of the contract obtained a contractor's license. All of the work under the contract between Swedlow and the state was officially accepted by the state on October 27, 1948.

After the contract was completed a controversy arose between Swedlow and Flickinger concerning the work under their contract; and Swedlow sued (April 9, 1949) Flickinger and Welker, individually and as copartners, for a sum in excess of \$60,000 as damages for breach of contract. Flickinger and Welker answered and, in addition, filed a counterclaim alleging that there was a sum of money owing to them and that an account had been stated for some \$11,000 between the parties. In that action judgment was entered (February 3, 1953) that neither party take anything on their opposing claims. That judgment became final.

The present action was brought (May 12, 1949) by Flickinger, individually and as assignee of the partnership, against Swedlow, the general contractor, and the surety, Fireman's Fund, setting forth a claim for work performed under the contract and for payment alleged to be due under the terms of defendants' bond. (Formerly Code Civ. Proc. § 1184e; now Code Civ. Proc. § 1192.1.) The same amount asserted in the prior action as a counterclaim by defendants Flickinger and Welker, plus one additional charge for certain blasting material furnished for the construction project, constitutes the sum sought in this action. The parties agreed that the present action should be ordered off calendar pending disposition of the prior action, and it was reset for trial on January 8, 1954. By stipulation, the pleadings in the prior action were introduced in evidence in this action.

Flickinger sought recovery here in his own name, alleging that at all times he had been a licensed contractor; that he had assigned the "benefits" of his individual contract to the partnership (Flickinger & Welker); that the partnership and Welker had agreed to do the work under his control and direction; that he (Flickinger) duly performed all the conditions agreed to be performed; and that prior to the commencement of suit the partnership and Welker had assigned to him all their right and interest in the money here sought for the work performed. However, at the trial Flickinger testified that following the oral assignment of the Swedlow contract to the partnership, the partnership did the work; and the court generally found that "plaintiff and said partnership duly performed all" the agreed conditions and work for defendant Swedlow. The court further found that "during all of the time mentioned in plaintiff's * * * complaint, plaintiff was and now is a duly licensed contractor * * *; that Ralph Welker at all times since November 24, 1947, has been and now is a duly licensed contractor * * *; and that at all times since May 9, 1949, the said partnership of Flickinger & Welker has been and now is a duly licensed contractor * * *," which date was some six months after the work was completed

and three days before the filing of the complaint in this action. The court concluded that Flickinger and Welker individually and as partners had "substantially complied with the licensing provisions of the Business and Professions Code," and that "the cause of action * * * [was] not barred by * * * section 7031 or any section of [that] code." It further determined that the prior decision was not *res judicata*, and that this action was not barred by the provisions of section 439 of the Code of Civil Procedure. Accordingly, judgment was entered on plaintiff's alleged claim.

Defendants moved for a new trial, which was denied. However, at that time, in response to defendants' request for a "more detailed and comprehensive finding of fact with reference to [their] sixth affirmative defense" (the alleged bar of section 439 of the Code of Civil Procedure), the court made these additional findings, Code Civ. Proc. § 662: That the same highway construction project was the subject matter of both actions, involving the same basic contract between Swedlow and the state and the same subcontract between Swedlow and Flickinger; and that "the work and labor for which plaintiff herein seeks to recover upon defendants' labor and material bond arose out of said agreement (subcontract) between * * * Flickinger and * * * Swedlow * * * upon which Swedlow * * * brought suit as plaintiff in [the prior] action." Upon the basis of this finding, defendants properly challenge the propriety of the trial court's conclusion that the statutory bar, Code Civ. Proc. § 439, does not apply; and accordingly, they seek reversal of the judgment.

Section 439 provides: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." A counterclaim "must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had * * *." Code Civ. Proc. § 438; *Tomales Bay Oyster Corp. v. Superior Court*, 35

Cal.2d 389, 393, 217 P.2d 968; Case v. Ka-dota Fig Ass'n, 35 Cal.2d 596, 603-604, 220 P.2d 912.

[1] Any claim which Flickinger, Welker or the partnership may have had against Swedlow arising out of the contract between Flickinger and Swedlow could and should have been presented by them by way of counterclaim in the prior action. Such counterclaim came precisely within the terms of said section 439. It was "upon a cause arising out of the transaction" set forth in Swedlow's complaint in that action "as the foundation of plaintiff's (Swedlow's) claim"; it would have tended "to diminish or defeat" Swedlow's recovery; and it existed, if it could be sustained by any defendant in that action, "in favor of a defendant and against a plaintiff between whom a several judgment might be had." Therefore, the defendants in the prior action, including Flickinger, were required to assert any counterclaim which they may have had against Swedlow or be forever barred. Code Civ.Proc. § 439.

Apparently recognizing the necessity for filing a counterclaim in the prior action, defendants therein attempted to establish such counterclaim in the form of an account stated. They omitted, however, to urge directly any counterclaim which they may have had under the terms of Flickinger's contract with Swedlow. A final judgment on the merits was entered against them upon their counterclaim in the form in which it was stated, and they now take the position that they are not barred in this action either upon the theory of res judicata or upon the theory that said section 439 is applicable. They rely on cases indicating that an action upon an account stated is a different form of action from an action upon the original obligation. Jones v. Wilton, 10 Cal.2d 493, 498, 75 P.2d 593; Young v. LoPresti, 95 Cal.App. 79, 82, 272 P. 310; Hallford v. Baird, 27 Cal.App.2d 384, 389, 80 P.2d 1040. We are of the view, however, that such cases are not helpful to plaintiff here; and that to sustain plaintiff's claim would defeat the salutary purpose and policy of the compulsory counterclaim requirement.

[2-4] The law abhors a multiplicity of actions, and the obvious intent of the Legislature in enacting the counterclaim statutes, Code Civ.Proc. §§ 438, 439, was to provide for the settlement, in a single action, of all conflicting claims between the parties arising out of the same transaction. (23 Cal.Jur. § 4, pp. 221-222.) Thus, a party cannot by negligence or design withhold issues and litigate them in successive actions; he may not split his demands or defenses; he may not submit his case in piecemeal fashion. Brunswig Drug Co. v. Springer, 55 Cal.App.2d 444, 449-450, 130 P.2d 758. If by an attempt at artful pleading, a party could assert his cause in one form in one action and, after an adverse decision on the merits, reassert it in another form in a subsequent action, there would be no end to litigation; and, of course, the mere fact that Flickinger may have seen fit to counterclaim in the prior action in the form of an account stated cannot place him in any better position than if he had omitted to file a counterclaim of any kind in that action.

[5-9] Plaintiff contends, however, that he is not barred from relitigating his rights under his contract with Swedlow as this is an action on Swedlow's bond; that the defendant surety company was not a party to the prior action and could not have been made a party except by way of cross-complaint; and that plaintiff was not required to file a cross-complaint in the prior action. The fallacy underlying this contention is that any right which plaintiff might have had to recover upon the bond was necessarily dependent upon plaintiff's right to recover upon his contract with Swedlow. While he had the option to file a cross-complaint on the bond and thereby bring in the surety as a party in the prior action, Code Civ.Proc. § 389, he was clearly compelled to assert by way of counterclaim, in said prior action, any right which he had against Swedlow under the contract which was the basis of Swedlow's prior action. Schrader v. Neville, 34 Cal.2d 112, 115, 207 P.2d 1057. Having omitted to assert directly in that action his alleged rights under the contract, but having elected to assert

his alleged rights upon an alleged account stated with the resulting adverse final judgment on the merits, plaintiff is now barred from relitigating his alleged rights under the contract as the basis for an action against Swedlow as the principal on the bond. And as such defense to this action is available to Swedlow as the principal, it is likewise available to defendant Fireman's Fund, as the surety on the bond. "Sureties on a bond have a legal right to avail themselves of all defenses that would be allowed the principal and are generally in no worse position than he would be if sued separately." 8 Cal.Jur.2d § 82, p. 691; County of Sonoma v. Hall, 132 Cal. 589, 593-594, 62 P. 257, 312, 65 P. 12, 459.

[10] Nor does the record support plaintiff's claim that by reason of laches, waiver or estoppel, defendants may not rely on the statutory bar of section 439 of the Code of Civil Procedure. In answer to plaintiff's original complaint in this action, defendants urged as an affirmative defense the pendency of the prior action. At that time and apparently until the entry of judgment in that action on February 3, 1953, defendants believed that the issue herein as to the liability of the parties on their conflicting claims arising out of their basic agreement was being litigated in the prior action. Then, when plaintiff indicated his intent to bring the present action to trial, defendants were granted leave to amend their answer by adding the further defenses of res judicata and the statutory bar of the compulsory counterclaim. Code Civ.Proc. § 439. Plaintiff offered no evidence showing any laches, waiver or estoppel chargeable against defendants in so amending their answer; and to the contrary, the record indicates that defendants acted with reasonable promptness in filing their amendment on December 30, 1953, after the parties had submitted arguments thereon, and prior to the trial herein.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

Barbara EMERY and Joyce Emery, minors,
by and through their Guardian ad litem,
Esther Louise Emery, and Esther Louise
Emery, Plaintiffs and Appellants,

v.

Buel E. EMERY, James Buel Emery, First
Doe, Second Doe, Third Doe, and Fourth
Doe, Defendants and Respondents.

S. F. 19339.

Supreme Court of California, In Bank.

Oct. 28, 1955.

Action by unemancipated minor daughters and by mother against father and unemancipated minor son for injuries sustained while daughters were guests in automobile owned by father and driven by son and for medical and other care furnished by mother. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., entered judgment on order which sustained, without leave to amend, defendants' general demurrer to plaintiffs' second amended complaint, and plaintiffs appealed. The Supreme Court, Traynor, J., held that father and son were not immune from suit by daughters but that mother's pleading was defective as against father and son.

Judgment reversed.

Opinion, 284 P.2d 150, vacated.

1. Automobiles $\hookrightarrow$ 229½

Where automobile accident out of which personal injury action arose occurred in Idaho, Idaho law would be determinative of answer to question whether complaint alleged facts sufficient to constitute causes of action against the defendants.

2. Negligence $\hookrightarrow$ 11

"Wilful misconduct" implies at least the intentional doing of something either with knowledge that serious injury is a probable, as distinguished from possible, result, or intentional doing of an act with wanton and reckless disregard of its possible result.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

3. Automobiles ⇨238(7)

Complaint, which alleged that host motorist was an unskilled driver, was sleepy, and had not slept for twenty-four hours, but drove at excessive speed on narrow road, and that such facts were known to automobile owner under whose direction motorist drove, and that motorist's falling asleep caused automobile to roll over, was, under Idaho guest statute, sufficient to allege "wilful misconduct" on part of host motorist and owner. I.C. § 49-1001; Vehicle Code, § 403.

4. Husband and Wife ⇨203½

Infants ⇨3

Parent and Child ⇨11

Where, in action by unemancipated minor daughters and by mother against father and unemancipated minor son for injuries sustained and medical and other care furnished as result of automobile accident, all parties were apparently domiciliaries of California, the Supreme Court would look to California law to determine whether any disabilities or immunities existed.

5. Parent and Child ⇨11

Preservation of parent's right to discipline his minor children has been basic policy behind rule of parental immunity from tort liability.

6. Parent and Child ⇨2(1), 11

Law imposes on parent duty to rear and discipline his child and right to prescribe course of reasonable conduct for child's development, and parent has wide discretion in performance of his parental functions, but such discretion does not include right wilfully to inflict personal injuries beyond limits of reasonable parental discipline.

7. Parent and Child ⇨11

An unemancipated minor may sue his parent for a wilful or malicious tort.

8. Parent and Child ⇨11

Father was not immune from suit brought by his unemancipated minor daughters for alleged wilful misconduct concerning father's automobile in which daughters were injured while passengers, and which was being operated by minor unemancipated son at time of injury.

9. Infants ⇨59

Exception to general principle of liability of minors for their torts would not be lightly created and would not be created on basis of speculative assumption that, to do so, would preserve family harmony between plaintiff unemancipated sisters and defendant unemancipated brother. West's Ann. Civ.Code, §§ 41, 3523.

10. Infants ⇨59

Mere possibility of fraud or collusion in tort actions between minor unemancipated brothers and sisters because of possible existence of liability insurance would not warrant immunity from liability between brothers and sisters where liability would otherwise exist, since child's interest in freedom from personal injury caused by tortious conduct of another would be sufficient to outweigh any danger of fraud or collusion.

11. Torts ⇨21

Courts will not immunize tort-feasors from liability in a whole class of cases because of possibility of fraud, but will depend upon the Legislature to deal with the problem as a question of public policy.

12. Automobiles ⇨181(1)

In enacting the guest statute, Legislature considered that immunity thereby granted was sufficient to protect automobile owner and operator from fraudulent claims, and, therefore, the Supreme Court would not extend such immunity further in a particular class of cases to claims for injuries proximately resulting from operator's wilful misconduct or intoxication. Vehicle Code, § 403.

13. Parent and Child ⇨8, 13(1)

Ordinarily, parent is not vicariously liable for torts of his minor child, and minor child's property is his own and not that of his parents. West's Ann.Civ.Code, § 202.

14. Infants ⇨59

Possibility of unemancipated minor brother's succession, by intestacy, to damages recovered from him by his unemancipated minor brother or sister would be too remote and speculative to form basis upon which to found rule of immunity from tort liability between brothers and sisters.

15. Infants ⚭59

Unemancipated minor sisters, who were injured while guests in automobile owned by their father and driven by unemancipated minor brother, were entitled to maintain personal injury action against their minor brother.

16. Husband and Wife ⚭249

Negligence ⚭89(2)

Parent and Child ⚭7(9)

Cause of action for damages suffered by parents because of injury to their minor unemancipated daughters was community property, and husband's alleged wilful misconduct in permitting his automobile to be operated by his unemancipated minor son in certain alleged manner was imputable to mother, and, therefore, mother could not recover from father for medical and other care furnished by mother to unemancipated minor daughters who were injured while guests in the automobile.

17. Parent and Child ⚭7(11)

Mother's pleading, which attempted to state cause of action against her unemancipated minor son for medical and other care furnished by mother to unemancipated minor daughters who were injured while guests in automobile driven by son, was defective in view of fact that it failed to comply with requirements pertaining to bringing of such action by one parent where other parent has failed to join as plaintiff. West's Ann.Code Civ.Proc. § 376.

1. The relevant paragraphs of the complaint are as follows:**VII**

"That on or about the 18th day of June, 1952, at approximately 9:30 A. M., on said public highway 99, about twenty-eight miles west of Idaho Falls, in the State of Idaho, the Plaintiff was riding as a guest in a certain 1939 Pontiac Automobile, California license plate, being driven, operated and maintained by the Defendant, James Buel Emery as the agent, servant and employee of the Defendant Buel E. Emery, that the said Buel E. Emery is the legal registered owner of said 1939 Pontiac automobile, California license plate.

VIII

"That at all times herein mentioned defendant James Buel Emery was a minor of the age of seventeen (17) years;

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein and Robert J. Cort, San Francisco, for appellants.

Worthington, Park & Worthington and Ronsia W. Fields, San Francisco, for respondents.

TRAYNOR, Justice.

Plaintiffs Barbara and Joyce Emery, unemancipated minor daughters of plaintiff Esther Emery and defendant Buel Emery, brought this action to recover for personal injuries sustained in an automobile accident that occurred in the State of Idaho. At the time of the accident, Barbara and Joyce were riding as guests in an automobile owned by Buel and driven by defendant James Emery, their unemancipated minor brother. Esther, appearing individually, alleges that she is responsible for the support, maintenance, and medical care of Barbara and Joyce and attempts to state a separate cause of action to recover for medical, nursing, hospital, and other care furnished Barbara and Joyce. Judgment for defendants was entered on an order sustaining, without leave to amend, defendants' general demurrer to plaintiffs' second amended complaint. Plaintiffs appeal.

[1] The first question presented on appeal is whether Barbara and Joyce have alleged facts¹ sufficient to constitute causes of action against defendants, assuming that

that at time and place hereinafter and hereinbefore mentioned; said minor defendant James Buel Emery had only been driving for a short period of time and was an unskilled and inexperienced driver and unaccustomed to driving during the times, in the places and under the circumstances hereinbefore and hereinafter mentioned; all of which facts were known to the Defendant Buel E. Emery.

IX

"That at said time, place, and direction, as aforesaid, the Defendants James B. Emery and Buel E. Emery were guilty of wilful misconduct; that said wilful misconduct consisted of the following acts under the following existing circumstances: That Defendant Buel E. Emery, the father of the minor Defendant James B. Emery, directed the said minor Defendant James B. Emery to drive that cer-

the latter are not immune from suit because of their family relationship to these plaintiffs. Since the accident occurred in the State of Idaho, the law of that state is determinative of the answer to this question. *Grant v. McAuliffe*, 41 Cal.2d 859, 862, 264 P.2d 944, 42 A.L.R.2d 1162; *Loranger v. Nadeau*, 215 Cal. 362, 366-367, 10 P.2d 63, 84 A.L.R. 1264. The applicable Idaho statute provides, "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others." Idaho Code, § 49-1001.

The Idaho Supreme Court has interpreted the term "reckless disregard" in that statute as describing conduct that is not necessarily as culpable as that described by the words "wilful misconduct" as used in section 403

of the California Vehicle Code.² *Mason v. Mootz*, 73 Idaho 461, 253 P.2d 240, 243; *Hughes v. Hudelson*, 67 Idaho 10, 169 P.2d 712, 716. A fortiori, if the complaint states causes of action for "wilful misconduct" within the meaning of the California statute it also states causes of action for conduct in "reckless disregard of the rights of others" within the meaning of the Idaho statute.

[2,3] "Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. [Citations.]" *Norton v. Puter*, 138 Cal.App. 253, 258, 32 P.2d 172, 174, quoted with approval in *Parsons v. Fuller*, 8 Cal.2d 463, 468, 66 P.2d 430. "Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton

tain 1939 Pontiac automobile, California license plate, knowing that the said Defendant James B. Emery was sleepy and drowsy and had not had any sleep for a long period of time in excess of twenty-four hours; that the said Defendant James B. Emery did for many miles and for a long period of time prior to and during said accident, drive at high and excessive rates of speed, with the knowledge and consent of his father, the said Defendant Buel E. Emery; that the said defendant Buel E. Emery, the father of the minor defendant James Buel Emery, directed the said minor defendant James Buel Emery to drive that certain 1939 Pontiac automobile, California license plate, knowing that the said minor Defendant James Buel Emery was an unskilled driver and unaccustomed to driving during the times, in the places and under the circumstances hereinbefore and hereinafter mentioned; that said Defendant Buel E. Emery knew that the said road was in a dangerous condition in that said road had dirt and gravel on either side and was only a 2-lane highway; that while the minor Defendant James Buel Emery was so operating said aforementioned automobile, said minor Defendant James Buel Emery fell asleep at the wheel of said car while said car was travelling at said high and excessive

rates of speed, and lost control thereof, causing said car to roll over; that all of the aforementioned wilful misconduct of the defendants took place with a complete disregard of and indifference to the great possibility of injuring the persons riding in the car that defendants were operating, including the plaintiff herein, and with full knowledge of the dangers involved; and that as a direct and proximate result of said wilful misconduct on the part of the defendants as aforementioned the said 1939 Pontiac automobile, California license plates, did at the aforementioned time and place and direction leave the highway and roll over as aforementioned, causing the plaintiff to sustain severe, serious and permanent injuries as hereinafter set forth."

2. "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

and reckless disregard of its *possible* result.'” Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194, 197, quoted with approval in Mercer-Fraser Co. v. Industrial Acc. Comm., 40 Cal.2d 102, 118, 251 P.2d 955. In Parsons v. Fuller, *supra*, it was held that the evidence, which showed that the defendant had “persisted” in driving at an excessive rate of speed “for some hours and over many miles of travel, after repeated protests on the part of his guest, and while they were traveling over a mountain road with frequent curves * * *,” was sufficient to show wilful misconduct. 8 Cal.2d at page 465, 66 P.2d at page 431. In that case the court said, “To us it seems clear that one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, “takes a chance” on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of willful misconduct.” Ibid., 8 Cal.2d at pages 468-469, 66 P.2d at page 433. In the present case it is alleged in the complaint (see footnote 1, *supra*) that James was an unskilled driver, that immediately before the accident he was “sleepy and drowsy” and had not had any sleep for more than 24 hours, that for a long period of time and many miles of travel before the accident he drove at high and excessive rates of speed on a road that was narrow and unfamiliar to him, that the foregoing facts were known to Buel, that James drove under these circumstances with the consent and under the direction of Buel, that James fell asleep “while said car was travelling at said high and excessive rates of speed, and lost control thereof, causing said car to roll over. * * *” Applying the foregoing principles, we conclude that the complaint adequately alleges wilful misconduct on the part of James and Buel and thus that the minor plaintiffs have stated causes of action against defendants, assuming that the latter are not immune from suit because of

their family relationship to the minor plaintiffs.

[4] To determine whether Buel and James are immune from liability to Barbara and Joyce for the torts alleged in the complaint, it is first necessary to decide whether that question should be determined by the law of California or that of Idaho. This choice of law problem is one of first impression in this state. The possible choices in cases like the present one are three: the law of the place where the injury occurred, the law of the forum, and the law of the state in which the family is domiciled. We are aware of only two reported cases on the precise question presented. In Ball v. Ball, 269 P.2d 302, 304, the Supreme Court of Wyoming applied the law of the place (Montana) where the injury occurred to determine this question. It is not, however, a question of tort but one of capacity to sue and be sued³ and as to that question the place of injury is both fortuitous and irrelevant. In Fowlkes v. Ray-O-Vac Co., 52 Ga.App. 338, 340, 183 S.E. 210, 212, the Court of Appeals of Georgia held that in actions between a minor child and its parent the “law of the forum governs as to the parties and the right to sue.” In a somewhat analogous situation, many courts have held in tort actions between husbands and wives that questions of capacity to sue and be sued should be governed by the law of the forum. (See Ford, Interspousal Liability for Automobile Accidents in the Conflict of Laws, 15 U.Pitts.L.Rev. 397, 419, and cases cited.) It should be noted, however, that in many of these cases, as in Fowlkes v. Ray-O-Vac, *supra*, the state of the forum was also the state of the domicile. Although tort actions between members of the same family will ordinarily be brought in the state of the family domicile, the courts or another state will in some cases be a more convenient forum, and thus the question arises whether the choice of law rule should be expressed in terms of the law

3. The parent's immunity, if any, from tort liability is based on the minor child's disability to sue rather than on the absence of a violated duty. See Worrell v. Wor-

rell, 174 Va. 11, 23, 27, 4 S.E.2d 343; Dunlap v. Dunlap, 84 N.H. 352, 372, 150 A. 905, 71 A.L.R. 1055.

of the forum or that of the domicile. We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist.

Defendants contend that *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7, and *Myers v. Tranquillity Irrigation District*, 26 Cal.App.2d 385, 79 P.2d 419, are controlling on the question of Buel's immunity to suit by his unemancipated minor daughters, Barbara and Joyce. In *Trudell v. Leatherby* it was stated that a "minor child has no right of action against a parent for the tort of the latter", 212 Cal. at page 680, 300 P. at page 8, but plaintiff points out that both *Trudell v. Leatherby* and *Myers v. Tranquillity Irrigation District* involved actions for injuries caused by the parent's negligence, whereas in the present case Barbara and Joyce state causes of action for wilful misconduct. To sustain their contention, plaintiffs cite a number of cases from other jurisdictions holding that, although a parent is not responsible to his minor child for negligence, he is responsible for wilful and malicious torts. *Wright v. Wright*, 85 Ga.App. 721, 70 S.E.2d 152, 155-156 [wilful misconduct]; *Treschman v. Treschman*, 28 Ind. App. 206, 210-212, 61 N.E. 961 [assault and battery]; *Siembab v. Siembab*, 202 Misc. 1053, 1056, 112 N.Y.S.2d 82 [wilful misconduct]; *Meyer v. Ritterbush*, 196 Misc. 551, 554, 92 N.Y.S.2d 595 [wilful misconduct],

affirmed 276 App.Div. 972, 94 N.Y.S.2d 620; *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923 [intentional mental cruelty]; *Dix v. Martin*, 171 Mo.App. 266, 274, 157 S.W. 133 [assault]; *Cowgill v. Boock*, 189 Or. 282, 293-301, 218 P.2d 445, 20 A.L.R. 2d 219 [wilful misconduct]; see also, *Cannon v. Cannon*, 287 N.Y. 425, 429, 40 N.E. 2d 236; *Baker v. Baker*, Mo., 263 S.W.2d 29, 30-31; *Levesque v. Levesque*, 99 N.H. 147, 106 A.2d 563, 564; *Matarese v. Matarese*, 47 R.I. 131, 134, 131 A. 198, 42 A.L.R. 1360; *Aboussie v. Aboussie*, Tex.Civ. App., 270 S.W.2d 636, 639; *Brumfield v. Brumfield*, 194 Va. 577, 583, 74 S.E.2d 170; *Securo v. Securo*, 110 W.Va. 1, 2, 156 S.E. 750.

[5-8] Although there are no California cases involving an action by a minor child against its parent for a wilful or malicious tort, the modern trend of decisions, see, Annotation 19 A.L.R.2d 423, 427 and cases cited; *Prosser on Torts* [2d ed.] 675-677; *Davis v. Smith*, D.C.E.D.Pa., 126 F.Supp. 497, 502-506 and cases cited; *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055; *Borst v. Borst*, 41 Wash.2d 642, 647-654, 251 P.2d 149 and cases cited; 29 N.Y. U.L.Rev. 1302; 39 Va.L.Rev. 389, is to mitigate the rule of absolute immunity established by the early cases of *Hewlett v. George*, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 [false imprisonment of minor child in an insane asylum], and *Roller v. Roller*, 37 Wash. 242, 79 P. 788, 68 L.R.A. 893 [rape of a minor child by her father]. The rationale of the cases refusing to extend immunity to the parent for wilful or malicious torts against his minor children is that the lack of such immunity does not conflict with or inhibit reasonable parental discipline. See *Cowgill v. Boock*, supra, 189 Or. 282, 293, 297-298, 218 P.2d 445; *Borst v. Borst*, supra, 41 Wash.2d 642, 656, 251 P.2d 149; *McCurdy*, "Torts Between Persons in Domestic Relations," 43 Harv.L. Rev. 1030, 1079; 64 Harv.L.Rev. 1208. Preservation of the parent's right to discipline his minor children has been the basic policy behind the rule of parental immunity from tort liability. (See *McCurdy*, supra, 43 Harv.L.Rev. 1030, 1076-1077.)

Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right wilfully to inflict personal injuries beyond the limits of reasonable parental discipline. No sound public policy would be subserved by extending it beyond those limits. While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent's wilful or malicious misconduct. A child, like every other individual, has a right to freedom from such injury. Accordingly, we conclude that an unemancipated minor may sue his parent for a wilful or malicious tort, and thus that Buel is not immune from suit for the causes of action pleaded by Barbara and Joyce in the complaint in the present action.

[9] In support of their contention that James is not immune from suit, plaintiffs Barbara and Joyce cite *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E.2d 254, 123 A.L.R. 1015, in which the New York Court of Appeals held that an action was maintainable by a 12-year-old boy against his 16-year-old sister for injuries sustained while riding in an automobile negligently operated by her. See also, *Munsert v. Farmers Mut. Automobile Ins. Co.*, 229 Wis. 581, 586, 281 N.W. 671, 119 A.L.R. 1390; *Beilke v. Knaack*, 207 Wis. 490, 493-494, 242 N.W. 176. Although defendants concede that the few reported cases involving this question all support plaintiffs' contention that actions between minor brothers and sisters are maintainable, they nevertheless argue that those cases are unsound and should not be followed by this court. They contend that to allow tort actions to be maintained between minor brothers and sisters will (1) disrupt the family harmony, (2) encourage fraud and collusion, (3) impair the parents' exercise of their disciplinary functions, (4) result in an uneven distribution of the family resources, and (5) encourage useless litigation since there is a possibility that the minor defendant will

live to inherit the money recovered from him by the minor plaintiff. These arguments are not persuasive. Exceptions to the general principle of liability, Civ.Code, § 3523 ["For every wrong there is a remedy."] of minors for their torts, Civ.Code, § 41; *Ellis v. D'Angelo*, 116 Cal.App.2d 310, 313-315, 253 P.2d 675, are not to be lightly created, and we decline to create such an exception on the basis of the speculative assumption that to do so would preserve family harmony. An uncompensated tort is no more apt to promote or preserve peace in the family than is an action between minor brother and sister to recover damages for that tort. Furthermore, the relationship between brother and sister is not complicated by reciprocal rights and obligations of the kind that characterize the relationships of husband and wife and parent and child and that lend some support to the immunities from tort liability that have been recognized in such cases.

[10-12] Defendants' second argument, that tort actions between minor brothers and sisters will encourage fraud and collusion, is based on assumptions opposite from those on which their first argument is based. This argument assumes that the action is not in reality directed against the minor brother or sister of the plaintiff, but is in fact directed at his liability insurer. If this assumption is correct, maintenance of such a tort action would not disturb the family peace and harmony; on the contrary, the "domestic harmony will not be disrupted so much by allowing the action as by denying it." (Prosser on Torts [2d ed.] 677.) Moreover, although defendants' statement that the existence of insurance, of which there is no evidence in the present case, "gives no cause of action where one did not exist before" is correct, by the same token the mere possibility of fraud or collusion because of the possible existence of liability insurance does not warrant immunity from liability where it would otherwise exist. The interest of the child in freedom from personal injury caused by the tortious conduct of others is sufficient to outweigh any danger of fraud or collusion. As the Supreme Court of Washington said in reply to the same argument in a case involving an analogous situation [action by a child to re-

cover for injuries caused by its parent's negligent operation of a truck for business purposes], "The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases. *Rozell v. Rozell*, supra. If those processes prove inadequate, the problem becomes one for the legislature. See *Signs v. Signs*, supra [156 Ohio St. 566, 103 N.E.2d 743]. Courts will not immunize tortfeasors from liability in a whole class of cases because of the possibility of fraud, but will depend upon the legislature to deal with the problem as a question of public policy." *Borst v. Borst*, supra, 41 Wash.2d 642, 653-654, 251 P.2d 149, 155. In California, the Legislature has dealt with the problem. Our guest statute, Veh.Code § 403, which was enacted to protect owners and operators of vehicles from fraudulent claims of those riding as guests, *Weber v. Pinyan*, 9 Cal.2d 226, 229, 70 P.2d 183, 112 A.L.R. 407, grants the owner and operator of a vehicle absolute immunity from liability for injuries proximately resulting from negligence in the operation of the vehicle. Since the Legislature obviously considered that the immunity thus granted was sufficient to protect the owner and operator from fraudulent claims, we think it improper for this court to extend that immunity further in a particular class of cases to claims for injuries proximately resulting from the operator's wilful misconduct or intoxication.

[13-15] Although defendants contend that to allow tort actions between minor brothers and sisters will impair their parents' exercise of their disciplinary functions, they fail to make clear how that impairment will take place and we see no sub-

stance in the contention. Similarly, the contention that to allow a sister to recover a judgment against her brother will result in an uneven distribution of the family resources is without merit. A parent is not ordinarily vicariously liable for the torts of his minor child, *Weber v. Pinyan*, 9 Cal.2d 226, 235, 70 P.2d 183; *Martin v. Barrett*, 120 Cal.App.2d 625, 628, 261 P.2d 551; *Ellis v. D'Angelo*, supra, 116 Cal.App.2d 310, 317, 253 P.2d 675, and a minor child's property is his own and not that of his parents. In re Estate of Tetsubumi Yano, 188 Cal. 645, 649, 206 P. 995; Civ.Code, § 202. Finally, we think that the possibility of a minor defendant's succession by intestacy to the damages recovered from him by a minor brother or sister is too remote and speculative a basis on which to found the rule of immunity for which defendant contends. (See *McCurdy*, supra, 43 Harv.L. Rev. 1030, 1073.) Accordingly, we conclude that Barbara and Joyce may maintain the present action against their minor brother, James.

[16,17] In the third cause of action pleaded in the complaint Esther, the mother of the minor plaintiffs, attempts to recover for the expenses incurred in caring for and treating the injuries received by the minor plaintiffs. Insofar as that cause of action is pleaded against her husband, Buel, the pleading is defective since a cause of action for damages suffered by the parents because of injury to their minor child is community property, *Flores v. Brown*, 39 Cal.2d 622, 630, 248 P.2d 922 and Buel's alleged wilful misconduct is imputable to Esther. (*Ibid.*) Insofar as Esther attempts to state a cause of action against her minor son, James, the pleading is defective since it fails to comply with the requirements of section 376 of the Code of Civil Procedure.⁴

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER and SPENCE, JJ., concur.

4. "The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another. If either parent shall fail on demand to join as plaintiff in such action or is dead

or cannot be found, then the other parent may maintain such action and the parent, if living, who does not join as plaintiff must be joined as a defendant
* * *"

45 Cal.2d 414

**Anthony ROGERS, Plaintiff and
Respondent,
v.**

**LOS ANGELES TRANSIT LINES, Langen-
dorf United Bakeries, Inc., Ben B. Harmell
and E. E. Feb, Defendants and Appellants.
L.A. 23806.**

Supreme Court of California.
In Bank.
Oct. 28, 1955.

Action against owner and drivers of truck and bus for injuries sustained by a bus passenger whose elbow, which was protruding from bus window, struck open rear door of parked bakery truck. The Superior Court, Los Angeles County, Wallace L. Ware, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, Carter, J., held that passenger's resting of his arm on the windowsill did not constitute contributory negligence as a matter of law.

Affirmed.

Opinion 283 P.2d 265, vacated.

1. Carriers ⇨280(1)

Duty of care owed to passenger by common carrier includes use of utmost care and diligence for his safe carriage.

2. Carriers ⇨320(20, 30)

In action against carrier for injuries sustained by passenger whose elbow, which was protruding from bus window, struck open door of parked bakery truck, evidence was sufficient to take to jury questions as to whether bus driver had been negligent in driving too close to truck and as to whether bus driver should have anticipated that truck door might be open or whether opening of truck door just before passenger's elbow was struck was such an independent intervening cause as would break chain of causation.

3. Carriers ⇨316(1)

Res ipsa loquitur doctrine was applicable as between passenger and owner and driver of bus in which passenger was rid-

ing when he was injured as result of his elbow (which was at time protruding from bus window) striking open rear door of bakery truck.

4. Appeal and Error ⇨856(1)

Doctrine of res ipsa loquitur could be relied upon to support judgment for passenger in his action against carrier even though passenger had offered no jury instruction on subject and none had been given.

5. Carriers ⇨347(6)

In action against carrier for injuries sustained by passenger whose elbow, which was protruding from bus window, struck open rear door of parked bakery truck, question of contributory negligence and assumption of risk were, under evidence, for jury.

6. Carriers ⇨347(6)

Passenger's resting of his arm on windowsill of bus does not constitute contributory negligence as a matter of the law.

7. Negligence ⇨105

A person, if fully informed, may assume risk even though dangerous condition is caused by negligence of others; but he does not assume risk of negligence which he has no reason to anticipate.

8. Negligence ⇨105

Assumption of risk requires knowledge of danger, and mere fact that plaintiff would, in exercise of ordinary care, have known and appreciated danger is not sufficient.

9. Trial ⇨261

Trial court was under no duty to correct tendered instructions.

10. Trial ⇨236(1)

Instruction that credibility of party could be tested by contradictory statements in pretrial deposition read in evidence adequately covered subject, and it was not error to omit therefrom direction that if any statement in such deposition constituted an admission against interest it could be considered in determining truth or falsity thereof as well as in judging credibility.

11. Automobiles ⇨173(1)

Statute, prohibiting leaving a door open on side of vehicle available to moving traffic for period of time longer than necessary to load or unload passengers, applies to trucks as well as to passenger vehicles. Vehicle Code, §§ 32, 596.6.

12. Automobiles ⇨245(17)

In action against truck owner and driver for injuries sustained by bus passenger whose elbow, which was protruding from bus window, struck open rear door of parked bakery truck, evidence raised question for jury with regard to negligence of defendants.

Melvin L. R. Harris, David S. Smith, Parker, Stanbury, Reese & McGee and William C. Wetherbee, Los Angeles, for appellants.

F. Murray Keslar, Los Angeles, for respondent.

CARTER, Justice.

Defendants, Los Angeles Transit Lines, hereafter called Transit Lines, a common carrier of passengers by bus in Los Angeles, Feb, the driver of one of its busses, Langendorf United Bakeries, hereafter called Langendorf, a corporation operating trucks delivering its products, and Harmell, the driver of one of its trucks, appeal from a judgment entered on a jury verdict for damages for plaintiff for personal injuries alleged to have been suffered by plaintiff as the result of defendants' negligence. Plaintiff's right arm was injured when he was resting it on the window ledge of Transit Lines' bus in which he was riding as a passenger when it collided with the rear door of Langendorf's truck.

Plaintiff was riding as a regular passenger on a Transit Lines' bus driven by Feb. He was seated on the right rear side of the bus beside a window. The day was warm and that window and others were open. The window ledge was shoulder high to plaintiff, and he was resting his right arm on it with his elbow protruding beyond the outside of the ledge. The bus was being driven

on Beverly Boulevard, a street having three lanes on each side of its center including the one next to the curb. Langendorf's truck was parked on Beverly Boulevard in the curb lane about half way between two streets intersecting Beverly. The bus swung to the curb lane and made a stop. The driver proceeded ahead swinging the bus out toward the center lane (of the three lanes) and around the truck. He drove so close to the truck that plaintiff's elbow collided with the door on the end of the truck which was open and in that position extended beyond the side of the truck. As a result thereof plaintiff suffered the injuries for which he was awarded damages against all four defendants.

Defendants Transit Lines and Feb contend that as a matter of law they were not negligent; that plaintiff was contributively negligent and had assumed the risk; and that there was error with respect to the jury instructions.

[1-4] It is conceded by those defendants that: "[T]he duty of care owed to a passenger by a common carrier includes the use of the utmost care and diligence for his safe carriage." *McBride v. Atchison, Topeka & S. F. Ry. Co.*, 44 Cal.2d 113, 279 P.2d 966, 968. In the light of that rule the jury could properly conclude, as it did, that the bus was driven too close to the parked truck for safety. The bus was 105 inches wide; the middle lane in which it was proceeding was 108 inches wide. While no part of the bus contacted any part of the truck, the proximity of the bus to the truck was evident. Plaintiff's elbow was struck and it protruded only 2 to 4 inches beyond the window sill. The rear door of the truck when open extended 4 inches beyond the fender, the widest part of the truck. Plaintiff testified that the door on the truck was opened just before his elbow was struck, and it was for the jury to decide that the bus driver should have anticipated that might happen; that it was not an independent intervening cause such as would break the chain of causation. See *Richardson v. Ham*, 44 Cal.2d 772, 285 P.2d 269; *Austin v. Riverside Portland Cement Co.*, 44 Cal.2d 225, 282 P.2d 69. There were no guards or bars on the bus window. It is

common practice for a person to rest his arm on the window sill of the vehicle which he is driving or in which he is riding and allow his elbow to protrude to some extent beyond the window sill. While it would appear that the doctrine of *res ipsa loquitur* is clearly applicable as between plaintiff and Feb and Transit Lines, plaintiff did not invoke the doctrine either in the trial court or on this appeal. It may be relied upon, however, to support a judgment even though plaintiff offers no jury instruction on the subject and none is given. *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7; *Rose v. Melody Lane*, 39 Cal.2d 481, 247 P.2d 335.

[5] It is clear that the jury was not required to find plaintiff was contributively negligent or that he had assumed the risk. In addition to the evidence above mentioned plaintiff testified that he had no awareness of impending danger before the accident happened and that he did not think his arm could be hit; he was not watching the traffic.

[6] Resting the arm on the window sill such as was done here does not constitute contributory negligence as a matter of law; it is a question for the jury. See *Albania v. Kovacevich*, 44 Cal.App.2d 925, 113 P.2d 251; *Ivancich v. Davies*, 186 Cal. 520, 199 P. 784; *Gornstein v. Priver*, 64 Cal.App. 249, 221 P. 396; *Lindenberg v. Needles*, 203 Md. 8, 97 A.2d 901, 40 A.L.R.2d 233; *Capitol Motor Lines v. Billingslea*, 246 Ala. 501, 21 So.2d 240, 157 A.L.R. 1212; *Georgetown & T. R. Co. v. Smith*, 25 App.D.C. 259, 5 L.R.A.,N.S., 274; *Malakia v. Rhode Island Co.*, 36 R.I. 149, 89 A. 337, Ann.Cas. 1916C, p. 1218. While there are a few authorities to the contrary, the great weight of authority is as stated. (See authorities cited supra.)

[7] As to assumption of the risk the jury was justified in concluding that plaintiff did not have actual knowledge and appreciation of the danger involved so as to consent to the risk and the facts do not show that he knew of and appreciated the hazard. See *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, 265 P.2d 904. He was not required to anticipate that Transit Lines

and Langendorf would be negligent. Plaintiff could not have assumed the risk at all unless he actually saw that the door of the Langendorf truck was open some time before it struck his elbow and also knew that the bus was being driven too close to it. While a person, if fully informed, may assume the risk even though the dangerous condition is caused by the negligence of others. *Prescott v. Ralphs Grocery Co.*, supra, 42 Cal.2d 158, 162, 265 P.2d 904. "The plaintiff does not assume the risk of any negligence which he has no reason to anticipate, but once he is fully informed of it, it is well settled that the risks arising from such negligence may be assumed." (Prosser on Torts, p. 385.)

[8, 9] Transit Lines and Feb claim error in the refusal to give their offered instruction on assumption of risk. Suffice it to say the offered instruction was erroneous in that it advised the jury that plaintiff would assume the risk if in the exercise of ordinary care he would have known and appreciated the danger rather than that he must have knowledge of the danger. See *Austin v. Riverside Portland Cement Co.*, supra, 44 Cal.2d 225, 282 P.2d 69; *Prescott v. Ralphs Grocery Co.*, supra, 42 Cal. 2d 158, 265 P.2d 904. Under the last cited authorities the trial court was under no duty to correct the instructions.

[10] Transit Lines and Feb also claim error in the omission from an instruction of the following statement: "If, prior to the trial, the deposition of a party to the action was taken, and if part or all of it was read into evidence, and if you should believe that in said deposition he made *contradictory statement or statements in conflict with his testimony here in court, you may consider such conflicts, and any explanations given therefor, in testing his credibility, in like manner as if all such testimony were given originally at the trial. The deposition, too, was given under oath. Also, if any statement in a party's deposition constituted an admission against interest, it may be considered in determining the truth or falsity thereof as well as in judging his credibility.*" The parts italic-

ized were omitted and it is asserted that the portion with respect to admissions should have been left in. The instruction as given adequately covers the subject.

Defendants Langendorf and Harmell contend prejudicial error was committed in the giving of the following instruction at plaintiff's request: "You are instructed that Section 596.6 of the Vehicle Code of the State of California provides as follows:

"Sections 596.6—Opening and Closing Vehicle Doors.

"No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, nor shall any person leave a door open upon the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload *passengers*." (the word "passengers" was omitted although it appears in the code section mentioned); that conduct in violation of section 596.6 is negligence per se and requires a presumption of negligence but it is rebuttable and "may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise." Defendants assert the section has no application to the rear doors of panel trucks; and that inasmuch as Harmell, the operator of the truck, testified that he had both doors open to unload merchandise and while the left door extended beyond the body of his truck it did not protrude beyond the white line of the curb lane in which he was parked, the jury would no doubt have found him free from negligence if properly instructed.

[11,12] Section 596.6 refers to the opening of a door of a "motor vehicle" and that term as defined in the Vehicle Code includes trucks. Veh.Code, § 32. The reference to loading and unloading passengers does not limit its application to passenger

vehicles. There is no provision bearing upon a door left open to unload merchandise and in that respect the instruction was more favorable to defendants than required by the section. The instruction and section do nothing more than prescribe the conduct of a man of ordinary prudence with respect to opening doors on the traffic side of vehicles. *West v. House*, 99 Cal.App.2d 643, 222 P.2d 269. We hold, therefore, that the instruction was proper; the question of defendants' negligence was for the jury. *West v. House*, supra, 99 Cal.App.2d 643, 222 P.2d 269.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



45 Cal.2d 409

Josefa P. RUIZ, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Whiting Mead Company, a corporation, et al., Respondents.

L.A. 23751.

Supreme Court of California.

In Bank.

Oct. 28, 1955.

Widow of deceased employee brought proceedings to review order of the Industrial Accident Commission of State of California denying death benefits. The Supreme Court, Spence, J., held that where employee contracted silicosis in course of his employment, and date of injury was fixed as July 24, 1949, and disability payments and medical expenses were awarded for 240 weeks, and employee died on June 4, 1954, which was about 253 weeks after date of injury, and five weeks later his widow filed application for death benefits, her

claim was barred by provision of the Labor Code that proceedings for collection of death benefits may be commenced one year from date of death where death occurs within one year from date of injury, or date of last furnishing of any benefits where death occurs more than one year from date of injury, and that no such proceedings may be commenced more than one year after date of death, nor more than 240 weeks from date of injury.

Affirmed.

1. Workmen's Compensation Ⓒ1274

Where employee contracted silicosis in course of his employment, and date of injury was fixed as July 24, 1949, and disability payments and medical expenses were awarded for 240 weeks, and employee died on June 4, 1954, which was about 253 weeks after date of injury, and five weeks later his widow filed application for death benefits, her claim was barred by provision of the Labor Code that proceedings for collection of death benefits may be commenced one year from date of death where death occurs within one year from date of injury, or date of last furnishing of any benefits where death occurs more than one year from date of injury, and that no such proceedings may be commenced more than one year after date of death, "nor" more than 240 weeks from date of injury. Labor Code, §§ 4701, 5406.

See publication Words and Phrases, for other judicial constructions and definitions of "Nor".

2. Workmen's Compensation Ⓒ53

Rule that all provisions of the Workmen's Compensation Law shall be liberally construed, does not mean that the Legislature's intent, as expressed in the statute, can be ignored.

3. Statutes Ⓒ212.5

A radical change of wording of statute by the Legislature cannot be deemed meaningless and without design.

4. Workmen's Compensation Ⓒ1274

Diligence in presentation of compensation claim, so that claimant is not guilty

of sleeping on his rights, has no bearing in determining whether claimant has satisfied time provisos of statutory provision that proceedings for collection of death benefits may be commenced one year from date of death where death occurs within one year from date of injury, or date of last furnishing of any benefits where death occurs more than one year from date of injury, and that no such proceedings may be commenced more than one year after date of death, nor more than 240 weeks from date of injury. Labor Code, § 5406.

5. Constitutional Law Ⓒ301

Workmen's Compensation Ⓒ39

Application of section of the Labor Code providing that proceedings for collection of death benefits may be commenced one year from date of death where death occurs within one year from date of injury, or date of last furnishing of any benefits, where death occurs more than one year from date of injury, and that no such proceedings may be commenced more than one year after date of death, nor more than 240 weeks from date of injury, so as to cut off any right to death benefits before it accrues, is not a deprivation of property without due process of law, since right to recover death benefits is fully statutory. Labor Code, § 5406; U.S.C.A. Const. Amend. 14; West's Ann. Const. art. 1, § 13.

6. Workmen's Compensation Ⓒ47

Section of Labor Code providing that proceedings for collection of death benefits may be commenced one year from date of death where death occurs within one year from date of injury, or date of last furnishing of any benefits where death occurs more than one year from date of injury, and that no such proceedings may be commenced more than one year after date of death, nor more than 240 weeks from date of injury, is not ambiguous and neither requires nor admits of interpretation. Labor Code, § 5406.

Margolis, McTernan & Branton, Los Angeles, for petitioner.

Everett A. Corten, Edward A. Sarkisian, Herlihy & Herlihy and Ray B. Cumming, Los Angeles, for respondents.

SPENCE, Justice.

This is a proceeding to review the order of the Industrial Accident Commission denying death benefits to petitioner, who is the surviving wife of Joaquin Ruiz. Labor Code, § 4701. The denial was based on the ground that the claim was not filed within 240 weeks from the date of injury, Labor Code, § 5406, even though that period had elapsed before the time of death. The plain language of the statute sustains the Commission's order and petitioner cannot prevail.

Petitioner's husband was found to have contracted silicosis in the course of his employment; the date of injury was fixed as July 24, 1949, and disability payments and medical expenses were awarded. Thereafter, it was found that the injury resulted in permanent disability of 100 per cent, and that it became permanent and stationary on June 24, 1952. Accordingly, the Commission made an award of permanent disability payments for a period of 240 weeks, and a life pension thereafter. The deceased died on June 4, 1954, which was about 253 weeks after the date of injury. On July 9, 1954, 5 weeks later, petitioner filed her application for death benefits. At the hearing the defense of the statute of limitations was raised. The Commission found that petitioner's "application was filed more than 240 weeks from the date of injury and the claim is therefore barred." Labor Code, § 5406.

Labor Code, section 5406, (Stats.1947, ch. 1034, § 4, p. 2307) provides that proceedings for the collection of death benefits may be commenced "one year from:

"(a) The date of death where death occurs within one year from date of injury; or

"(b) The date of last furnishing of any [compensation] benefits * * * where death occurs more than one year from the date of injury.

"No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury."

The question presented is the proper application of this section in the light of the time limitations provided in the last paragraph. Petitioner contends that the claim for death benefits may be filed either one year from the date of death *or* 240 weeks from the date of injury; that she complied with the first alternative in filing her claim within one year after the date of death; that if she also were required to file the claim within 240 weeks from the date of injury, that period had elapsed before the death of her husband occurred (253 weeks after the date of injury), and the death benefit claim would therefore be barred before it ever arose. On the other hand, respondents contend that these limitations do not apply in the alternative, but rather *both* apply in determining whether or not the claim is timely filed. The clear mandate of the statute supports respondents' position.

The last paragraph of section 5406 unmistakably declares a time restriction that is based on two conditions conjunctively applicable as separated by the word "nor." This conjunction is defined as "introducing the second (and each following) member of an alternative proposition or of a negative proposition expressing reciprocation, and indicating the continuation of the force of a negative in the first member to apply equally to the second (and each following); or not; no more; and not; likewise not;—used: a. Following a negative such as *no, not, never.*" (Webster's New Inter. Dict., Second Edition, Unabridged.) From this definition it plainly appears that the last paragraph of the section means: (1) No proceeding for a death benefit may be commenced more than one year after the date of death; and (2) *likewise* no such proceeding may be commenced more than 240 weeks from the date of injury.

The governing time restriction was added to the statute in 1947. Prior to that amendment, section 5406 read as enacted in 1937,

when the following periods governed the commencement of proceedings for the collection of death benefits: "(a) One year from the date of death, and in any event within—(1) Two years from the date of injury, except as otherwise provided in this section; (2) 240 weeks from the date of injury, where the injury causing death also caused disability which continued to the date of death and for which a disability payment has been made, or agreed to be made, or proceedings for its collection had been instituted within the time limits set forth in section 5405." This section was construed in *Bianco v. Industrial Accident Commission*, 24 Cal.2d 584, 150 P.2d 806, decided July 25, 1944. There the employee's death occurred on June 11, 1941, from silicosis, which had first become disabling in April, 1939. The widow filed her application December 1, 1941, which was more than two years after the injury but within one year of her husband's death. It was held that the statutory periods were permissible alternatives—either one year from the death *or* two years from the injury, whichever was the later date—and the widow's claim was therefore not barred. In reaching this decision, the *Bianco* case expressly disapproved *Glavich v. Industrial Accident Commission*, 44 Cal.App.2d 517, 112 P.2d 774, decided April 28, 1941, wherein section 5406 in the same form had been applied to bar a widow's claim for death benefits filed within one year from her husband's death but more than two years after the date of his injury. 24 Cal.2d 591, 150 P.2d 806.

From a review of the legislative history of section 5406, it clearly appears that the purpose of the 1947 amendment was to change the existing law as enunciated in the *Bianco* decision. The majority opinion in the *Bianco* case recognized that its construction of section 5406 "is fraught with some dangers in respect to fraudulent and stale claims made by dependents long after the injury which ultimately causes death has occurred", but it declared that to be "a matter for the Legislature" to consider. 24 Cal.2d 591, 150 P.2d 810. In accord with this suggestion, the Legislature in 1947

amended section 5406, using language quite different from the prior wording and plainly indicating its intention to avoid permissible alternative time periods for the filing of claims for death benefits by providing: "No such proceedings may be commenced more than one year after the date of death, *nor* more than 240 weeks from the date of injury." (Emphasis added.) Significantly, no change was made in the statute in its 1937 form following its application in the *Glavich* case in 1941, and it was only after a contrary construction was placed upon it in the *Bianco* case in 1944 that the statute was amended. Had the Legislature been satisfied with the statute, as construed in the *Bianco* case, no change or amendment would have been necessary.

[1-3] Applying section 5406 as it now reads to the facts of this case, it is clear that petitioner's claim for death benefits, having been filed "more than 240 weeks from the date of (her husband's) injury", did not meet the statutory requirement and is therefore barred. It is true, as petitioner argues, that all provisions of the workmen's compensation law should be liberally construed to effect the law's beneficent purposes, *Colonial Ins. Co. v. Industrial Accident Commission*, 27 Cal.2d 437, 439, 164 P.2d 490, but that does not mean that the Legislature's intent as expressed in the statute can be ignored. *Pacific Coast Joint Stock Land Bank of San Francisco v. Roberts*, 16 Cal.2d 800, 805, 108 P.2d 439; *Shorb v. Barkley*, 108 Cal.App.2d 873, 877, 240 P.2d 337; *Department of Motor Vehicles California Highway Patrol v. Industrial Accident Commission*, 83 Cal.App.2d 671, 677, 189 P.2d 730; *Goldberg v. Pacific Employers Ins. Co.*, 70 Cal.App.2d 472, 476, 161 P.2d 272. Petitioner simply takes the position that the filing of her claim within one year from the date of her husband's death should still satisfy the statute, and that presentation of the claim within 240 weeks from the date of his injury should not be necessary. But such conclusion would amount to a restoration of the law prevailing under the *Bianco* decision and would require a total disregard of the Legislature's subsequent radical change of the

wording of the section. Such change cannot be deemed meaningless and without design. 23 Cal.Jur., § 154, p. 778; *People v. Santa Fe Federal Savings & Loan Ass'n*, 28 Cal.2d 675, 685, 171 P.2d 713.

[4, 5] Concededly, as petitioner maintains, if the death benefit claim must be filed within 240 weeks from the date of injury, and if that time has elapsed before the death of the employee, then the death benefit claim is barred before it ever arose. To this point, petitioner cites the general rule that ordinarily a statute of limitations begins to run from the time a cause of action accrues and there is a remedy available. *Barlow v. City Council of City of Inglewood*, 32 Cal.2d 688, 694, 197 P.2d 721; *Irvine v. Bossen*, 25 Cal.2d 652, 658, 155 P.2d 9. But this point was precisely the one that was advanced and prevailed in the *Bianco* case; and following that decision, the Legislature, presumably with knowledge thereof, 23 Cal.Jur. § 159, p. 782; *Whitley v. Superior Court*, 18 Cal.2d 75, 78, 113 P.2d 449, amended the section as it presently reads. Accordingly, the time limitation appears to be not a normal statute of limitations, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits. Diligence in the presentation of the claim, so as not to be guilty of sleeping on one's rights, apparently has no bearing if the specified time provisos are not satisfied. Petitioner claims that the application of the statute so as to cut off any right to death benefits before it accrues would be unconstitutional as a deprivation of property without due process of law. U.C.Const., Fourteenth Amendment; Cal.Const., art. 1, § 13. However, her right to recover death benefits is wholly statutory, and her constitutional objection has no bearing on the issue.

[6] It thus appears that the Legislature in plain language has declared the governing time limitations, as it has the right to do. There is no ambiguity in the present wording of the section, and it neither requires nor admits of interpretation. *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal. 2d 344, 353-354, 139 P.2d 908. Accordingly, in this case where the bar of the prescribed limitations period was raised, the

Commission properly denied relief under the provisions of section 5406 of the Labor Code.

The order of the Industrial Accident Commission is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



45 Cal.2d 395

FINANCIAL INDEMNITY COMPANY, a
California corporation, and G. Kenneth Vaughn, Petitioners,

v.

The SUPERIOR COURT of The State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

F. Britton McConnell, Real Party in Interest.

L. A. 23641.

Supreme Court of California.

In Bank.

Oct. 28, 1955.

Hearing Denied Nov. 23, 1955.

Mandamus proceeding to compel Superior Court to hear action for declaratory relief and injunction which had been brought to prevent Insurance Commissioner from taking over assets of insurance company, but in which Superior Court had refused to issue temporary restraining order to enjoin commissioner from filing statutory application for conservatorship on ground of want of jurisdiction to act until seizure by commissioner. Petitioners filed application for leave to present additional evidence. The Supreme Court, Edmonds, J., held that fact that Insurance Commissioner threatened, by application for conservatorship under statute requiring court to grant application upon showing that any of enumerated conditions existed, to take over insurance company for reasons not specified as grounds by statute, did not warrant judicial interference with exercise of commissioner's official duty, and

court was without jurisdiction to enjoin commissioner from making such application, and that evidence of insurance company's solvency had no bearing upon issue at hand.

Application for leave to produce additional evidence denied, demurrers to petition for writ of mandate sustained, and order to show cause vacated.

Carter and Schauer, JJ., dissented.

Opinion, 277 P.2d 432, vacated.

1. Appeal and Error ⚡4

Mandamus ⚡4(1)

Appeal is usual course open to litigant who believes trial court has committed error, but where court disposes of matter before it upon ground that it has no jurisdiction, and thereby precludes decision on merits, mandamus has been issued to compel court to decide issues upon merits.

2. Judgment ⚡570(9)

Dismissal of proceeding or denial of relief on sole ground of lack of jurisdiction is not decision on merits.

3. Insurance ⚡44

Only requirement for judicial action upon application of Insurance Commissioner for conservatorship is his determination that he believes a hazardous condition exists which jeopardizes future of company, and upon application stating those facts, court must issue order for conservatorship. West's Ann.Insurance Code, §§ 16, 1011.

4. Injunction ⚡85(2)

Provisions of Civil Code and Code of Civil Procedure that injunction cannot be granted to prevent execution of public statute by officers of law for public benefit, do not bar judicial action where invalidity of statute under which officer is acting is shown or where officer exceeds his powers. West's Ann.Civ.Code, § 3423, subd. 4; West's Ann.Code Civ.Proc. § 526, par. 2, subd. 4.

5. Insurance ⚡44

In taking over books and assets of insurance company, whether by application for conservatorship or by summary seizure,

if insurance commissioner follows statutory procedure and certifies that certain conditions exist, his action cannot be successfully challenged on ground of excess of authority. West's Ann.Insurance Code, §§ 1011, 1013; West's Ann.Civ.Code, § 3423, subd. 4; West's Ann.Code Civ.Proc. § 526, par. 2, subd. 4.

6. Injunction ⚡118(3)

Court is not vested with jurisdiction to issue injunction by allegation that Insurance Commissioner has abused his discretion or acted in bad faith in taking over books and assets of insurance company by application for conservatorship or by summary seizure. West's Ann.Insurance Code, §§ 1011, 1013; West's Ann.Civ.Code, § 3423, subd. 4; West's Ann.Code Civ.Proc. § 526, par. 2, subd. 4.

7. Insurance ⚡44

Primary purpose for drastic remedy provided by sections of Insurance Code authorizing Insurance Commissioner to take over books and assets of insurance company by application for conservatorship or by summary seizure is to prevent dissipation of assets of company after commissioner has determined that hazardous condition exists. West's Ann.Insurance Code, §§ 1011, 1013.

8. Injunction ⚡28

Insurance Code clearly indicates a legislative intent to create system to protect public interest in insurance companies, subordinating possible irreparable injury to companies to public interest, and issuance of injunction stopping commissioner's application for conservatorship or summary seizure would defeat purpose of such statutes. West's Ann.Insurance Code, §§ 1011, 1013.

9. Injunction ⚡28

Fact that Insurance Commissioner threatened, by application for conservatorship under statute requiring court to grant application upon showing that any of enumerated conditions existed, to take over insurance company for reasons not specified as grounds by statute, did not warrant judicial interference with exercise of commissioner's official duty, and court was

without jurisdiction to enjoin commissioner from making such application. West's Ann. Insurance Code, §§ 1011, 1013; West's Ann. Civ. Code, § 3423, subd. 4; West's Ann. Code Civ. Proc. § 526, par. 2, subd. 4.

10. Insurance ☞44

Evidence of insurer's solvency would be relevant in statutory hearing for dissolution of conservatorship. West's Ann. Insurance Code, § 1012.

11. Mandamus ☞167

In mandamus proceeding to compel Superior Court to hear action for declaratory relief and injunction which had been brought to prevent Insurance Commissioner from taking over assets of insurance company, but in which Superior Court had refused to issue temporary restraining order to enjoin commissioner from filing statutory application for conservatorship on ground of want of jurisdiction to act until after seizure by commissioner, evidence of insurance company's solvency had no bearing upon issue at hand. West's Ann. Insurance Code, §§ 1011, 1013.

John S. Bolton, Wright, Wright, Green & Wright, Loyd Wright and Dudley K. Wright, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Edmund G. Brown, Atty. Gen., Everett W. Mattoon, Asst. Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for real party in interest.

EDMONDS, Justice.

G. Kenneth Vaughn is the owner of all of the outstanding capital stock of Finan-

cial Indemnity Company, a California corporation licensed to do business as an insurer in this state. The company and Vaughn commenced an action in the superior court seeking declaratory relief and an injunction to prevent the Insurance Commissioner from taking over the assets of the corporation. As ground for justifying judicial interference with the purpose of the Insurance Commissioner, it is alleged that the condition of the company does not come within the statutory conditions allowing him to take charge of its affairs.

On the day after that action was commenced, the commissioner presented in open court an application for conservatorship pursuant to the provisions of section 1011 of the Insurance Code.¹ Vaughn and the company requested the court to issue an order to show cause and a temporary restraining order to enjoin the commissioner from filing his application. The court refused to do so, upon the ground that "it does not have any jurisdiction in such matters until the commissioner files a petition under section 1011 or summarily seizes the company under section 1013² * * *. If the court issued an injunction herein it would * * * [usurp] the discretion exclusively vested in the commissioner to determine and find, in the first instance, whether or not conditions justifying seizure existed."

Vaughn and the company then filed in the District Court of Appeal the present proceeding in mandamus. That court ordered the superior court to show cause why a writ of mandate should not issue requiring the court to proceed to a hearing and determination of the action for declaratory relief and injunction. It also

1. Section 1011: "The superior court * * * shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the commissioner * * *."

2. Section 1013: "Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or

that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises * * * and retain possession subject to the order of the court. * * *"

provided that "pending the hearing of such order to show cause, you are directed to take no action calculated to affect the pendency of said cause except to proceed with the trial thereof."

The Insurance Commissioner, as the real party in interest, noticed a motion to vacate the order to show cause or for modification of it by deleting the portion which prohibited him from filing an application for conservatorship pending the hearing. He also filed a return by way of demurrer, alleging that the petition for mandamus does not state a cause of action because the court has no jurisdiction over the respondent superior court, or the subject matter of the petition. By answer, the commissioner denies specifically and generally each and every allegation except those pertaining to the corporate status of the company, Vaughn's stock interest, the pendency of the action in the superior court and its refusal to act in the matter. As an affirmative defense, he attacks the petition upon the same grounds presented by the demurrer. The superior court demurred to the petition upon the grounds that it does not state facts sufficient to entitle the petitioners to the remedy sought.

Vaughn and the company contend that the commissioner is attempting to apply sections 1011 and 1013 of the Insurance Code in an unconstitutional manner, in that he threatens to take over the company for reasons not specified as grounds by statute. Such action, the argument continues, would deprive the petitioners of their property rights without due process of law. The position of the commissioner and the respondent court is that the writ should be denied because (1) the superior court has passed on the matter and its order is appealable; (2) the pendency of an action for declaratory relief and an injunction does not enlarge the jurisdiction of the court nor bar the commissioner from acting pursuant to section 1011 of the Insurance Code; (3) when an application is filed by the commissioner pursuant to statute, it is the mandatory duty of the respondent court to issue a vesting order; and (4) the courts have no jurisdiction to

enjoin State officers from the execution of constitutional statutes for the public benefit.

[1,2] Section 1086 of the Code of Civil Procedure provides that the writ of mandate "must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law". "An appeal is the usual course open to a litigant who believes that the trial court has committed error." *Phelan v. Superior Court*, 35 Cal.2d 363, 366, 217 P.2d 951, 953. However, where the court disposes of a matter before it upon the ground that it has no jurisdiction, and thereby precludes a decision on the merits, mandamus has been issued to compel the court to decide the issues upon the merits. See: *Cahill v. Superior Court*, 145 Cal. 42, 78 P. 467; *Times Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547; *Levy v. Superior Court*, 15 Cal.2d 692, 104 P.2d 770, 129 A.L.R. 956. A dismissal of a proceeding or a denial of relief on the sole ground of lack of jurisdiction is not a decision on the merits. See: *Hogeberg v. Industrial Acc. Comm.*, 201 Cal. 169, 182-183, 256 P. 413; *Helvey v. Castles*, 73 Cal.App.2d 667, 672, 167 P.2d 492. And in *Katenkamp v. Superior Court*, 16 Cal.2d 696, at page 698, 108 P.2d 1, at page 2, the court said, "If a court is mistaken in its assumption that it does not possess the requisite jurisdiction, *mandamus* will issue to compel it to assume jurisdiction."

The trial court's refusal to issue the requested order to show cause and temporary restraining order was based squarely upon the ground of lack of jurisdiction. The decisive question, therefore, in the present proceeding is whether upon any theory reasonably to be drawn from the facts stated in the complaint of Vaughn and the company, the commissioner may be enjoined from filing an application for conservatorship.

The purpose of Vaughn and the company is to have the issue of whether grounds for conservatorship exist determined before the commissioner is allowed to take over the company. They assert that if the conditions provided by statute as grounds for taking over the business of

an insurer do not exist, an order allowing the commissioner to do so would amount to an application of the provisions of the Insurance Code against them in an unconstitutional manner. This argument assumes that any error in judgment by the commissioner would be a violation of constitutional rights. But as was said in *Rhode Island Insurance Co. v. Downey*, 95 Cal.App.2d 220, 230-231, 212 P.2d 965, 973, "It is not a requirement of the statute * * *, that such matters not be disputable. The Legislature undoubtedly assumed that in most cases the company involved would dispute the commissioner's contentions, and accordingly provided, in section 1012³ for a full hearing before the trial court, at which the company could show that the conditions claimed by the commissioner did not exist. There is no implied restriction in the statute that the commissioner act only where the existence of the dangerous condition is beyond dispute."

In the Rhode Island case the commissioner obtained an order appointing him conservator. The company sought a writ of mandate directing the superior court to vacate the order, contending, among other points, that the facts did not justify the commissioner's action. The court refused to issue the writ, saying, "The statute, as construed by the California courts, requires only that the commissioner file a verified application stating that he has found one, or more, of the statutory grounds to exist. 'In making his application under section 1011 of the Insurance Code, the commissioner does not seek a judicial appointment and a judicial ruling that the company is in fact delinquent. By his application the commissioner merely represents that he has found certain conditions to exist and has made his official administrative determination to proceed as authorized by the statute. In obtaining ex parte order, the commissioner is not re-

quired to show to the court that the company was in fact in a hazardous condition, but only that he, as a state officer, invested by legislative authority with the power, has so "determined" and "found". * * * *Caminetti v. Imperial Mut. L. Ins. Co.*, 59 Cal.App.2d 476, 487, 139 P.2d 681, 687; emphasis added." 95 Cal.App.2d at pages 230, 231, 212 P.2d at page 973.

The court not only concluded that the issues must be heard in a proceeding brought pursuant to section 1012 but also held that an order made in accordance with its provisions is not a deprivation of due process. "Although the requirements of due process often involve a prior full hearing, it has long been recognized that where public necessity requires, there can be action followed by a hearing. * * *" 95 Cal.App.2d at page 235, 212 P.2d at page 976. Also see: *Carpenter v. Pacific Mutual Ins. Co.*, 10 Cal.2d 307, 324, 74 P.2d 761; *State Savings & Commercial Bank v. Anderson*, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675; *North American Building & Loan Ass'n v. Richardson*, 6 Cal.2d 90, 56 P.2d 1221. "It must be remembered that insurance companies, like banks and building and loan companies, are charged with a public interest, and hence, the price of doing business is the fact that whenever a condition exists which the insurance commissioner feels is hazardous, he may take over the company and the question of whether he was justified in doing so is thereafter threshed out." 95 Cal.App.2d at page 233, 212 P.2d at page 974.

[3] The Legislature has provided a procedure by which the public interest in insurance companies may be protected. The only requirement for judicial action upon the application of the commissioner is his determination that he believes a hazardous condition exists which jeopardizes the future of the company. Upon an application stating those facts, the code pro-

3. Section 1012: "Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner

to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business."

vides that the court "shall" issue the order for conservatorship. The word "shall" as used in the Insurance Code, is mandatory. Section 16.

[4, 5] Section 3423(4) of the Civil Code and also section 526, par. 2(4) of the Code of Civil Procedure provide that an injunction cannot be granted "to prevent the execution of a public statute by officers of the law for the public benefit." These sections do not bar judicial action where the invalidity of the statute under which he is acting is shown. *Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 154 P. 845, or when the officer exceeds his powers. *Cowell v. Martin*, 43 Cal. 605. However, sections 1011 and 1013 of the Insurance Code have been upheld as valid, *Rhode Island Ins. Co. v. Downey*, 95 Cal.App.2d 220, 212 P.2d 965, and if the commissioner follows the statutory procedure and certifies that certain conditions exist, his action cannot be successfully challenged on the ground of excess of authority.

In *Southern Oregon Co. v. Quine*, 70 Or. 63, 139 P. 332, 333, the court said, "We think the law is fixed, beyond cavil, that courts of equity have no power by injunction to restrain a public officer from performing an official act that he is required by valid law to perform. It is not sufficient to clothe the court with jurisdiction to say simply that, unless the court extends its restraining hand, hardships will follow, or irreparable damage will ensue, because the officer delegated to execute such law may act unwisely or injuriously to the party seeking relief. The acts must be such as are without the sanction of a sound law." This statement has been quoted with approval by the courts of this state. See: *Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 154 P. 845; *Loftis v. Superior Court*, 25 Cal.App.2d 346, 353, 77 P.2d 491.

[6, 7] A court is not vested with jurisdiction to issue an injunction by an allegation in the pleadings that the commissioner has abused his discretion or acted in bad faith. The primary purpose for the drastic remedy provided by sections 1011 and 1013 of the Insurance Code is to prevent dissipation of the assets of the

company after the commissioner has determined that a hazardous condition exists. To allow a court to delay conservatorship while it determines the motives of the commissioner would as effectively defeat that purpose as to postpone the conservatorship while the existence or nonexistence of the hazardous condition is judicially established. Any dictum in the Rhode Island case to the contrary is disapproved.

In *Modern Barber College v. California Emp. Stab. Comm.*, 31 Cal.2d 720, 192 P.2d 916, this court refused to compel, by writ of mandate, the cancellation of charges made against the petitioner for amounts assertedly due under the Unemployment Insurance Act. It was held that judicial review of the collection may be had only after payment under protest. That act provides that no injunction or writ of mandate shall issue to prevent or enjoin the collection of contributions.

In upholding the statute, the court said, "If proceedings which halt the collection of the tax were allowed to be brought before the payments are made, the power would be placed in the hands of employers to so delay the creation of the fund as to frustrate the purposes of the act. It has been expressly declared by this court that these purposes are of great public importance, and that procedural obstacles which would delay or prevent their fulfillment are to be avoided." 31 Cal.2d at page 732, 192 P.2d at page 923.

[8] The Insurance Code clearly indicates a legislative intent to create a system to protect the public interest in insurance companies. The issuance of an injunction would defeat the purpose of such statutes. See *Moore v. Superior Court*, 6 Cal.2d 421, 424, 57 P.2d 1314. The Legislature has determined that possible irreparable injury to the company must be subordinated to the public interest. See: *Rhode Island Ins. Co. v. Downey*, 95 Cal.App.2d 220, 212 P.2d 965; *North American B. & L. Ass'n v. Richardson*, 6 Cal.2d 90, 56 P.2d 1221; *State Savings & Commercial Bank v. Anderson*, 165 Cal. 437, 132 P. 755, L.R.A. 1915E, 675.

The petitioners have filed an application for leave to present additional evidence.

They claim that an examination of the company's financial condition, recently completed by the Insurance Commissioner, shows that it is solvent. They do not state the purpose for which the evidence is offered, but apparently it is in support of their position that the contemplated application by the commissioner for an order authorizing him to conduct the business as conservator is not to be made upon statutory grounds.

[9-11] For the reasons which have been stated, the petition for mandate presents no tenable ground for judicial interference with the exercise of the commissioner's official duty. Although after an order has been made upon such an application, evidence of the insurer's solvency would be relevant in a hearing conducted pursuant to section 1012 of the Insurance Code, it has no bearing upon the issue in the present proceeding. Upon the record before him, the trial judge was correct in the conclusion that the court was without jurisdiction to enjoin the commissioner from making such application.

The application for leave to produce additional evidence is denied. The demurrers to the petition for a writ of mandate are sustained, and the order to show cause is vacated.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion holds that the superior court has no jurisdiction in an action which seeks declaratory relief and an injunction against the insurance commissioner who, it is charged, is threatening to abuse and exceed his statutory power with respect to assuming control over plaintiff insurance company purportedly because it is in an unstable financial condition. It is pointed out that the commission may seize a company if certain conditions exist either with or without a proceeding in court. Insurance Code, §§ 1011, 1013.

In the action of which the majority says the superior court did not have jurisdiction, the plaintiff alleges in its complaint ample facts to give the court jurisdiction. The complaint must be accepted as true as the question involved is solely whether the action is one in which the court has jurisdiction. It is alleged that the insurance commissioner has been investigating plaintiff since its organization and has claimed that plaintiff Vaughn is not a proper person to hold the stock of the plaintiff and that it was insolvent; that plaintiff is solvent;* that during the commissioner's investigation, his subordinates "exhibited an extreme personal animosity to officers, directors, employees and counsel for plaintiff * * * and both the financial reports and the reports on the conditions of the company have been motivated by bias and prejudice, and a desire to accomplish the removal of G. Kenneth Vaughn and his family from the insurance business"; that as a result of the action of the commissioner and his subordinates and the threat to take the specified action irreparable injury has resulted and will result; that a new and unimpeachable board of directors for plaintiff has been elected and "There is not, and there is no claim by defendants that there is, any hazardous conditions in the management of plaintiff company under present management; no member of the Vaughn family has any control in the management or conduct of the business of said company.

"The financial condition of said plaintiff company is exceedingly strong and its net earnings and policy holders' surplus have, and are, increasing substantially, and the defendants do not and cannot make any claim that the company is not now in a sound financial condition and solvent within the meaning of the Insurance Code. There is no claim that the public, policyholders, or creditors are or will be exposed to any detriment. * * *

"Defendants herein have never afforded to plaintiffs an opportunity to present their case before an impartial tribunal, either

* It offers evidence here to show beyond doubt that it was and is solvent.

administrative or judicial, and have never issued any ruling or order directing plaintiffs to comply with or correct any alleged noncompliance with any provision of the Insurance Code."

The authorities are clear that a person may have declaratory relief and injunctive relief against a public officer when such officer's acts will cause him to be deprived of constitutional rights, or when the officer is acting arbitrarily and outside the scope of the powers given to him by statute when such action will cause irreparable harm to the person. In *Brock v. Superior Court*, 11 Cal.2d 682, 81 P.2d 931, petitioner, the state Director of Agriculture, sought prohibition to restrain the trial in an action by plaintiffs against defendant director to have him restrained from enforcing the milk control act because he had failed to follow the law establishing the milk control area. This court denied prohibition and found that the trial court had jurisdiction of the action. We stated, 11 Cal.2d at page 684, 81 P.2d at page 932: "In support of their demand for an injunction against the director of agriculture, the plaintiffs allege that the director of agriculture failed to comply with the provisions of the Milk Control Act in the formation of said area and in the establishment of the amended Stabilization and Marketing Plan for the sale of milk and cream within said area.

"* * * The defendant in said action, the director of agriculture, was present both upon the application for a restraining order, and at the hearing of the order to show cause why a temporary injunction should not issue. His contention on these occasions, and his contention now, is that the Milk Control Act is presumed to be valid, and that the defendant as a public officer is presumed to have regularly performed his official duty in the organization of said area and in the establishing of said stabilization and marketing plan, and, therefore, no injunction may be issued to prevent the execution of said statute by him as such public officer without the establishment, after due hearing, of the invalidity of his acts, and that until such hearing and the final determination that his acts are illegal, the courts are without jurisdiction to is-

sue an injunction restraining him from attempting to enforce the statute. * * *

"Petitioner relies upon section 526 of the Code of Civil Procedure and section 3423 of the Civil Code. The fourth subdivision of each of these sections provides that an injunction will not lie to prevent the execution of a public statute by an officer of the law for the public benefit. But petitioner concedes, as we understand his position, that if it be determined after a trial that the officer is acting illegally, then it is within the power of the court to restrain his acts. These code sections therefore do not answer our present inquiry.

"* * * The case before the trial court in that instance was precisely like that involved in a recent case decided by this court where we held that as there were issues of fact tendered by the complaint in an injunctive proceeding, the trial court had jurisdiction to try these issues of fact, and that prohibition would not lie to restrain the trial court from issuing an injunction against an officer in an attempt to enforce a public statute, until these issues of fact were determined. *Agricultural Prorate Comm. v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495. In that case our decision upon this point is as follows (page 513): 'In the injunction suit before the respondent court the plaintiffs therein made the claim that the prorate district in which the applicants were purporting to act as officers was never legally formed or organized in that the petition for the formation of said district was never signed by the necessary two-thirds of the lemon producers residing in said proposed district or zone, and therefore the commission had no authority to make its order organizing said district without an election being held therein to pass upon the question of the formation of said district. This claim on the part of said plaintiffs was set forth in paragraph XX of their complaint in which it is alleged, among other things, that "said petition was not signed by two-thirds or more in number of the producers of lemons in California, nor by the owners of two-thirds or more of the producing factors of lemons in California." If that allegation is true, then the district was not legally formed or organized, and if it was not so organized,

an injunction against the applicants restraining them from executing the terms of said act would lie. On the hearing of the application for a temporary injunction, an affidavit was filed which purported to deny the allegations of paragraph XX of the said complaint. There is nothing, however, in the record before us to indicate that the respondent court has ever passed upon the issue tendered by the allegations of said paragraph XX. In fact, it would be rather unusual for the court to finally pass upon an issue of fact on an application for a temporary injunction. This issue of fact, however, was presented by the plaintiffs in the injunction suit and the court had jurisdiction to decide it. So far it has never done so. The injunction suit is still in the respondent court, and that court has exclusive jurisdiction to hear and determine all undecided issues of facts presented by the pleadings in such suit. Should it determine that said district was legally organized and that the orders which the plaintiffs in said action seek to restrain are valid and binding upon those to whom they are directed, then it would be the duty of said court to deny the injunction and dismiss the suit. On the other hand, should the trial court find in favor of the plaintiffs in said suit upon the allegations of said paragraph XX, then it would necessarily follow that said orders would have no legal support and the defendants in said suit should be enjoined from enforcing them. For this reason, the application for a writ of prohibition directed to respondents restraining them from proceeding in said action should be denied.'

"We see no reason to recede from the position taken in the decision of that case. It appears to us to be the only reasonable conclusion that can be reached in proceedings of that nature. *To hold otherwise would be to tie the hands of the court in cases in which great and irreparable injury might be done private citizens by officers acting under a mistaken belief of their authority.*"

The same holding prevailed in *Brock v. Superior Court*, 12 Cal.2d 605, 86 P.2d 805; *Agricultural Prorate Comm. v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495; and *Agricultural Probate Comm. v. Superior Court*,

31 Cal.App.2d 518, 88 P.2d 253. In the latter case, 31 Cal.App.2d at page 523, 88 P.2d at page 255, the court said: "The second point, that the order of the respondent court violated certain Code provisions, is not well taken, for if the officers were in fact acting illegally, it is, as held in the foregoing case, within the power of the court to restrain their acts. * * * 'To hold otherwise would be to tie the hands of the court in cases in which great and irreparable injury might be done private citizens by officers acting under a mistaken belief of their authority.'" (*Brock v. Superior Court*, supra, 11 Cal.2d 682,) 81 P.2d 931.

Similarly, in the instant case the superior court had jurisdiction to determine whether the commissioner's threatened action was illegal. There can be no doubt that the injury to plaintiff insurance company will be irreparable if it is taken over by the commissioner. Its credit and standing will be seriously impaired.

The majority opinion states that plaintiff has its relief by an attack on the seizure after it has been accomplished, Ins. Code, § 1012, and that that remedy is exclusive. There is nothing in the Insurance Code which makes it the exclusive remedy as there was in the case of *Modern Barber Colleges v. California Emp. Stab. Comm.*, 31 Cal.2d 720, 192 P.2d 916, relied upon by the majority. It must be remembered that plaintiff's action was for declaratory, as well as injunctive, relief and, furthermore, we held in *California Physicians' Service v. Garrison*, 28 Cal.2d 790, 801, 172 P.2d 4, 11, 167 A.L.R. 306, that "section 1062 of the Code of Civil Procedure expressly provides that the remedy through declaratory relief is cumulative and not restrictive of any other remedy provided by law." The court was there speaking of an action wherein plaintiff sought to have the court declare that the Insurance Code did not apply to its members' business.

I would, therefore, grant the writ of mandate prayed for herein.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

45 Cal.2d 183

BUCKLEY v. CHADWICK.

L. A. 23492.

Supreme Court of California.

Nov. 8, 1955.

On petition for rehearing. For prior opinion see 288 P.2d 12.

Rehearing denied.

CARTER, Justice (dissenting).

The majority of this court has modified its opinion and denied a rehearing in this case notwithstanding the fact that the petition for rehearing pointed out that never before has an appellate court in this state held that the denial of the right to exercise a peremptory challenge is a mere error in procedure which may be cured by the application of section 4½ of Article VI of the Constitution of California and that numerous cases holding to the contrary were not even mentioned in the majority opinion. As counsel for appellant point out in their petition for rehearing there is a long and unbroken line of well considered opinions of this court and the District Courts of Appeal holding squarely that the right to challenge peremptorily is absolute, and not qualified by the necessity of showing injury. This rule was reannounced as late as July 27th, 1951 in the case of *People v. Diaz*, 105 Cal.App.2d 690, 696, 234 P.2d 300, 304, (hearing denied by this court without dissenting vote) where the District Court of Appeal said: "The denial of the right of peremptory challenge cannot be said to be a mere matter of procedure. The right is absolute. *People v. Helm*, 152 Cal. 532, 535, 93 P. 99. It is a substantial right. It has been said that it is one of the chief safeguards of a defendant against an unlawful conviction and that the courts ought to permit its freest exercise within the limitation fixed by the legislature. *People v. Edwards*, 101 Cal. 543, 544, 36 P. 7. As said by the Supreme Court of the United States in *Hayes v. Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578, 580, *experience has shown that one of the most effective means to free the jury box from persons unfit to be there is the exercise of the peremptory chal-*

lenge. The right may not be abridged or denied. Arbitrary abridgment or denial of the right runs counter to principles vital to the integrity and maintenance of the system of a constitutional right of trial by jury." (Emphasis added.)

Numerous other decisions, quoted in the decisions cited in *People v. Diaz*, *supra*, reiterate as a constitutional dogma that under our jury system, the right to peremptory challenge is absolute and an "inseparable and inalienable part of the right of trial by jury guaranteed by the Constitution." "

The majority of the court has recognized this principle in theory, but has just as effectively denied it in practice.

Upon the authority of *People v. Estorga*, 206 Cal. 81, 273 P. 575 and *People v. Hickman*, 204 Cal. 470, 268 P. 909, 270 P. 1117, this court has qualified the right and requires an "affirmative showing" of bias or prejudice. In neither of the above cited cases was a party deprived of a peremptory challenge. These two cases can therefore be no authority or precedent for the holding of this court.

In applying the provision of section 4½, Article VI, of the California Constitution, which applies to procedural defects, and not to errors of substantive law, this court has in effect overruled a number of precedents of this court holding directly to the contrary, that the provisions of section 4½, Article VI, California Constitution, do not apply where the right to peremptory challenge has been abridged.

In *People v. Carmichael*, 198 Cal. 534, at page 547, 246 P. 62, at page 67, the court, referring to Article VI, section 4½ of the Constitution, declared: "It was never intended by this provision of the Constitution to take from the defendant in a criminal action his fundamental right to a jury trial or in any substantial manner to abridge this right. *People v. Wismer*, 58 Cal.App. 679, 688, 209 P. 259."

In *People v. Wismer*, 58 Cal.App. 679, 209 P. 259, after the defendant had exercised all of his peremptory challenges, he was compelled to accept a juror who was

disqualified by reason of actual bias. The court held, 58 Cal.App. at page 687, 209 P. at page 263: "Section 4½ of article 6 of the Constitution has no application to the situation presented here. The right of trial by jury is fundamental—a right which came to us from the common law and as such guaranteed by the Constitution—and inseparably connected therewith (indeed, it is of the very essence thereof) is the right to a trial by a jury consisting of unbiased and unprejudiced persons."

In *People v. Bennett*, 79 Cal.App. 76, at page 91, 249 P. 20, at page 25, the court stated: "And it should always be remembered that, in the trial of a criminal case, any act or action of a trial court which must necessarily have the effect of denying to the accused a trial by a fair and impartial jury will not be excused or mitigated by the terms of section 4½ of article 6 of the Constitution. The right of trial by jury is fundamental."

In *People v. O'Connor*, 81 Cal.App. 506, 254 P. 630, the defendant was denied the right to exercise the number of peremptory challenges to which he was entitled under the statute. It was contended that section 4½ of Article VI applied. The court said, 81 Cal.App. at page 520, 254 P. at page 635: "As generally defined, 'procedure' includes in its meaning whatever is embraced by the three technical terms, pleading, evidence and practice. 32 Cyc. 405. Had there been no denial of the exercise of any peremptory challenges, we seriously question whether this section has any application to the cause before us. This section must refer to pleading and procedure, as authorized by the Codes. Thus, to make it applicable to the pleadings, had there been any defects in the informations not affecting the substantial rights of the parties, as accorded by law, then, and in that case, the error should be held harmless. Likewise, if the court omitted to follow the procedure embodied by the Codes for the arraignment and trial of the defendants upon the informations filed against them and had committed some error in so doing, which did not affect the substantial rights of the parties, then such error in procedure would likewise be held harmless, but, it cannot reasonably be held

that section 4½ of article 6 is so broad in its meaning as to permit the trial court to disregard the usual and ordinary procedure in the trial of a cause and adopt a new and entirely different manner from that recognized by law. Such a course is not a mistake in procedure, it is a substitution of procedure. What would excuse a mistake in procedure would not and could not be held to allow the creation of a course unprovided for by law. Mistake is one thing; a substitution is an entirely different thing." (Emphasis added.)

It is abundantly clear from the above cited authorities that section 4½ of Article VI, since it relates to procedure, has no application where the right to peremptory challenge has been interfered with. Yet, the majority here, without citation of authority in support of its position holds that simply because "the jurors were polled and were unanimous in their verdict" the error in denying appellant his right to exercise a peremptory challenge was cured by section 4½ of Article VI of the Constitution. The majority arrives at this conclusion even though it concedes that the evidence produced on behalf of appellant was amply sufficient to support a verdict and judgment in his favor.

There can be no question whatsoever that, so far as appears from the face of the majority opinion, the conclusion that no miscarriage of justice resulted was not based on a review of all of the evidence in the case but solely on the ground that there was no affirmative showing that any juror who served was biased or otherwise unfit. Of course, it is obvious from a consideration of the authorities cited in my dissenting opinion heretofore filed in this case that such a showing would be virtually impossible in view of the law relating to the unimpeachability of verdicts. But the majority does not attempt to meet this argument, but blindly invokes the provisions of section 4½ of Article VI of the Constitution because the jury was unanimous in its verdict in favor of defendant.

In so holding, it is obvious that the majority do not appreciate the significance of the right to a peremptory challenge. This

challenge has always existed in our law and has a very salutary purpose. It enables the litigant to remove from the jury box a prospective juror who has failed to disclose his true mental state and who may possess deep seated prejudices against the litigant or his case which the prospective juror will not admit on voir dire examination. The right to remove such a prospective juror without disclosing the reason therefor, is a basic fundamental right guaranteed by the statutes of this state and is known and recognized by all trial lawyers to be one of the most important safeguards against the selection of those for jury duty who are disqualified because they possess a state of mind adverse to the party exercising the challenge which cannot be disclosed by voir dire examination. The assumption of the majority that one prejudiced juror could not bring about a unanimous verdict against a party in the face of satisfactory evidence in his favor when he has been denied the right to challenge the prejudiced juror, is not borne out by either theory or practical experience. Those who have had experience in the trial of jury cases appreciate the importance of eliminating from juries those who have preconceived notions as to what result should be reached regardless of the evidence, and many tales have been told and more remain untold of how one or two overzealous jurors have brought about a verdict against the weight of the evidence. In this connection I cannot refrain from repeating the warning I so often heard from my venerable father that one rotten apple will spoil the whole barrel. While this was applied to an occasional bad boy in the community, it is just as applicable to jurors or other small groups.

It is traditional in our judicial system that the jury selected to try a case should be fair and impartial. The Legislature has endeavored to prescribe a system for the selection of juries which will as nearly as possible guarantee to litigants a jury composed of fair and impartial persons. This court has held unanimously in this case that the system provided by the Legislature for the selection of juries was not followed in this case. That there was a substantial depart-

ture from the system so prescribed there can be no question. Such being the case, the plaintiff was not accorded the type of jury trial guaranteed by the laws of this state. The majority concedes that this was error. There is only one way to cure this error and that is to grant plaintiff a new trial. To do otherwise is to deny to plaintiff the equal and exact justice to which he is entitled, by the verdict of a jury impartially selected, which Thomas Jefferson declared to be one of the principles which "form the bright constellation which has gone before us." (First Inaugural Address, March 4, 1801.)



136 Cal.App.2d 754

**Application of Rayford MEDLIN
For a Writ of Habeas Corpus.**

Cr. 5515.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 7, 1955.

Habeas corpus proceeding. The District Court of Appeal, Doran, J., held that since the petitioner had been legally committed and continued to be mentally ill, ordered to show cause theretofore issued would have to be discharged and petition for writ of habeas corpus denied.

Order accordingly.

Habeas Corpus ¶62

Where habeas corpus petitioner's claim that he had asked clerk to procure attorney to represent him and that clerk of court had failed to do so was rebutted by clerk's affidavit, which was filed together with return to show cause order, and in the return it was stated that the habeas corpus petitioner had been re-examined subsequent to filing of petition and found to be mental-

ly ill, order to show cause was discharged and petition for writ of habeas corpus denied.

Louis Most, Beverly Hills, for petitioner.

Edmund G. Brown, Atty. Gen., James D. Loeb, Deputy Atty. Gen., for respondent.

DORAN, Justice.

On August 27, 1953, a petition was filed in the Superior Court of the State of California, in and for the County of Los Angeles by Louis F. Acosta, Deputy Sheriff, alleging that he believed Rayford M. Medlin to be mentally ill and in need of supervision; that the said Rayford M. Medlin was then held in the Los Angeles County Jail, Booking No. 282688 on a charge of Suspicion of Extortion and that the said Louis F. Acosta had a letter from Dr. Marcus E. Crahan, Senior Jail Physician, which stated in part that the story said defendant gave to the examiner had a delusional trend and his ideations appeared to be abnormal and irrational, that it was felt he should be given a period of observation in the Psychopathic Ward and such disposition made as deemed advisable and indicated by the Psychopathic Court.

That an Order for the Examination or Detention of the said Rayford M. Medlin at the Psychopathic Ward of the Los Angeles County General Hospital was made by the Honorable George A. Dockweiler of the Superior Court in and for the County of Los Angeles on August 27, 1953 and on August 28, 1953 the same judge ordered him to appear for hearing and examination in Department 54 of the Superior Court on September 1, 1953 at 9:30 a. m.; that a Certificate of Medical Examiners was signed and filed by doctors J. G. Staub and F. A. Buell, stating that they had examined Rayford M. Medlin on August 28, 1953 and made a tentative diagnosis of paranoid psychotic reaction with recommendation for supervision, treatment and care at the Norwalk State Hospital.

That thereafter the Judgment of Mental Illness and Order for Care and Hospitaliza-

tion was made and Petitioner, Rayford M. Medlin, was committed to said Norwalk State Hospital on September 1, 1953, where he is now confined.

On September 14, 1955, petitioner filed with this court a petition for a Writ of Habeas Corpus, seeking his release on the ground that his confinement was illegal in that while held for observation in the Psychopathic Ward of the General Hospital of Los Angeles County, and when arraigned in Department 54 of the Superior Court, "I asked the Clerk of court to contact an attorney for me. The Clerk of court stated that he would contact an attorney to represent me. However, the Clerk of court failed to contact an attorney to represent me." This court issued an order to show cause directed to Robert E. Wyers, M. D., Superintendent, Metropolitan State Hospital at Norwalk, California, to appear and show cause why the writ prayed for should not issue.

In his return to the aforesaid order to show cause, respondent Superintendent and Medical Director alleged that petitioner was confined in said state hospital pursuant to the commitment by said superior court as above set forth. With said return there was also filed an affidavit of L. L. Solomon, Deputy County Clerk of Department 54 of the Superior Court of Los Angeles County, wherein the affiant stated:

"That at no time on or before September 1, 1953, the date on which petitioner's sanity hearing was held in Department 54 of the Superior Court did the petitioner contact the affiant; that at no time on or before September 1, 1953 did petitioner request the affiant to procure an attorney for petitioner; that at no time on or before September 1, 1953 did affiant agree to procure an attorney for petitioner."

In his aforesaid return the Superintendent and Medical Director of the Metropolitan State Hospital further set forth, "That on September 20, 1955 Rayford Medlin was before the Medical Staff of this hospital and was again diagnosed as being mentally ill; that it is my opinion as Superintendent and Medical Director of the Metropolitan State Hospital that said

Rayford Medlin continues to be mentally ill and should be confined in a State institution for care and treatment."

Since petitioner was legally committed and continues to be mentally ill it follows that the order to show cause heretofore issued should be discharged and the petition for a Writ of Habeas Corpus denied. It is so ordered.

WHITE, P. J., and ASHBURN, Justice pro tem., concur.



136 Cal.App.2d 679

Joseph B. VINCENT, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION
of the State of California, Jansen Cement
Company and Industrial Indemnity Com-
pany, Respondents.

Civ. 8822.

District Court of Appeal, Third District,
California.

Nov. 1, 1955.

Workmen's compensation proceeding. The Industrial Accident Board awarded benefits on basis of 26 per cent total disability, and the employee petitioned for review. The District Court of Appeal, Peek, J., held that evidence sustained finding of 26 per cent total disability.

Award affirmed.

1. Workmen's Compensation ⇨1935

Where the Industrial Commission heard medical evidence as well as employee's own testimony, in the absence of any showing other than employee's statement that commission failed to consider evidence relating to nature of his injury and his age and occupation in determining his permanent disability rating, commission was presumed to have made its workmen's compensation de-

cision on all the evidence. Labor Code, § 4660(a).

2. Workmen's Compensation ⇨1724

The Industrial Accident Commission can find from the evidence a percentage of disability less than the percentage allowed for "slight" spinal impairment as shown in the permissive schedule adopted by commission pursuant to the workmen's compensation law. Labor Code, §§ 4660(b), 4662.

3. Workmen's Compensation ⇨1724

Where the Industrial Accident Commission was confronted with divergent views as to extent of loss of function of employee's back, commission could make a determination within the range of the evidence as to the degree of disability. Labor Code, § 4660(b).

4. Workmen's Compensation ⇨1653

In workmen's compensation proceeding, evidence sustained Industrial Accident Commission's finding that injury to employee's back caused permanent disability which was 26 per cent of total. Labor Code, §§ 4660(a, b), 4662.

Joseph C. Lavelle and Frances Newell Carr, Sacramento, for petitioner.

Everett A. Corten and Daniel C. Murphy, San Francisco, for Industrial Accident Commission.

Mento, Buchler & Littlefield, Sacramento, for Jansen Cement Co.

PEEK, Justice.

Petitioner seeks review and annulment of an order of the respondent commission awarding him benefits for permanent disability which the referee found to be equal to 26 per cent of total.

His first contention is that the commission did not follow the provisions of Labor Code, § 4660(a), in determining his permanent disability rating; that is, it failed to consider the nature of the physical injury, the occupation of the injured employee and his age at the time of injury as regards his diminished ability to compete in an open labor market. His second contention is that the commission did not follow the schedule

of percentage ratings adopted for spinal impairment resulting in permanent disability, which schedule provides as follows:

Slight	30%
Moderate	50%
Severe	100%

In support of his first contention he argues that the medical reports demonstrated additional elements of disability which were not considered, such as taut hamstrings, traumatic arthritis, back pain, ache and fatigue of the limbs, defect in the reflexes and sensory changes, and that no consideration was given to the fact that he would be unable to continue his regular employment in manual labor.

[1] The question presented here is quite similar to one which was before the court in *Liberty Mut. Ins. Co. v. Industrial Acc. Comm.*, 33 Cal.2d 89, 199 P.2d 302. There it was held that the commission "is presumed to have made its decision on all the evidence." 33 Cal.2d at page 92, 199 P.2d at page 305. Here the medical evidence as well as petitioner's own testimony posed for determination all of the elements noted by petitioner. In the absence of any showing other than his own statement that the commission failed to consider such evidence, the rule noted in the case above cited must control. Furthermore here, as in that case, the petition for a rehearing before the commission made the same points and argument as are now made and the petition was denied.

As the respondent commission comments in its answer, the determination referred to in subsection (a) of Labor Code, section 4660, will of necessity be arbitrary to a degree, and no one can determine with nicety exactly how much an injured employee should receive for the permanent loss, or loss of use, of a particular member of his body. This is illustrated by the provisions of section 4662 which provide that except as to certain enumerated cases, the determination and extent of permanent disability shall be determined by the commission "in accordance with the fact."

To assist the commission in this regard, and to maintain as much uniformity as possible, the Legislature has authorized it to adopt a schedule for the determination of percentages of permanent disability. Section 4660(b), Labor Code. It is therein provided that, "The commission may prepare, adopt, and from time to time amend * * *" such a schedule and that it shall be "prima facie evidence" of the percentage of disability to be attributed to each injury covered by the schedule.

[2] The use by the doctors of phrases such as "slight to moderate limitation of motion in low back", "considerable limitation of back motions", and "rather doubtful that he will return to manual labor", and the findings of the referee and conclusions of the commission that the percentage of permanent disability was less than the percentage allowed for "slight" impairment as shown in the schedule cannot be given the weight which petitioner would accord to such terms. In other words, if the permissive schedule adopted by the commission were to be followed literally, which is the effect of petitioner's argument, then any employee with an impaired spine could be rated only at 30, 50 or 100 per cent of total disability.

[3, 4] Here again as in the *Liberty Mutual* case the commission was confronted with divergent views as to the extent of loss of function of petitioner's back, a difficult task under the most favorable circumstances. Necessarily, said the court, 33 Cal.2d at page 93, 199 P.2d at page 306, such a task "involves some measure of conjecture and compromise by the finder of fact as certainly would occur in the mental processes of a so-called expert witness." Thus when the commission is confronted with such divergent views "it may make a determination within the range of the evidence as to the degree of disability." Here two of the physicians expressed doubt that petitioner would return to manual labor although one believed he could perform some types of labor. These opinions appeared to be based not only upon his impaired spinal function, but also upon their opinion

that petitioner had little incentive to return to manual labor and would rather seek other work as was suggested by their referral of him to the Vocational Rehabilitation Bureau.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



136 Cal.App.2d 608

Joseph S. COZZOLINO, Petitioner
and Appellant,

v.

CITY OF FONTANA, a City of the Sixth Class, County of San Bernardino, State of California; Henry Younge, Chief of Police, and M. W. Leetzow, R. L. Gazvoda, Mrs. Vera Wyatt, Jack Bullk, Eugene Conlon, duly elected and serving Council for said City, Respondents.

Civ. 5086.

District Court of Appeal, Fourth District,
California.

Oct. 28, 1955.

Proceeding for writ of mandate to compel reinstatement of subordinate police officer in sixth class city. The Superior Court, of San Bernardino County, Carl B. Hilliard, J., entered judgment of dismissal, and petitioner appealed. The District Court of Appeal, Barnard, P. J., held that a motion adopted by the city council and entered in its minutes concurring an action of chief of police in dismissing petitioner was sufficient, to effectuate discharge where there were no restrictions or limitations provided by law as to method of discharge and city had no civil service, merit, or personnel system.

Judgment affirmed.

1. Municipal Corporations ⇨184(1), 185(3)

Under Government Code sections providing that city council may appoint such

subordinate police officers or employees as it deems necessary and providing that council shall fix compensation by ordinance and that such officers and employees hold office during pleasure of city council, there is no requirement that appointment or termination of service of officers as employees be by resolution or ordinance. West's Ann. Gov.Code, §§ 36505, 36506.

2. Municipal Corporations ⇨184(1)

In cities of sixth class, police officers may be appointed by city council or they may be appointed by chief of police, with approval of city council, and in neither instance, is it required that appointment be made by resolution adopted by city council. West's Ann. Gov.Code, §§ 36505, 36506, 36808, 38630, 38631.

3. Municipal Corporations ⇨185, 185(3)

Subordinate police officers in city of sixth class may be dismissed at any time, and a motion adopted by city council of city of Fontana, entered in its minutes, that council concurred in action of chief of police in dismissing a police officer was sufficient and it was not necessary that dismissal be by resolution or ordinance or that council initiate original proceedings to dismiss such officer, where city had no civil service, merit or personnel system. West's Ann. Gov.Code, §§ 36505, 36506, 36808, 38630, 38631.

4. Municipal Corporations ⇨185(3)

The fact that police officer in city of sixth class was appointed by means of resolution did not require that his dismissal be by resolution. West's Ann. Gov.Code, §§ 36505, 36506, 36808, 38630, 38631.

5. Municipal Corporations ⇨185(4)

Under statute providing that city council may hold closed sessions to consider dismissal of officer or employee, unless such officer or employee requests a public hearing, action of city council in adopting motion for dismissal of police officer was not rendered insufficient by alleged fact that meeting was not open to public, notwithstanding other statute providing that city council meetings shall be public. West's Ann. Gov.Code, §§ 36808, 54953, 54957.

T. L. DeBord, Barstow, for appellant.

Henry F. Rager, Fontana, for respondents.

BARNARD, Presiding Justice.

By a petition for a writ of mandate, filed on July 26, 1954 the petitioner sought reinstatement as a police officer for the city of Fontana. A demurrer was sustained with leave to amend, and an amended petition was filed. A demurrer was again sustained with leave to amend, and the petitioner filed notice of his election to stand on the amended petition. A judgment of dismissal was then entered, and this appeal followed.

So far as material here, the petition alleged that Fontana is a city of the sixth class; that petitioner was employed as a police officer for said city on October 21, 1952, by "Resolution No. 44"; that said Resolution No. 44 is still in effect and has not been rescinded; that petitioner was summarily discharged by the chief of police of said city on January 22, 1954; that a "closed hearing" was held on February 2, 1954, for the purpose of determining whether the action of the chief of police in discharging the petitioner was justified; that the action taken at this meeting did not purport to be an original action by the city council, but was for the purpose of satisfying the public demand and to ratify and approve the prior action of the chief of police; that the petitioner's salary was paid up to and including February 2, 1954; that on July 15, 1954, the petitioner made demand upon the chief of police and the city council to reinstate him to his position and to certify and approve his payroll from February 2; and that said demand has been refused.

A copy of Resolution No. 44 was attached to the petition with a certificate that it was adopted by the city council at a regular meeting on October 21, 1952. It is headed "A Resolution of the City Council * * * Authorizing the Employment of Police Officers." It states that it is necessary and convenient that officers be employed for the city police department. It then "authorizes" for such employment five named persons, including this petitioner.

The minutes of "a regular meeting" of the city council held on February 2, 1954, were also attached to the petition. These minutes recite that one councilman "moved that the Council concur in the action of the Chief of Police in his dismissal of (this petitioner) on the evidence given", and that the motion was seconded by another councilman. After setting forth some of the discussion which followed, the minutes recite that the motion to approve the action of the chief of police was passed and adopted by a vote of three to two.

Briefly stated, the appellant admits that his continued employment was at the pleasure of the city council, but contends that since he was appointed by a formal resolution his employment could be terminated only by a formal resolution adopted by the city council "rescinding" his employment under Resolution No. 44; that the power to rescind Resolution No. 44 could not be delegated to the chief of police; that since the chief of police had no authority to rescind a formal resolution of the city council his action, in discharging the petitioner, was ultra vires and void; that the act of the chief of police being void could not be ratified by the city council; that the only way the petitioner could be removed from his position is by an original act of the city council rescinding and cancelling his appointment under Resolution No. 44; that the city council took no such original action; and that the action taken by the city council on February 2 could not be considered an original action for the further reason that it was not a public meeting, as required by section 36808 of the Government Code.

[1-3] Section 36505 of the Government Code provides that the city council shall appoint the chief of police, and may appoint such other subordinate officers or employees as it deems necessary. Section 36506 provides that the city council shall fix the compensation of all appointive officers or employees by resolution or ordinance. It then provides that "Such officers and employees hold office during the pleasure of the city council." While these statutes require that the compensation of such employees shall be fixed by resolution or ordi-

nance, there is no such requirement with respect to their appointment or the termination of their service. Section 38630 provides that the police department of a sixth class city is under the control of the chief of police. Section 38631 provides that the chief of police of such a city may appoint police officers subject to the approval of the legislative body. It thus appears that the city council may appoint police officers or that they may be appointed by the chief of police, with the approval of the city council. In neither instance is it required that such appointments must be made by a resolution adopted by the city council. In view of the statutory provision that such employees hold office during the pleasure of the city council, it naturally follows that they may be dismissed at any time, in the absence of restrictions or limitations provided by law. No restriction as to the manner in which the discharge of such employees shall be expressed appears in these statutes. A motion adopted by the city council and entered in its minutes was certainly sufficient for that purpose.

[4] The fact that the appellant happened to be appointed by means of a resolution, although one was not necessary, is not controlling. This probably occurred because this new city, incorporated on June 25, 1952, made the appointment of five police officers in the same resolution in which it declared the necessity that such officers be employed. The action taken by the city council on February 2, 1954, did not purport to, and did not, repeal or rescind Resolution No. 44, or any part thereof, and there was no occasion or necessity for doing so. It was merely a method of meeting a subsequent development and terminating the appellant's employment, which the city council has a right to do without using the precise language of a formal resolution. Moreover, even if it could be assumed that a resolution was necessary in this particular instance, a motion adopted by the city council and entered in its minutes would be a substantial compliance with that requirement. *Dixon v. La Guardia*, 277 N.Y. 84, 13 N.E.2d 450.

Nothing is alleged in the petition, or appears in the record, which would remove the appellant from the effect of these general statutes. The respondents state in their brief that at all times here involved the city had no Civil Service, Merit or Personnel system with respect to its employees. In his reply brief the appellant does not deny this, but states that this fact does not appear in the record since the amended complaint did not allege that there was no civil service or personnel system in effect. The amended complaint did not allege that there was such a system in effect, but it was incumbent on the appellant to allege sufficient facts to show that he was entitled to the relief demanded. Under the facts alleged, the appellant was not entitled to that relief in the absence of a further showing that some existing limitation or restriction on the city's right to discharge him would prevent his dismissal at that time. He refused to further amend, and the court was justified in acting accordingly.

[5] The appellant makes some further contention that the action of the city council on February 2, 1954, was not sufficient because that meeting was not an open and public meeting, as required by section 36808 of the Government Code. Assuming that this was a closed meeting, and if it be further assumed that some meeting was necessary, Section 54953 provides that city council meetings shall be open and public "except as otherwise provided in this chapter", and Section 54957 permits a closed session to consider the dismissal of an officer or employee, "unless such officer or employee requests a public hearing."

The facts alleged in the petition would not have supported a finding that the city's power of dismissal was not legally exercised. *Keeley v. City of Modesto*, 36 Cal. App.2d 254, 97 P.2d 468; *Chambers v. City of Sunnyvale*, 56 Cal.App.2d 438, 132 P.2d 849; *Hackler v. Ward*, 105 Cal.App.2d 615, 234 P.2d 170.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

136 Cal.App.2d 726

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Luther CARPENTER, Defendant
and Appellant.

Cr. 2599.

District Court of Appeal, Third District,
California.

Nov. 3, 1955.

Defendant was convicted of statutory rape on an eight year old girl. From an order of the Superior Court, Sacramento County, Grover W. Bedeau and Raymond T. Coughlin, JJ., denying defendant's motion for new trial, and the court's judgment on the jury's verdict, defendant appealed. The District Court of Appeal, McMurray, J. pro tem., held that whether victim's testimony was result of coaching or true relation of facts was question for jury.

Order and judgment affirmed.

1. Witnesses ⚖️40(2)

The right to determine competency of child under 10 years old to testify rests with trial judge. West's Ann.Code Civ. Proc. § 1880, subd. 2.

2. Criminal Law ⚖️1036(2)

Where testimony of child under 10 years old is received without objection after trial judge's examination of child for competency, any objection thereto will be deemed waived and cannot be considered for first time on appeal from conviction of crime. West's Ann.Code Civ.Proc. § 1880, subd. 2.

3. Criminal Law ⚖️1036(2)

In prosecution for statutory rape on eight year old girl, defendant, failing to object to girl's testimony on ground that she was not competent witness, waived right to urge in District Court of Appeal, on appeal from conviction, that trial judge erred in permitting her to testify. Pen. Code, § 288; West's Ann.Code Civ.Proc. § 1880, subd. 2.

4. Criminal Law ⚖️1159(4)

On appeal from conviction of statutory rape on eight year old girl, whether girl's testimony was inherently improbable and result of coaching, rather than relation of true facts, should not be determined by District Court of Appeal, in absence of positive showing of abuse of power by trial judge or jury. Pen.Code, § 288.

5. Criminal Law ⚖️553

The mere fact that circumstances of crime were bizarre or unusual does not render testimony to that effect inherently improbable but testimony must be of such nature that it is unbelievable on its face or physically impossible to be inherently improbable.

6. Rape ⚖️52(1)

In prosecution for statutory rape on eight year old girl, her lack of outcry at time of alleged act did not render her testimony inherently improbable, in view of physician's testimony that such an act might not cause such great pain to girl of that age as to cause her to cry out. Pen. Code, § 288.

7. Criminal Law ⚖️742(1)

In prosecution for statutory rape on eight year old girl, whether her testimony was result of coaching or true relation of facts was question for jury. Pen.Code, § 288.

Jack Odbert, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

McMURRAY, Justice pro tem.

This is an appeal from an order denying a motion for new trial and from the judgment entered upon the jury's verdict of guilty of violating section 288 of the Penal Code.

Viewing the evidence in a light most favorable to the People (respondent) the facts are that on July 2, 1954, defendant, a 64-year old man, committed rape upon the person of an 8-year old girl who made no outcry or complaint at the time of the

offense nor until a vaginal infection was discovered on July 7, 1954, at which time she was examined by a physician.

The act took place in a toilet on the back porch of the home in which defendant and the victim both lived and was accomplished in the presence of a two-year old girl who had accompanied the victim to the toilet.

Appellant urges that the victim was incompetent to act as a witness; that the evidence is not sufficient to support the verdict and that the verdict was based on passion and prejudice.

The question of the competence of a child to testify is governed by Section 1880, subdivision 2, of the Code of Civil Procedure, which reads as follows:

"The following persons cannot be witnesses:

* * * * *

"2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

[1-3] The right to make the determination as to the competence of a child under ten rests with the trial judge and where, as here, he examines the child for competence and thereafter testimony is received without objection,

"* * * any objection to the witness' competency will be deemed to have been waived and cannot be considered for the first time on appeal. (People v. Singh, 182 Cal. 457, 484, 188 P. 987; People v. Collins, 5 Cal. App. 654, 658, 91 P. 158; People v. Horowitz, 70 Cal.App.2d 675, 696, 161 P.2d 833; Cf., People v. Evans, 63 Cal.App. 777, 782, 220 P. 309.)

"In view of the fact that defendant failed to object in the trial court to

the prosecuting witness' testimony on the ground that she was not a competent witness, under the above stated rule he has waived the right to urge in this court that it was error for the trial judge to permit her to testify." People v. Aleshire, 90 Cal.App.2d 506, 509, 203 P.2d 569, 571.

[4-7] Appellant's attack upon the sufficiency of the evidence to support the verdict resolves itself into an argument that the child's testimony was inherently improbable, and was the result of coaching rather than a relation of true facts. This contention is not a matter which should be determined by this court in the absence of a positive showing of abuse of power by the trial judge or jury. There is no such showing here. Merely because the circumstances of a crime are bizarre or unusual does not render testimony to that effect inherently improbable; the testimony must be of such a nature that it is unbelievable upon its face or is physically impossible. People v. Lindsey, 90 Cal.App.2d 558, 563, 203 P.2d 572. Appellant urges that the lack of outcry at the time of the act alleged renders the testimony inherently improbable. He overlooks, however, the physician's testimony to the effect that such an act might not cause such great pain to an 8-year old girl as to cause her to cry out. Whether or not the witness' testimony was the result of coaching or was a true relation of facts was a question for the jury. People v. Aleshire, supra.

The jury and the trial judge resolved the considerable conflict in the evidence against appellant. There is no evidence of any passion or prejudice in the record.

The order and the judgment appealed from are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

136 Cal.App.2d 812

Fern D. FOSTER and Lane Foster, a minor,
by his Guardian ad Litem and Trustee,
Fern D. Foster, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION
of the State of California, State Department
of Public Works, Division of Highways,
State Compensation Insurance Fund,
Respondents.

Civ. 8861.

District Court of Appeal, Third District,
California.

Nov. 8, 1955.

Proceeding to review findings and order of Industrial Accident Commission denying award of death benefits. The District Court of Appeal, Schottky, J., held that finding and conclusion that death from myocardial infarction due to coronary occlusion did not arise out of or in course of employment as lead mechanic by Division of Highways were supported by substantial evidence.

Order affirmed.

1. Workmen's Compensation ☞1418

That referee and Industrial Accident Commission rejected report of one medical expert, which would have sustained award of death benefits, and accepted contrary opinion of another expert was not ground for reversal of order denying compensation.

2. Workmen's Compensation ☞1396

Opinion of a medical expert based on hypothetical statements of the facts in the record is competent evidence in workmen's compensation proceedings.

3. Workmen's Compensation ☞1704

The weight to be accorded opinions of experts is a question for Industrial Accident Commission.

4. Workmen's Compensation ☞1939

Finding of Industrial Accident Commission cannot be disturbed by reviewing court, if such finding is supported by any evidence or reasonable inference.

5. Workmen's Compensation ☞1939

In reviewing action of Industrial Accident Commission, the function of courts is to determine whether the evidence, if believed, is substantial and supports the findings of Commission.

6. Workmen's Compensation ☞1519

Finding and conclusion of Industrial Accident Commission that death of lead mechanic employed by Division of Highways as a result of myocardial infarction due to coronary occlusion did not arise out of and in course of employment and hence was not compensable were supported by substantial evidence.

Timothy W. O'Brien, Sacramento, and
Burke & Rawles, Ukiah, for petitioners.

Everett A. Corten and Daniel C. Murphy,
San Francisco, for Industrial Acc. Commission.

T. Groezinger, Asst. Chief Counsel, San
Francisco, for State Compensation Ins.
Fund.

SCHOTTKY, Justice.

This is a proceeding to review the findings of the Industrial Accident Commission that the death of Leaton G. Foster did not arise out of and in the course of his employment and the consequent order denying benefits to petitioners.

The facts, which are not in substantial dispute, may be summarized as follows:

The decedent, Leaton G. Foster, was a lead mechanic working for the Division of Highways at Camp 39 in Modoc County. He died of myocardial infarction due to coronary occlusion on January 9, 1954.

During the month of December, 1953, and up to date of death the decedent had worked consistently overtime. Part of this evidently due to the absence of his co-mechanic, Mr. Wallace, for the first thirteen days of December. The work from December to date of death was described by Mr. Wallace as routine. There was no rush work. Mr. Wallace performed most or all of the heavy and outside work. Decedent had a prior back injury and had to avoid

heavy lifting. The maintenance shop had proper mechanical equipment available for the handling of heavy loads. Extra help was available if needed but none was requested by decedent. Nowhere in the evidence is there an indication that the decedent was under any emotional or physical strain. There is no evidence of strain or exertion just prior to his death.

On January 9, 1954, the only work to be performed in the shop was the replacement of tracks on a caterpillar. This was being done by Mr. Wallace.

On the morning of January 9, 1954, the decedent arose at his usual time, ate his usual breakfast, his outward appearances were normal, he had no complaints. He went to the shop office adjoining the maintenance shop, arriving before the usual starting time of 7:30 a. m. He was engaged in paper work at his desk when Mr. Wallace arrived at 7:20 a. m. A conversation ensued between the decedent and Mr. Wallace. Decedent did not show any outward signs of distress, he did not complain of physical distress.

At 7:30 a. m. Mr. Wallace began work on the caterpillar, leaving decedent in the office with the paper work. Mr. Wallace recalls that while under the caterpillar he heard some one at the welding bench and heard sounds similar to those made in preparing a welding torch. These sounds were of only a few minutes' duration. A short while later he thought he heard his name called. After another interval he heard his name called and went into the office. He found the decedent in the office reclining on a seat used as a couch. Overalls were on the floor at one end of the couch, crumpled as if they had just been stepped out of. The decedent was in obvious distress and was taken to his house, which is at the camp, then to the hospital, where he died that same day.

There was no medical history of a heart condition but the report of Dr. Salvatore Lucia who had treated decedent on several occasions over a period of years stated: "It is my candid opinion that the work in which Mr. Foster engaged and the circumstances under which it was consummated directly

contributed to his demise, as is clearly shown by the details of his last illness."

Dr. Charles Wallace, a doctor who was not acquainted with decedent, made a report based upon the study of the testimony and of certain documents submitted to him which described decedent's final illness and the duties of his employment. This physician's report concluded with the statement:

"In my opinion, there is no shred of evidence that his job was in any way responsible for his death. In the first place, his kind of work can not be said to contribute to the fundamental disease, coronary arteriosclerosis. Nor could the back injury have caused or even aggravated such an abnormality. Secondly, assuming that he had coronary arteriosclerosis, there is nothing to support the thesis that his work precipitated the fatal attack or coronary occlusion. There are instances when unusual and extraordinary physical activity or severe and exceedingly upsetting emotional upheaval may be said to precipitate occlusion of previously diseased arteries, but certainly neither situation was evident here."

It is apparent that the medical evidence is in sharp conflict and petitioners seek to overcome this by contending that the referee did not give proper consideration to the report of Dr. Lucia who was more familiar with the physical condition of decedent than was Dr. Wallace. They argue that the evidence clearly establishes that the decedent's death did arise out of and did occur in the course of decedent's employment, and that the medical evidence of Dr. Lucia substantiates the proposition that the type of work and the prolonged working hours required of the decedent were the precipitating factors which brought on the heart attack which resulted in his death.

[1-3] While petitioners' arguments are persuasive and the evidence of Dr. Lucia would no doubt have sustained a compensable award if the referee and the Commission had accepted it, the rejection of it and the acceptance of a contrary opinion from another expert is not ground for reversal by an appellate court. For as stated in

Nielsen v. Industrial Accident Commission, 220 Cal. 118, at page 123, 29 P.2d 852, at page 854: "The opinion of experts based on hypothetical statements of the facts in the record is competent evidence. The weight of such evidence is for the commission's determination."

The referee in recommending that the petition for reconsideration be denied stated:

"In view of the evidence presented, which in the opinion of this Referee did not establish that applicant was doing more than a minimum amount of work, namely, paper work, on the date of his death, January 9, 1954, it is felt that the applicants did not establish that the decedent sustained a disabling heart condition as a result of his employment such as would entitle them to an award of death benefits. There is no definite showing that the decedent had performed work in the shop on the date of his attack. As a matter of fact, the direct testimony by Mr. William W. Wallace was to the effect that He was performing the only actual work being conducted in the shop on that day. The only possible inference that decedent had done any mechanical work on January 9, 1954, would be based upon the statement of Mr. Wallace that he heard sounds in the shop which continued for a few minutes and believed that the same had emanated from the welding bench located in the maintenance shop; that the sounds were similar to those made by a person preparing a torch. Other than the noise heard by the witness, the decedent was stated to have called to the witness and had been found in the office of the shop at about 8:00 A.M., or an hour and a half after the start of the work day.

"It is true there is a conflict in the medical reports as to the cause of death. In the opinion of this Referee the medical report of Dr. Wallace is the most reasonable medical opinion in view of the testimony concerning the activities of the decedent on January 9, 1954."

[4, 5] It is well established that "if there is any evidence, whether direct or by reasonable inference, which will support the finding of the commission, a reviewing court has no power to disturb it. Mercer-Fraser Co. v. Industrial Accident Commission, 40 Cal.2d 102, 114, 251 P.2d 955. The function of the court on review of the action of the commission is to determine whether the evidence, if believed, is substantial and supports the findings." Industrial Indemnity Co. v. Industrial Accident Commission, 115 Cal.App.2d 684, 692, 252 P.2d 649, 654.

[6] We are satisfied that there is substantial evidence to support the findings and conclusion of respondent commission that the death of Leaton G. Foster did not arise out of or occur in the course of his employment.

The order denying an award is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



136 Cal.App.2d 621

R. E. ALLEN, as Receiver, Rena C. Sibert, as administratrix of the Estate of Clarence E. Sibert, deceased, Rena C. Sibert, and Mary Jane Cashin, Plaintiffs and Appellants,

v.

George W. SHAVER, George W. Shaver, Jr., and Glennie Shaver, Defendants and Respondents.

Civ. 20714.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1955.

Rehearing Denied Nov. 22, 1955.

Hearing Denied Dec. 29, 1955.

Action by deceased partner's widow and daughter against surviving partner for accounting for profits allegedly derived from use of patent jointly owned by partners. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered

judgment for defendant, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that evidence supported finding that surviving partner had not derived profit from patent other than that accounted for.

Judgment affirmed.

See also, 113 Cal.App.2d 19, 247 P.2d 609.

1. Appeal and Error ☞931(1)

Reviewing court must resolve every doubt and conflict in evidence in favor of judgment.

2. Appeal and Error ☞989, 996

It is not function of reviewing court to reweigh evidence or draw inferences contrary to those drawn by trial court, nor will reviewing court pass upon inconsistencies in testimony.

3. Appeal and Error

☞930(1), 931(1), 1001(1), 1002, 1010(1), 1011(1)

All conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold verdict if possible, and verdict will stand if there is any substantial evidence, contradicted or uncontradicted to support it, and the same rule applies in review of findings of a judge.

4. Partnership ☞336(3)

In action by deceased partner's widow and daughter against surviving partner for accounting for profits allegedly derived from use of patent owned jointly by partners, evidence supported finding that surviving partner had not derived profit from patent other than that accounted for. Probate Code, § 571; West's Ann.Corp.Code, § 15042.



Irving M. Walker, Richard L. North, Jean Wunderlich, Los Angeles, for appellants.

Stanley M. Arndt, Los Angeles, for respondent George W. Shaver.

Ira L. Sherman, Leon B. Brown, Los Angeles, for respondents, Glennie F. Shaver, George W. Shaver, Jr.

WHITE, Presiding Justice.

Primarily, this is an appeal by plaintiff executrix from a judgment of the Superior Court of Los Angeles County in an action by her to enforce an accounting by the surviving partner of her deceased husband. The other parties and other purposes of the action will not be discussed or considered except in connection with issues to which they are pertinent.

Respondent George W. Shaver is the surviving partner of Clarence Sibert, deceased, and will hereafter be referred to as "respondent". He has adopted as his statement of facts and "first answer to appellant's brief" a detailed opinion filed by the trial court and set forth in respondent's appendix to his brief.

The facts, as stated by the trial court, occupy 11 pages of the printed appendix to respondent's brief. Few references to the record are given in support thereof. The court's findings occupy six pages of the Clerk's Transcript and contain many long lists of numbers referring to paragraphs of pleadings found true or untrue. Respondent says in his brief that appellant's "statement of facts must be ignored as not correct". Each party has called the court's attention to the failure of the other to comply with certain rules on appeal and urged that therefore the brief of the other should be disregarded. From the reading and consideration of the Clerk's and Reporter's Transcripts, 380 pages of briefs, and numerous, varied and lengthy exhibits, including files and reporter's transcripts in prior actions, we realize that it is a difficult case to state, either clearly or briefly, and we are convinced that both appellant and respondent have made honest attempts to present the matters which they believe should be considered by this court. Consequently, we will not here discuss infractions of the rules on appeal by either party, but will proceed to consider the appeal upon its merits.

Clarence Sibert (hereinafter referred to as "Clarence") died intestate October 8, 1937, leaving his widow Rena, who was then recovering from a nervous breakdown, and their daughter Mary Jane, then

a minor. Respondent is the husband of Clarence's sister and the two families were intimate friends.

In 1935, Clarence was employed as a jewelry manufacturer and respondent was employed as a salesman of market and restaurant equipment. Respondent told Clarence there was a need for a shoestring potato cutter and both, as partners, began working evenings, weekends and other spare time to devise one. Many models were made, tested, bent or broken and abandoned. Designs were repeatedly changed and improved, and new models made and tested. June 10, 1936, their application for letters patent was filed and manufacture and sale of the cutters was begun. In September 1936, the patent claims were rejected as lacking in novelty, all claims being covered by prior expired patents. The application was subject to amendment. In November 1936, the partnership business was moved to larger quarters but continued to be a spare time project. Prior to December 1, 1936, more than 60 cutters had been sold at \$35 each. February 8, 1937, as partners, respondent and Clarence filed with the County Clerk a certificate that they were doing business under the fictitious firm name of S & S Specialty Company. June 14, 1938, a patent was issued in the joint names of Clarence and respondent, on a single combination claim, described in the amendment filed after Clarence's death but based upon a model devised with his assistance.

On August 1, 1938, respondent filed with the State Board of Equalization a statement and secured from them a certificate that he individually was doing business under the name of S & S Specialty Company; that the old S & S Specialty Company, which formerly consisted of George W. Shaver and Clarence E. Sibert, ceased as of the day before.

On or about August 25, 1952, after the judgment next cited had become final, citation under section 571 of the Probate Code required respondent, as surviving partner, to render an account. He caused notice of dissolution of the partnership to be filed with the County Clerk, ceased business under the name of "S & S Specialty

Company" and published notice that the patent would be sold on September 25, 1952.

On the same day, August 25, 1952, Shaver Specialty Company began doing business at the same location, with the same stock and equipment, the same employees, the same product, and the same customers.

In the instant action, the testimony of respondent's expert witnesses placed the value of the patent at \$97.20, \$157.20, \$300 and \$500, and the court found the value of the pending application at the time of Clarence's death to be \$97.20. January 24, 1948, respondent alone applied for a new combination patent. According to respondent's own testimony, at least 10,000 cutters had been sold at from \$17.50 to \$35 each prior to that date. From 1936 to 1948, the handle of each cutter bore the imprints "Keen Kut Shoestring" and either "Pat. Pend." or the number of the patent issued to Clarence and respondent. From 1948 to the time of the trial of the instant action, each handle bore the imprints "Keen Kut Shoestring" and the number of respondent's new patent.

We deem it unnecessary to detail the facts constituting the claimed fraud on the part of respondent in obtaining from Rena and Mary Jane a purported assignment to him for the reason that rescission of the assignment has been adjudged by the Superior Court of Los Angeles in Action No. 564,297, by judgment dated April 9, 1951, affirmed June 20, 1952, in 111 Cal.App.2d 833, 245 P.2d 514, and hearing thereon denied by the Supreme Court August 14, 1952. In that action it was found that "At the time of his death Sibert was the owner of record of a half interest in and to the invention covered by said application for Letters Patent and Shaver was the owner of record of a similar one-half interest, but each of such ownerships was subject to an agreement of the parties that the invention should be an asset of said partnership. At the time of his death Sibert was the owner of a one-half interest in said partnership." It was then adjudged that " * * * in 1934 Clarence E. Sibert and

George W. Shaver formed an equal partnership under the name, then or subsequently adopted, of S & S Specialty Co., for the creation of the invention covered by said Letters Patent and for the manufacture and sale of said invention, which partnership was in existence at the time of the death of Clarence E. Sibert; that said partnership has not been and the affairs of said partnership have not been wound up and settled by George W. Shaver, the surviving partner; that said partnership is the equitable owner of said Letters Patent and said invention and Rena C. Sibert and Mary Jane Cashin and George W. Shaver are ordered and directed to do everything necessary to vest in said partnership the record ownership of said Letters Patent and said invention;". Shortly before the trial of the instant action, the parties had formally transferred record ownership of the patent to the partnership.

By said judgment, it was further ordered "That said partnership and the affairs thereof be wound up and settled by said George W. Shaver, as the surviving partner, and that George W. Shaver account to the Estate of Clarence E. Sibert, Deceased, and to Rena C. Sibert, as the administratrix thereof, under the supervision and direction of Department 5 of the Superior Court of the State of California, in and for the County of Los Angeles (being the probate department in which the administration of said estate is pending) for the interest of Clarence E. Sibert in said partnership and in all profits thereof and in all profits realized by Shaver from the operation of the business conducted under the name of S & S Specialty Co. and by the use of the assets of the partnership from the date of the commencement of the partnership to the date of the winding up and settlement of the affairs of the partnership;".

The court, in its memorandum opinion in the instant action adopted by respondent as his "first answer" to appellant's opening brief, demonstrates mathematically that as of the time of his death Clarence Sibert's interest in the partnership was \$206.40, that the average capital used in the busi-

ness over 14.8 years after his death was \$50,000 or more; that the total profits for the accounting period was \$555,965.92, of which 22.8% or \$126,760.22 is attributable to the use of capital; that Sibert's \$206.40 interest represents .00412 of the average total capital employed; that the portion of profits which may be attributed to the use of his capital is therefore \$522.25; that, however, only 60% of the business was attributable to the use of the patent and therefore only 60% of the profits, or \$444.79 could possibly be attributable to Sibert's interest in the patent; that respondent had paid to appellants for the assignment (heretofore rescinded) \$305, on which simple interest for the time retained by appellant is \$341.60, which provides an equitable offset of \$646.60, leaving appellant indebted to respondent in the sum of \$126.85.

The Court, in his said opinion, states further that:

"We think that under the circumstances the equitable offset heretofore mentioned should be allowed and the account settled as showing nothing due plaintiffs from the profits of the Shaver family's business.

"However, if the precedent heretofore set in these proceedings is broken and just one question of fact is decided in favor of the defendants, the same decision can be arrived at without reference to equity."

The finding in this regard is as follows:

"That no profits were ever made by the partnership dissolved by the death of Clarence E. Sibert, in the business of said partnership either before or after its dissolution, and that said business sustained an operating loss of \$87.20 prior to dissolution, all of which was paid by the defendant George W. Shaver from his own funds; that prior to the death of Clarence E. Sibert said deceased withdrew his entire capital contribution to said partnership and at the time of his death had no interest therein by way of capital contribution; that at said time defendant George W. Shaver had an unreturned capital contribution therein amounting to \$200, together with credit for payment of operating loss hereinbefore mentioned, in the amount of \$87.20, making

a total credit due to said George W. Shaver in the sum of \$287.20. That at the time of dissolution the business of said partnership had no good will of any value and its only asset was the patent application referred to in the pleadings herein, which was then of a value of \$97.20, and the total capital of the partnership as of said date, including the patent application and the invention represented thereby, was \$297.20. That after payment to said George W. Shaver of said sum of \$287.20, representing his contribution to capital and payment of operating loss, there would have remained a net surplus available for division between the partners amounting to \$10, of which each partner would have been entitled to \$5, had there been a winding up and settlement of the affairs of said partnership at that time. That in the absence of such winding up and settlement, the interest of said George W. Shaver in said partnership property and assets was in the sum of \$292.20 and the interest of said Clarence E. Sibert therein was \$5."

The court further found "that the only use made by the defendant Shaver of said patent was to print its number on the handle of the slicer, until January 24, 1948, when he made a substantial change in design and applied for a new 'combination' patent, which was later issued and is the property of the defendant Shaver and not the property of said original partnership and in which none of the plaintiffs have any interest".

It was also found that as affecting his own rights, respondent "was not guilty of any fraud save and except such as may have become established" by the judgment in the former action, and as to the other respondents "there was no fraud on the part of defendant George W. Shaver either in connection with the acquisition of the interest of the plaintiffs Rena C. Sibert and Mary Jane Cashin in and to the patent or invention nor in connection with anything that said George W. Shaver did prior thereto or thereafter."

Judgment was rendered that defendants George W. Shaver and his wife Glennie Shaver are the owners of certain real and

personal property involved herein, and "That defendants George W. Shaver, George W. Shaver, Jr., and Glennie Shaver, are the owners as partners of that certain business known as the Shaver Specialty Company, conducted at 6121 South Western Avenue, in the city of Los Angeles, State of California, together with the good will, stock in trade, equipment, machinery, tools, supplies, books, records, and other property of every kind and description, located at said address or used in connection with said business, as well as all outstanding debts or moneys due to or on account thereof.

"Second: That plaintiffs, and each of them, have no right, title, interest or claim in and to any of the real or personal property hereinbefore described and that the title of defendants therein as hereinbefore respectively set forth is hereby quieted against any and all claims of plaintiffs.

"Third: That all orders heretofore made in the matter of the administration of the estate of Clarence E. Sibert, deceased, restraining or purporting to restrain the sale of any property whether described herein or not, and more particularly that certain order made in said proceeding on the 30th day of September, 1952, restraining the sale of U. S. Patent No. 2130375, are hereby dissolved.

"Fourth: That the order heretofore made in this action appointing R. E. Allen Receiver is hereby vacated and set aside and said Receiver discharged.

"Fifth: It is ordered that all right, title and interest of George W. Shaver and of the estate of Clarence E. Sibert, deceased, together with all right, title and interest of the partnership formerly consisting of George W. Shaver and said Clarence E. Sibert doing business under the fictitious name and style of S & S Specialty Company, in and to U. S. Patent No. 2130375 be sold by defendant George W. Shaver, as the surviving partner, in the manner provided by law for sales upon execution, except that 30 days notice in writing of the time and place of sale shall be given to plaintiffs Rena C. Sibert, as Administratrix of the estate of Clarence E. Sibert, deceased.

ed, Rena C. Sibert and Mary Jane Cashin; and George W. Shaver or any of the parties to this action, as well as other persons, may be purchasers; that from the proceeds thereof, after payment of expenses of sale, there shall first be deducted and paid to said George W. Shaver the sum of \$287.30, representing the return of his contribution to capital and operating loss of said partnership; and the balance remaining, if any, divided equally between said George W. Shaver and Rena C. Sibert, as Administratrix of the estate of Clarence E. Sibert, deceased. The Court reserves jurisdiction to set aside or confirm such sale upon motion made by the purchaser or any of the parties to this action within ten (10) days thereafter, but unless such application shall be made within such period the said sale shall be and become final and conclusive upon the parties thereto and upon all parties to this action."

From such judgment, plaintiffs prosecute this appeal. In their opening brief appellants state that the substantive questions presented are:

"1. Does the evidence support the finding of the trial court that Shaver has fully, fairly and in good faith accounted to the Sibert Estate and that such accounting shows nothing due to any of the plaintiffs from any of the defendants?

"2. Was the trial court justified in determining that the profits attributable to the use by the defendants of the deceased partner's interest in the dissolved partnership should be determined under the provisions of Section 15042 of the Corporations Code, notwithstanding the plaintiff's contentions (a) that neither said Section 15042 or any other section or sections of the Corporations Code are by their terms applicable to the facts of this case, even if it be assumed that the defendant had not been guilty of fraud in continuing the business of the partnership, and (b) notwithstanding the plaintiff's contention that Shaver as the surviving partner, was a trustee and that, having violated his duties as trustee by fraudulently continuing the business of the partnership for his own benefit, he should be required to account in the man-

ner required of trustees who have fraudulently used the assets of the trust for their own benefit, and (c) notwithstanding the provisions of the Willis judgment (in the former trial) requiring Shaver to account 'for all profits realized by Shaver from the operation of the business conducted under the name of S & S Specialty Co., and by the use of the assets of the partnership from the commencement of the partnership to the date of the winding up and settlement of the affairs of the partnership?'

"In seeking an answer to this question, the court will have in mind the further finding by Judge Willis that Shaver had not wound up the affairs of the partnership.

"3. Was the trial court justified in determining that Glennie and George Junior might acquire interests in the Sibert-Shaver partnership business without giving any consideration therefor and hold that interest and the product thereof unaffected by the trustee status of Shaver as a surviving partner and unaffected by Shaver's fraudulent violation of that trust? And what additional obligations would arise from knowledge on the part of Glennie from the outset and on the part of George Junior somewhat later, that Shaver was such a trustee and that he had so violated his trust?"

It is at once apparent that appellants' attack upon the findings is grounded on the claim that they are not supported by the evidence, and, as a necessary corollary, that the findings do not support the judgment.

[1,2] When a judgment is challenged on the ground of "insufficiency of the evidence" an appellate tribunal must resolve every doubt and conflict in favor of the judgment in order to give it validity. It is not the function of an appellate court to reweigh the evidence or draw inferences contrary to those drawn by the trial court. Nor will an appellate court pass upon inconsistencies in testimony, but it will presume that the trial court has reconciled and accounted for, to its own satisfaction, all inconsistencies present in the testimony.

[3] The applicable rule is thus stated in *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690: "In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (Italics added.) (*Crawford v. Southern Pacific Co.*, 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.)"

[4] And this rule governs in a review of the findings of a judge the same as when considering a jury verdict. We have painstakingly examined the voluminous record before us in this case, including the reporter's transcript containing 992 pages, and the clerk's transcript of 178 pages, together with some 58 exhibits. This action is essentially one of fact and the evidence is highly conflicting, but upon the foregoing view of the law we cannot hold that any essential finding in this case is unsupported.

Appellants rely strongly on the judgment entered in the previous action tried before Judge Willis, and which judgment was affirmed on appeal. *Sibert v. Shaver*, 111 Cal. App.2d 833, 245 P.2d 514.

It is appellants' contention that respondent herein George W. Shaver made no attempt to comply therewith and exerted every effort to evade the mandate thereof. In the instant action, the court determined otherwise. The views of the trial court in that regard are set forth in its memorandum opinion, as follows:

"Within five days after the judgment became final Shaver made a bona fide attempt to comply with it. He ceased all activity under the name of S & S Specialty Company, closed his books and ordered a certified public accountant to prepare an ac-

count as of that date, filed and published notice of dissolution of the original partnership and notice to creditors, published notice of time and place of sale of the patent, executed an assignment of his one-half interest of record in the patent to the dissolved partnership, and requested the administratrix to execute a similar assignment covering the deceased's one-half interest of record therein. She made no reply to this request, and on September 30, 1952, procured an order from the Probate Court enjoining the sale of the patent and requiring Shaver to account to the estate for all profits made in his business.

"Being already in preparation, an account was filed on November 10, and as a result of hearings had between that date and January 28, 1953, supplemental accounts were filed furnishing all additional information requested by the administratrix. This accounting appears to have been an honest one, in which original book entries were adequately distinguished from estimates and subsequent charge-backs made by the accountant, in support of an accounting theory employed by him to show an assumed situation in which the Sibert estate had a continuing interest in the business as found by the court in the prior action. No changes were made in the original books which were kept on the basis of sole ownership by the Shaver family."

The court directed an accounting from October 8, 1937, the day of Sibert's death, to August 23, 1952, when, as the trial judge further observed in his memorandum opinion, "Shaver did everything in his power to wind up the business of the original partnership as ordered by the court, but was prevented from doing so by the action of the administratrix in refusing to join in an assignment of the patent to the partnership, as ordered by the court in the prior action, and procuring a restraining order against the sale of it."

No useful purpose would be served by further review of the testimony. Suffice it to say that, with voluminous and highly conflicting evidence before it, the trial court weighed that evidence, reconciled and accounted for to its own satisfaction,

the inconsistencies therein contained. Since there was substantial evidence to support the conclusions arrived at in the court below, it is not the function of an appellate tribunal to substitute its judgment for that of the trier of facts.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



William FISCHER, Plaintiff and
Respondent,
v.

COUNTY OF SHASTA, a political subdivision of the State of California, O. M. Turner, Lee S. Foster, Alfred Meeker, Andrew T. Jessen, J. G. Chatham, as the individual members of the Board of Supervisors of the County of Shasta, William F. Weber, as the Auditor of the County of Shasta, and Pacific Gas & Electric Co., a corporation, Defendants and Appellants.

Civ. 8608.

District Court of Appeal, Third District,
California.

Oct. 27, 1955.

Rehearing Denied Nov. 23, 1955.

Hearing Granted Dec. 21, 1955.*

Suit to enjoin county board and others from acting under contract for lighting of a state highway. The Superior Court, Shasta County, Albert F. Ross, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that county board could not, by creating special road maintenance district, contract for or expend public funds for the lighting of a state highway.

Judgment affirmed.

1. Highways ⇐95(1)

Streets and Highways Code discloses legislative plan that none of several agencies involved in highways may encroach upon domain of another except where legis-

lature has specifically provided it that way. Streets and Highways Code, § 100 et seq.

2. Highways ⇐90

In view of statute giving Department of Public Works full possession and control of all state highways, a county board may not, by creating a special road maintenance district, gain right to control, possess or maintain any section of state highway, or provide for lighting of highway by expenditure of public funds. Streets and Highways Code, § 90.

3. Highways ⇐90

County board could not, by creating special road maintenance district, contract for or expend public funds for the lighting of a state highway. Streets and Highways Code, §§ 24, 25, 27, 90, 91, 117, 130 et seq., 940, 941, 1550.1, 19000-19312, 19002.

Laurence J. Kennedy, Dist. Atty., Shasta County, Redding, for appellant Shasta County.

Robert H. Gerdes and William S. Love, San Francisco, Orr M. Chenoweth, Redding, for appellant Pacific Gas & Electric Co.

Carlton & Shadwell and Daniel S. Carlton, Redding, for respondent.

VAN DYKE, Presiding Justice.

This appeal involves the question of the power of a special road maintenance district to expend public funds to light state highways.

The Board of Supervisors of Shasta County, by ordinance dated January 26, 1953, created Shasta County Special Road Maintenance District No. 1, embracing an unincorporated area of Shasta County. The board acted pursuant to the provisions of Section 1550.1 of the Streets and Highways Code, the relevant portions of which are as follows:

"The board of supervisors may form special road maintenance districts in subdivided areas of the county wholly outside of incorporated cities. Formation of said districts may be ordered by the board of supervisors when in their opinion additional

* Opinion vacated 209 P.2d 222.

road funds are necessary to properly maintain roads in specific areas of the county."

Some years before this ordinance was passed there existed in Shasta County three unincorporated local communities known as Central Valley, Project City and Pine Grove. These communities are traversed by state highways 99 and 209 and these communities and their adjacent areas were included in the boundaries of the road maintenance district. Several years before the maintenance district was formed, these unincorporated areas had formed voluntary unincorporated associations for the purpose of lighting the highways and streets in these communities. The Pacific Gas & Electric Company had installed a lighting system for the use and convenience of these areas, a major portion of the installations being located in the state highway areas after permission first acquired from the Department of Public Works. This system had been used for lighting, but the method of paying the Pacific Gas & Electric Company for its services, through collections made by and among the members of the unincorporated associations, proved unsatisfactory. That was the situation when the board of supervisors created the special road maintenance district. Having so created it, the board on behalf of the county entered into a contract with the Pacific Gas & Electric Company calling for the operation of the lighting system at district expense. The system continued to be owned by the Pacific Gas & Electric Company and the county agreed to pay a certain charge for current consumed and service afforded in lighting the area.

Plaintiff, respondent herein, brought this action against the county, the members of the board of supervisors, the auditor of the county and the Pacific Gas & Electric Company, contending that the contract was unlawful, that the expenditure of any public funds pursuant to the terms thereof would be an illegal expenditure. He sought a permanent injunction prohibiting the expenditure. The cause was tried and the trial court found that the principal portion of the system lay within the rights of way of state highways 99 and 209; that the primary purpose and function of the sys-

tem was to light the sections of said highways which lay within the boundaries of the maintenance district. The trial court also found that the maintenance district had been created for the sole purpose of providing street lighting within its boundaries, which street lighting was to be financed by county funds. We may note here that there is nothing in the ordinance creating the district which bears out the court's findings as to its sole purpose. Legally, the district is a road maintenance district and has all of the powers, and may serve all of the purposes, of road maintenance within its boundaries as that term is defined in the statutes, which statutes include street lighting as part of road maintenance. The trial court further found that the contract between the county and the Pacific Gas & Electric Company providing for the financing of street lighting of portions of state highways out of county funds was for that reason null and void and that the plaintiff was entitled to an injunction forbidding the carrying out of said contract as involving in major part the unlawful disbursement of public funds. Judgment to that effect having been entered, the defendants appeal.

The parties all agree that the appeal raises the single question as to whether a board of supervisors, as the legislative body of a county, may provide street lighting for portions of state highways lying in an unincorporated area of its county through the medium of a special road maintenance district created pursuant to the provisions of section 1550.1 of the Streets and Highways Code.

In order to resolve the question thus presented we think it is necessary to consider the comprehensive legislative plan appearing in the Streets and Highways Code for the construction, maintenance, operation and control of public roads and ways. The Streets and Highways Code was first enacted in 1935. Stats.1935, ch. 29. It was declared to be an act to establish a streets and highways code, thereby consolidating and revising the law relating to public ways and all the appurtenances thereto. The first twenty-nine sections contain general provisions, definitions and other topics. Pertinent to this case are

sections 24 and 25. Section 24 defines the term "State highway" as meaning any highway which is acquired, laid out, constructed, improved or maintained as a state highway pursuant to constitutional or legislative authorization. Section 25 defines the term "county highway" as meaning any highway which is laid out or constructed as such by the county, laid out or constructed by others and dedicated or abandoned to or acquired by the county, or made a county highway in any action for the partition of real property or otherwise pursuant to law. Pertinent also is section 27, which defines "maintenance" as follows:

"* * * '[M]aintenance' includes:

"(a) The preservation and keeping of rights of way, and each type of roadway, structure, and facility, in the safe and usable condition to which it has been improved or constructed, but does not include reconstruction or other improvement.

"(b) The necessary provision for special safety conveniences and devices.

"(c) The general utility services such as roadside planting and weed control.

"(d) The special or emergency maintenance or repair necessitated by accidents or by storms or other weather conditions, slides, settlements or other unusual or unexpected damage to a roadway, structure or facility.

"(e) Such illumination of streets, roads, highways and bridges which in the judgment of the body authorized to expend such funds is required for the safety of persons using the said streets, roads, highways and bridges."

The section concludes as follows:

"The degree and type of maintenance for each highway, or portion thereof, shall be determined in the discretion of the authorities charged with the maintenance thereof, taking into consideration traffic requirements and moneys available therefor."

Leaving the general provisions, the code next contains Division 1—devoted to state

highways; Division 2—devoted to county highways; and, Division 2.5—devoted to city streets. In division 1 it is declared by section 90:

"The department [Department of Public Works] shall have full possession and control of all state highways and all property and rights in property acquired for state highway purposes. The department is authorized and directed to lay out and construct all state highways between the termini designated by law and on the most direct and practicable locations as determined by the commission."

Section 91 provides:

"The department shall improve and maintain the state highways, including all traversable highways which have been adopted or designated as state highways by the commission, as provided in this code."

Chapter 2 of the division describes "The State Highway System" and declares that: "The highways described in this chapter are state highways." Streets and Highways Code, § 230. Article 3 of that chapter contains a complete legislative designation of the state highway routes, and sections included in the article describe the various routes by giving the course and termini thereof. Without going further, it can be said that the first division of the Streets and Highways Code contains legislative recognition of and provision for a comprehensive system of state highways as distinguished from county highways and city streets, all of which state highways are declared to be under the full control and in the possession of the Department of Public Works.

Division 2 of the code concerns itself with county highways. Generally speaking, it vests the control and possession of county highways in the boards of supervisors of the several counties. Section 940 says: "Boards of supervisors shall have general supervision, management, and control of the county highways." Section 941 declares that: "Boards of supervisors shall by proper order cause those highways which are necessary to public convenience to be es-

published, recorded, constructed, and maintained in the manner provided in this division."

[1-3] We think it apparent from a consideration of the various provisions in the Streets and Highways Code that the legislature has set up a comprehensive legislative plan governing construction, maintenance, control and possession of public ways; that it has classified these ways and has given to the several public agencies jurisdiction over the classifications. It has set up a system of state highways, the full possession, control, and duty to maintain which it has given to the Department of Public Works. It has provided for a system of county highways within each of the counties and has given to the various county boards of supervisors the right and the duty to control, possess, maintain and construct them. Finally, we think it is apparent that, as a part of the legislative plan, none of the several agencies may encroach upon the domain of another except where the legislature has specifically provided that it may. We think, therefore, that a board of supervisors, having created a special road maintenance district, has thereby gained no control and no right to possess, or to in any sense maintain, any section of a state highway. We think that there is nothing in the legislative plan that permits a board, having created such a district, to maintain any portion of a state highway by lighting the same any more than it can maintain such portion by doing any of the other things included within the statutory definition of the word "maintenance". As a corollary, we think that a board of supervisors, having no power to maintain any portion of a state highway, cannot expend public funds for that purpose.

We find further authority for what we have said in certain decisions of the Supreme Court. In *Gillespie v. City of Los Angeles*, 36 Cal.2d 553, 559, 225 P.2d 522, 526, in a wrongful death action against the City of Los Angeles, arising out of an automobile accident on a portion of a state highway within the city limits, the Supreme Court, in holding that no relief could be had against the city, said:

" * * * The state department of public works has 'full possession and control' of all state highways, Streets and Highways Code, § 100, including 'State highways within cities'. Streets and Highways Code, § 204. Such highways are therefore 'under its jurisdiction' within the meaning of section 465 of the Vehicle Code. The duty to place and maintain the traffic signs and signals required by that section is expressly placed on the state department of public works. Moreover, it is that department only that determines the degree and type of maintenance including 'safety conveniences and devices' for each state highway. Streets and Highways Code, §§ 27, 100. It follows that state highways are not within the jurisdiction of local authorities to control or maintain, and are therefore not 'in their respective jurisdictions' under section 465 of the Vehicle Code."

See also *Whalen v. Ruiz*, 40 Cal.2d 294, 253 P.2d 457, wherein the Supreme Court held that a railroad company had no such authority as to warrant its making structural changes in the highway deck of a bridge which was part of a state highway. The court held that the jurisdiction of the Department of Public Works over state highways is exclusive. The Supreme Court said further in *Gillespie v. City of Los Angeles*, supra, 36 Cal.2d at page 559, 225 P.2d at page 526, discussing the effects that would flow from a division of control, including responsibility over state highways and the maintenance thereof:

"To hold that a state highway, which the state department of public works has 'full possession and control of,' and for which that department determines the degree and type of maintenance, including safety conveniences and devices, is 'in (the) respective jurisdictions' of local authorities would not only create a direct conflict between the two Codes, but would lead to anomalous and unreasonable results. Both subdivisions (a) and (b) of section 465 provide that the respective agencies 'shall place and maintain' the required traffic control devices. If two or more agencies had the same mandatory duty, confusion would result when they

sought to discharge their duties over the same highway, and the uniformity sought to be achieved by the state highway system would be defeated. See, *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 663, 262 P. 334. Moreover, the placement and maintenance of traffic signs and signals is only a part of the general duty to maintain streets and highways in a safe and usable condition. Whether or not there is need for warning signs or signals will frequently depend on what other steps may be taken to render the highway safe and usable. In the present case, for instance, posting a warning sign would be only one of several means that might be adopted to apprise motorists of the curve ahead. Proper maintenance might eliminate the danger altogether, so that no warning would be necessary. It would be unreasonable to conclude that the Legislature intended that the limited part of maintenance involving the placement and maintenance of traffic signs and signals should be treated differently from the problem as a whole."

It is suggested that the Highway Lighting District Act, Div. 14, Part 4, Sections 19000-19312, Sts. & H.Code, which does authorize a lighting district to be formed with power to construct and maintain a lighting system to illuminate public highways, including state highways, within the district, is a legislative recognition that the possession and control of state highways is not, as to lighting, exclusive in the department. Such districts are formed by petition, election, and order. The board of supervisors, after the district is formed, is granted authority to adopt and carry out a plan for a "street lighting system" * * * by means of street lights which are set upon poles or suspended in the air." It is declared, section 19002, that the act provides an alternative system for making the improvements authorized by Part 14, which part of the code authorizes the formation of lighting districts of various kinds. We think nothing in this legislation was intended to war against the comprehen-

sive plan for control, possession and maintenance of highways which appears in the code. On the contrary, this legislation, and other enactments such as that governing encroachment permits, section 117, Sts. & H.Code, contracts for proportionate sharing of construction expense, section 130 et seq., and the like, emphasize that, except where so expressly authorized, there shall be no overlapping of jurisdiction.

There are contentions by way of argument advanced by the appellants which we have not herein specifically treated. We think, however, that what we have said is sufficient to dispose of the single question posed by this appeal.

For the reasons we have given, the judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



136 Cal.App.2d 593

James A. BAUCUM and Paula Baucum, husband and wife, Plaintiffs, Cross-defendants and Appellants,

v.

Lee J. LE BARON and Esther LeBaron, husband and wife, Defendants, Cross-complainants and Respondents.

Civ. 8510.

District Court of Appeal, Third District, California.

Oct. 28, 1955.

Action to quiet title to land. Defendants, who filed cross-action for reformation of deed, claimed title to easement, and sought to quiet title of easements: The Superior Court, Tehama County, Curtiss E. Wetter, J., entered judgment quieting plaintiffs' title to land, and adjudged that defendants were owners of the easements in question and plaintiffs appealed from latter portion of judgment. The District Court of Appeal, Peck, J., held that where a party

to a quiet title action shows an equitable right to have the legal title conveyed to him, the court in the exercise of its chancery powers may grant the proper relief.

Judgment affirmed.

1. Evidence ⇨433(4)

In action to quiet title, where the pleadings put in issue a mutual mistake of the parties in framing and executing partition deeds, parol evidence was admissible.

2. Partition ⇨9(1)

Partition deeds must be read and construed together as a single instrument in the light of the circumstances attending the execution in order to carry into effect the intent of the parties.

3. Quietling Title ⇨49

Where a party to a quiet title action shows an equitable right to have legal title conveyed to him, the court in the exercise of its chancery powers may grant the proper relief. West's Ann.Code Civ.Proc. § 738.

4. Quietling Title ⇨46

The court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property.

5. Partition ⇨8

Where cotenants by an exchange of deeds partitioned property and endeavored to reserve certain rights of way as driveway over the property so divided, the fact that mutual deeds were executed by the cotenants and each partition deed was not signed by all cotenants did not render the deeds ineffective to create the intended easement.

6. Quietling Title ⇨43

In action to quiet title, since there was an obvious mistake in the deed, which mistake was put in issue by the pleadings, and since the validity of the agreement was in dispute, evidence on issue as to whether or not defendants were bona fide purchasers when they acquired their property was properly admitted. West's Ann.Code Civ. Proc. § 1856.

7. Estoppel ⇨92(3)

Where cotenants partitioned property by exchange of mutual deeds and endeavored to reserve certain rights of way as driveways over the property so divided, cotenants' successors in interest could not rely on right of way given their grantors and refuse to honor right of way reserved to the other cotenants by deeds which arose out of the same transaction.

Pugh & Webster, Red Bluff, for appellants.

Rawlins Coffman, Red Bluff, for respondents.

PEEK, Justice.

Plaintiffs sought to quiet their title to certain land in Tehama County, alleging that defendants claimed certain easements thereon. Defendants' cross-complaint admitted their claim and set forth two causes for affirmative relief. The first sought reformation of the deed by which they claimed title to the easements in question, and the second prayed that their title to the easements be quieted. The judgment of the court quieted plaintiffs' title and further adjudged that defendants were the owners of the easements in question. Plaintiffs now appeal from the latter portion of that judgment.

The record shows that on January 6, 1948, one Clendenning and his wife conveyed to defendants an undivided one-half interest, and to K. W. Dayton and his wife, the predecessors in interest to and grantors of the plaintiffs, the remaining one-half interest of the property here in question. On July 26, 1948, by an exchange of deeds defendants and the Daytons partitioned said property and endeavored to reserve certain rights of way as driveways over the property so divided. To obtain descriptions of the property from which to prepare the deeds, they secured the services of a land surveyor who, at the trial, testified to the instructions given him and the intentions of the parties as expressed to him. The defendants as well testified concerning the arrangements between themselves and the

Daytons and produced a memorandum made at that time. Thereafter the Daytons sold their portion of the land to the plaintiffs by deed dated February 6, 1950. The deeds of July 26, 1948, by which the Daytons conveyed to the defendants their portion of the land contained a clause reserving a strip of land 40 feet in width across the property for a driveway. The easements assumed to have been created by the 1948 deeds have been in continual use by the Daytons, the defendants and the plaintiffs, together with the patrons of the businesses of each party since that date. Through error in the course call of the description, the particular reservation here in issue described a right of way over property other than that here involved. The essence of the surveyor's testimony was to the effect that the call should have read 82° 40' east instead of 89° 40' west. The subsequent deed of February 6, 1950, by which the Daytons conveyed their property to plaintiffs described the rights of way reserved by reference to the original deed.

Plaintiffs' first contention is predicated upon the primary rule in quiet title proceedings that one can recover only upon the strength of his own title rather than upon the weakness or lack of title in his adversary. They argue that findings I and II insofar as they purport to find in accordance with the evidence submitted by defendants that they are the owners of the easements in question, could find support in the record only if the deed was reformed.

[1-4] Where, as here, the pleadings put in issue a mutual mistake of the parties in framing and executing partition deeds, parol evidence is admissible. *Booth v. Stow*, 38 Cal.App. 191, 175 P. 705. Such deeds must be read and construed together as a single instrument in the light of the circumstances attending the execution in order to carry into effect the intent of the parties. 68 C.J.S., Partition, § 9, b, p. 16; *Drake v. Tucker*, 43 Cal.App. 53, 184 P. 502. Furthermore, where a party to a quiet title action shows an equitable right to have the legal title conveyed to him, the court in the exercise of its chancery powers may grant the proper relief under sec-

tion 738 of the Code of Civil Procedure. *Noyes v. Huffman*, 41 Cal.App. 676, 183 P. 284. And, finally, as the court said in *Hendershott v. Shipman*, 37 Cal.2d 190, at page 194, 231 P.2d 481, at page 483, "It is now well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property."

[5] In their second contention plaintiffs urge preliminarily that the purported partition by the defendants and the Daytons of their common property was not effective to create the intended easement therein, since each partition deed should have been executed by all four of the cotenants rather than by the separate deeds of the Daytons and defendants. In other words defendants only owned an undivided interest in the property and hence they could not create an easement in the common estate against their cotenants. We again refer to the rule heretofore noted that under circumstances where the partition is made by mutual deeds they must be read together and construed as a single instrument in order to carry into effect the intent of the parties. The case of *Drake v. Tucker*, heretofore cited, presented a factual situation not wholly unlike the one now before the court. There the court in construing mutual deeds relative to certain riparian rights held that since both deeds were admittedly part of the same transaction, they had to be construed together. Viewing the present situation in light of the evidence and circumstances surrounding the transaction, a like conclusion must prevail here.

[6, 7] Plaintiffs' final contention is that the court erred in admitting evidence on the issue as to whether or not they were bona fide purchasers when they acquired their property. Defendants in answer to plaintiffs' contention state that since there was an obvious mistake in the deed, which mistake was put in issue by the pleadings, and since the validity of the agreement was in dispute, under the provisions of section 1856 of the Code of Civil Procedure, such evidence was proper admitted. The trial judge who viewed the premises, in

his memorandum of decision, noted that the deed from the Daytons to plaintiffs referred to the obvious error in the description; that plaintiffs had camped on or near the property prior to their acquisition thereof; that they had acquired a motel within a short distance of the property and established their residence there at or about the same time; that the evidence showed the property was used for fishing camps, docking facilities and small businesses; that to facilitate the use of the property as such, plaintiffs' predecessors had built a roadway along the reserved strip; and that plaintiffs could not on the one hand rely upon a right of way given their grantors and not honor a right of way reserved to the defendants by the deeds which arose out of the same transaction. Furthermore plaintiffs, according to the testimony, acknowledged the existence and use of the easement in question.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



136 Cal.App.2d 856

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

CHEW DOON CHAN, Defendant
and Appellant.

Cr. 5416.

District Court of Appeal, Second District,
Division 3, California.

Nov. 9, 1955.

Defendant was convicted of pimping. The Superior Court of Los Angeles County, Burdette J. Daniels, J., entered judgments and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Prostitution ⇨4

Evidence sustained conviction for pimping. Pen.Code, § 266h.

2. Criminal Law ⇨1170½(1)

In prosecution for pimping, introduction by prosecution during direct examination of prosecutrix, of letter, which prosecutrix had written to a policeman, and which stated that testimony given by her at preliminary examination was untrue, and which was contrary to her testimony at the trial, in order to permit prosecutrix to explain her motive in writing letter on direct examination instead of waiting until defendant introduced letter on cross-examination, was not prejudicial error. Pen.Code, § 266h.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Chew Doon Chan was accused of four violations of section 266h, Penal Code (pimping) in that he did on four separate dates live and derive support and maintenance, in whole or in part, from the earnings of Patricia Louise Grow as a prostitute and solicited and received compensation therefor from her. It was alleged that he had previously been convicted and had served a term of imprisonment for the crime of receiving and transporting opium. He was convicted on all counts and the court found that he had not suffered the alleged prior conviction. Motion for new trial and application for probation were denied and sentences were imposed to run concurrently with each other. The appeal is from the judgments and the order denying motion for new trial. The grounds of appeal are errors of law and insufficiency of the evidence.

[1] The claim of insufficiency of the evidence does not require extended discussion. The opening brief of the appellant contains a statement of the testimony of the prosecutrix. A summary of that testimony as related by defendant clearly shows that the witness testified to facts constituting the

elements of the offenses. She testified that she had come from San Francisco with one Caliva; she met appellant and he suggested her going to work for him as a prostitute; they picked up another girl named "Kitty" and went to defendant's home; they discussed the prices for prostitution; they went to a hotel and later Chan took the girls to a motel on July 22. Thereafter prosecutrix worked as a prostitute for defendant until August 11; she earned as a prostitute and turned over to defendant \$504 and received back from him \$252; each time she paid him money defendant would make a notation on a card and in a telephone memorandum book; Kitty worked with her during all this time. Later prosecutrix asked to be taken into custody by the police because of her fear of defendant. Another witness testified that in September he had a conversation with Chan concerning Miss Grow in which Chan mentioned that he wanted to put Miss Grow to work as a prostitute outside of town and wished the witness to supervise her work. The People introduced in evidence a book taken from defendant's premises at the time he was arrested. A Chinese-English interpreter testified that there were ten entries in the book in symbols, each consisting of a date in July and an amount of money; these totaled \$504 and there was another entry "\$252." On another page there were eight entries of sums of money under dates August 1 to August 10. There was testimony that when an officer took the book defendant said it was a grocery list. Defendant admitted knowing the prosecutrix, admitted having discussed prostitution with her, and asserted that she asked him to solicit for her and that he refused. He also admitted having rented quarters in the motel. He was an itinerant waiter and cook in Chinese restaurants. There was no evidence that his earnings in that employment were adequate for the support of his family. It was a reasonable inference that he derived support and maintenance, in part, from the girl's earnings. So much the worse for him if he engaged in pimping free from the urge of extreme financial distress. Although there was no direct evidence of solicitation by defendant, the cir-

cumstantial evidence was such as to create a strong inference that the men who visited prosecutrix were sent to her by the defendant. There is no merit whatever in the claim of insufficiency of the evidence to prove the offenses charged.

[2] During the direct examination of the prosecutrix there were produced by the defendant two letters written by the prosecutrix, one to the defendant apologizing for having made charges against him and the other to a Los Angeles policeman stating that the testimony she had given at the preliminary examination was untrue. Defendant objected to the introduction of the letter to the policeman; the objection was overruled and the ruling is assigned as error. Defendant argued that the letter was introduced to impeach the witness without any showing of surprise on the part of the prosecution. It was also argued that the letter was offered to rehabilitate the testimony of the witness, and that whatever the purpose the procedure was irregular and prejudicial. The letter was not offered either to impeach or rehabilitate the testimony of the witness. Anticipating that the defendant would introduce the letters in cross-examination, the People offered them in order to give the witness an opportunity to explain her motive in writing them. Ordinarily the defendant would have produced the letters in the course of cross-examination and upon redirect examination the witness would have been permitted to state her reasons for writing them. Inasmuch as the letters were contradictory of her testimony at the trial and were favorable to the defendant we do not see that the defendant suffered any prejudice through being deprived of the opportunity to use the letters in the course of the cross-examination. Moreover, the letters themselves took on added significance favorable to the defendant from the fact that the witness testified that she wrote them merely as a favor to defendant and not as a result of any other inducement. Defendant was accorded a fair trial and his appeal is without merit.

The judgments and order are affirmed.

PARKER WOOD, J., and NOURSE, Justice pro tem., concur.

136 Cal.App.2d 750

In re Fernando F. LEYVA, Jr., on
habeas corpus.

Cr. 3207.

District Court of Appeal, First District,
Division 1, California.

Nov. 7, 1955.

Habeas corpus proceeding. The District Court of Appeal, Peters, P. J., held that absent an allegation that point had been raised before trial court or on appeal in criminal case, habeas corpus petition based on contention that petitioner had been convicted by use of illegally secured evidence would be denied, notwithstanding petitioner's contention that use of such evidence had denied to him due process of law.

Petition denied.

Habeas Corpus ¶54

Absent an allegation that point had been raised before trial court or on appeal in criminal case, habeas corpus petition based on contention that petitioner had been convicted by use of illegally secured evidence would be denied, notwithstanding petitioner's contention that use of such evidence had denied to him due process of law.

Fernando F. Leyva, Jr., in pro. per.

PETERS, Presiding Justice.

This petition for habeas corpus is based on the contention that petitioner was convicted by the use of illegally secured evidence. There is no allegation that the point was raised before the trial court or on appeal. The sole contention is that the use of such evidence denied to petitioner "due process" of law. In *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, the Supreme Court was careful to point out that the rule involved was a rule of evidence and not a rule of constitutional law. See 44 Cal.2d at page 440, 282 P.2d at page 908. If this determination is to be questioned,

it should be in the Supreme Court and not in an intermediate appellate court that is bound by Supreme Court determinations. Under the circumstances, habeas corpus may not be used to re-litigate the issue.

The petition for habeas corpus is denied.

BRAY, and FRED B. WOOD, JJ.,
concur.



CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners, Plaintiff and Appellant,

v.

Frank A. BURNS, Norman C. Thomson
et al., Defendants,

Herman Stelzner and Walter R. McCoy,
Defendants and Respondents.

Civ. 16456.

District Court of Appeal, First District,
Division 2, California.

Oct. 31, 1955.

Hearing Granted Dec. 28, 1955. *

Action by city against limousine and bus service operators to enjoin them from operating on street within city airport and to obtain damages for such operations contrary to exclusive license and concession granted by city board of port commissioners to another limousine service. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment in favor of two defendants, and city appealed. The District Court of Appeal, Nourse, P. J., held that commissioners did not have power to dedicate road as public street under common-law doctrine of dedication by implication, in view of fact that board did not follow formal proceedings for opening of public street as provided for by city charter.

Judgment reversed with directions.

* Opinion vacated 296 P.2d 333.

1. Appeal and Error ⇨1011(1)**Dedication** ⇨45

Question whether there has been a common-law dedication of a road as a public street is one of fact, and generally, rule that decision of trial court based upon substantial though conflicting evidence is binding on appeal applies.

2. Dedication ⇨13

Board of Port Commissioners did not have power to dedicate road as public street under common-law doctrine of dedication by implication, in view of fact that Board did not follow formal proceedings for opening of public street as provided for by charter.

3. Dedication ⇨20(1), 44

Under California law, common-law dedication of road as public street or highway by informal implied offer by owner informally accepted by public through user may be made, and both offer and acceptance may be proved by circumstantial evidence.

4. Dedication ⇨20(2)

An actual intent and offer to dedicate may be inferred from owner's long acquiescence in public use of property under circumstances which negative idea that the use was under a license.

5. Dedication ⇨41

Long continued adverse use may establish against owner a conclusive presumption of dedication.

6. Dedication ⇨20(2)

Even under rule that actual intent and offer to dedicate may be inferred from owner's long acquiescence and public use of property under circumstances which negative idea that use was under a license, the actual offer of dedication by offeror legally entitled to make the dedication is required.

7. Dedication ⇨13

Unless specifically restricted, municipality may make actual offer of dedication of land owned by it just as a private owner may, and manner in which such offer can be made will be the same in either case except insofar as mode to be used by municipality is restricted by law.

8. Dedication ⇨13

Mode of dedicating property as public street, as prescribed by municipal charter, is measure of power to dedicate, and dedication made in disregard of such mode would be unenforceable.

9. Municipal Corporations ⇨646

Exclusive mode of opening public streets in port area is prescribed in Oakland city charter provision pertaining thereto.

10. Adverse Possession ⇨8(1)

Title by prescription cannot be acquired against municipality or subdivision of state in land reserved for or devoted to some specific public use. West's Ann.Civ. Code, § 1007; West's Ann.Code Civ.Proc. § 1238, subd. 20; West's Ann.Gov.Code, § 50470.

11. Dedication ⇨39

Fact that city defended its right to make exclusive contract with limousine airport service on ground that city operated airport in proprietary, not governmental, capacity would not preclude city from asserting, in defense to argument that airport street had been dedicated to public use, that title by prescription could not be acquired against municipality in land reserved for or devoted to some specific public use. West's Ann.Civ.Code, § 1007; West's Ann.Code Civ.Proc. § 1238, subd. 20; West's Ann.Gov.Code, § 50470.

12. Automobiles ⇨71

Where Public Utilities Commission had granted defendant a certificate of public convenience and necessity authorizing him to operate a passenger stage service for transportation of nonscheduled airline passengers from city airport to certain other points over and along the most appropriate public streets and highways between such points, superior jurisdiction of commission would not prevent city from giving exclusive franchise to another to perform such services, in view of fact that commission had not found that the airport road was a public street or determined that service authorized by commission would have to take place over such road. Public Utilities Code § 1033; West's Ann.St.Const. art. 12, § 23.

J. Kerwin Rooney, Port Atty., Edward A. Goggin, Asst. Port Atty., Oakland, for appellant.

Rodney H. Hamblin, Donovan, Stuhr & Martin, San Francisco, for respondent Herman Stelzner.

Herbert Bartholomew, San Francisco, for respondent Walter R. McCoy.

NOURSE, Presiding Justice.

This is an appeal by the City of Oakland (hereinafter called the City), from a judgment in favor of defendants Stelzner and McCoy in an action for an injunction and damages instituted by the City in relation to the operation by defendants of limousine or bus services from and on the Oakland Municipal Airport (hereinafter called the Airport), and their solicitation on the Airport of patronage for said services, allegedly in contravention of certain ordinances and regulations of the City and its Board of Port Commissioners (hereinafter called the Board), and of the exclusive license and concession granted by the Board for said services at the Airport to Fialer's Limousines, Inc. (hereinafter called Fialer's). A preliminary injunction which had been granted was vacated.

The court's findings of fact and conclusions of law are in part to the following general effect.

The City of Oakland owns the Airport, and it operates it through the Board in its proprietary capacity. Earhart Road is the principal roadway within the Airport passing the main buildings among which are the International Terminal Building, hangars and installations, and has been paved and provided with curbs by the Board. Since 1927 the main part of this road, specifically described in the findings, has been used generally by the public with the knowledge and without objection from the Board, which at no time took any action to terminate such general use. The Board has in that manner dedicated it to the public use under the common-law doctrine of dedication by implication and it is now a public street. It has not been dedicated in any formal manner. An unnamed side road of Earhart Road along the southwesterly side of the International Terminal

Building and a parking and turning area in back of said building, together by the court called Area B and delineated on a map, has been used since 1947 for ground transportation service for passengers of non-scheduled airlines and the vehicles transporting these passengers for hire had access to that Area B only by revocable permits of the Board and its agents. This Area B has not been dedicated to public use either formally or by implication.

The agreement between the City in its proprietary capacity and Fialer's, granting the latter an exclusive license for certain transportation services for hire commencing November 1, 1951, is valid except insofar as it purports to accord Fialer's exclusive rights with respect to the part of Earhart Road found to be a public street. The following ordinances allegedly violated by defendants were found to be valid ordinances regulating the use of airport property held by the City in its proprietary capacity but not applicable to the public part of Earhart Road:

Port Ordinance No. 641 of January 10, 1949 among other things prohibiting the use of the Airport as a base for the carrying for hire of passengers or for any other commercial purpose without license from the Board or its Port Manager.

Port Ordinance No. 786, of September 24, 1951, prohibiting solicitation of patronage for any taxicab, limousine or airline bus service within the Airport or entering the Airport for such purpose, except when so authorized by contract.

Port Ordinance No. 835 of November 3, 1952 adding to Port Ordinance No. 812, Section 2.1 prohibiting the operation of any vehicle or bus from the Airport unless with the approval of the Board and on its condition and terms.

Section 106 of Council Ordinance No. 3083 C.M.S. of May 31, 1949 prohibiting the operation or leaving of a vehicle on private property without the express permission of the owner.

Since November 1, 1951 nobody but Fialer's has been entitled to solicit patronage for or to engage in the transportation of persons on or from the Airport in airline

motor buses, taxicabs or limousines except that defendants may operate on the portion of Earhart Road found to be a public street.

Defendant Stelzner provided transportation with one limousine from March 21, 1946 to January 8, 1953, defendant McCoy with one bus from some time in 1947 to January 1953. Prior to November 1, 1951 defendants used Area B in operating their vehicles. On that date their permits were revoked and thereafter they used the portion of Earhart Road found to be a public street only. Both defendants are duly licensed by the City to operate a limousine carrying passengers for hire on the public streets of the City, which include the public portion of Earhart Road.

On January 23, 1951 defendant McCoy was granted by the Public Utilities Commission a certificate of public convenience and necessity authorizing him to operate a passenger stage service for the transportation of nonscheduled airline passengers from the Airport to certain points in Oakland and San Francisco and to Treasure Island over the most appropriate streets between the points authorized. On rehearing a petition of Fialer's to vacate said order was denied and the order affirmed. Said certificate is unambiguous and authorizes defendant McCoy to use the most appropriate public streets and highways between the points authorized including the part of Earhart Road found to be a public street. Defendant McCoy is under a duty to provide a ground transportation service in accordance with the certificate obtained.

Within a year prior to the commencement of the action defendants have not committed any of the acts prohibited in the ordinances mentioned herein except on the portion of Earhart Road which is a public street. They have within that period not violated said ordinances, not interfered with the exclusive contract between the City and Fialer's or with the City's duty to provide adequate ground transportation at the Airport, not trespassed upon property in the Airport held by the City in its proprietary capacity and not created any nuisance there after November 1, 1951.

Appellant's primary contention is that no part of Earhart Road is a public street but that in its entirety it is a private road within the Airport. The City has all power over it which the Court conceded to it with respect to the Airport property held in the City's proprietary capacity. The defendants have not cross-appealed and do not attack any of the findings or conclusions of law. They do not claim more extensive rights than those recognized in the judgment, to wit the right to operate their limousine or bus services on such portion of the airfield as is a public street. Whether the part of Earhart Road involved has or has not become a public street is therefore the crucial question.

[1, 2] Appellant urges both that the evidence does not support the finding that the Board by implication dedicated Earhart Road to be a public street and that the Board lacked power so to dedicate it. Whether there has been a common law dedication is a question of fact (15 Cal.Jur.2d 387) and the general rule that the decision of the trial court based on substantial though conflicting evidence is binding on appeal applies. *Diamond Match Co. v. Savercool*, 218 Cal. 665, 667, 24 P.2d 783. In this case it may well be that from the absence of all restriction on the use by the public of Earhart Road, including operation of scheduled Key System buses over it, pursuant to a certificate of public convenience and necessity of the Public Utilities Commission and from the lack of any reservation of private right by the Board an inference of an intent to dedicate as a public street could reasonably be drawn, notwithstanding the fact that the purpose for which the City uses the Airport property, to wit as a terminal for extensive air transportation together with numerous connected installations and enterprises, requires the daily use of its main roadway by thousands of persons who come as licensees or invitees of the City and whose presence for the purposes of the Airport itself cannot be considered evidence of an intention or offer to dedicate it as a public street. However, we need not decide this point because we have concluded that the Board lacked

power to dedicate Earhart Road in the manner found, by acquiescence in public use, without following the formal proceeding for opening of public streets provided for by section 218 of the Oakland City Charter to be stated hereafter.

[3-5] A common law dedication as a public street or highway by an informal implied offer by the owner informally accepted by the public through user is in general recognized in California and both offer and acceptance may be proved by circumstantial evidence. The function of the user by the public and the acquiescence therein by the owner in showing an offer of dedication as a public street or highway was recently analyzed in *Union Transp. Co. v. Sacramento County*, 42 Cal.2d 235, 240 et seq., 267 P.2d 10, and was there found to be twofold: (a) an actual intent and offer to dedicate may be inferred from the owner's long acquiescence in a public use of the property under circumstances which negative the idea that the use was under a license, (b) a long continued adverse use may establish against the owner a conclusive presumption of dedication. This latter effect of the user is in the character of prescription and the intent and offer of dedication may be constructive only.

[6] For the actual offer of dedication referred to in (a) an offeror legally entitled to make the dedication is required. See *Neil v. City of Glendale*, 106 Cal.App. 553, 557, 289 P. 877; whether the same capacity or authority is required with respect to the constructive dedication mentioned subd. (b) is more doubtful. See *Schwerdtle v. County of Placer*, 108 Cal. 589, 593, 41 P. 448; *Gray v. Magee*, 133 Cal.App. 653, 662, 24 P.2d 948.

[7,8] A municipal corporation, unless specially restricted, may as well make an actual offer of dedication of land owned by it as a private owner, 19 Cal.Jur. 23 et seq., § 384; 10 McQuillin Municipal Corporations, p. 104; 11 McQuillin, supra, p. 616; *City of Oakland v. Oakland Water Front Co.*, 162 Cal. 675, 680, 124 P. 251, and the manner in which such offer can be made will be the same in both cases (16 Am.Jur. 356, § 13), except insofar as for a municipal

corporation the mode is restricted by law, Constitution or charter. In 10 McQuillin, supra, p. 106 et seq., it is stated in general: "The legislature may prescribe the method by which the power to sell or lease or otherwise dispose of property shall be exercised, and, if applicable, the method so provided must be substantially followed. In like manner, compliance should be had with an applicable method of sale, lease or other disposition or [sic] property prescribed by a charter, or ordinance." The same rule is stated with respect to the vacating of public roads in *County of San Diego v. California Water & Telephone Co.*, 30 Cal.2d 817, 823, 186 P.2d 124, 175 A.L.R. 747, where also an analogous rule as to contracts for the sale of municipal property is mentioned. In *Miller v. McKinnon*, 20 Cal.2d 83, 88, 124 P.2d 34, 37, 140 A.L.R. 570, the following general rule is quoted from *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 353, 291 P. 839, 842, 71 A.L.R. 161: "It is * * * settled that the mode of contracting as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable." We hold that the same principle applies to voluntary dedication of municipal property to be a public street.

[9] In our case an exclusive mode of opening public streets in the Port Area is prescribed in section 218 of the Oakland City Charter, supra, which reads:

"Sec. 218. Whenever the Board shall determine that it is necessary to open, close, improve, alter or vacate a public street, or part of a public street within the 'Port Area,' a certified copy of the resolution so determining such necessity shall be filed by the Board in the office of the City Clerk, whereupon the City Manager and the City Council shall initiate and carry to completion the proceedings necessary to effect said proposal."

The word "whenever" in this section indicates that the mode prescribed is exclusive, the repeated use of the word "shall" in describing the procedure, that it is mandatory. Section 217 moreover prevents the City of Oakland or the Council from performing any of these acts mentioned in sec-

tion 218 without the cooperation of the Board, a provision of less importance in this case as dedication by the Board was found. It is undisputed and found at least by implication that Earhart Road has not been opened as a public street in the manner prescribed by section 218, *supra*. Even if the Board should have had the intention and had made the implied offer to dedicate Earhart Road as a public street without substantially following the procedure of section 218, such offer would have been invalid and ineffective.

[10] It could be argued that the creation of an easement of public street by adverse user by the public as mentioned above subd. (b) without an actual intent or offer to dedicate by the City or any of its agents is not the opening of a public street by the Board or the City, but an adverse imposing of such burden to which section 218, *supra*, does not apply. However, such creation would be one by prescription, and no title by prescription can be acquired against any municipal corporation or subdivision of the State, at least not in land reserved for or devoted to some specific public use. (2 Cal.Jur.2d 507, § 10). In *Henry Cowell Lime & Cement Co. v. State*, 18 Cal.2d 169, 172, 114 P.2d 331, 332, the Supreme Court quotes from *Richert v. City of San Diego*, 109 Cal.App. 548, 553-554, 293 P. 673, 676, as follows: "Where land held by the state or any of its subdivisions has been actually reserved for or dedicated to some specific public use, there can be no adverse holding thereof which can give title to the adverse claimant." In *Bartholomew v. Staheli*, 86 Cal.App.2d 844, 857, 195 P.2d 824, 832, it is stated quoting from *People ex rel. State Board of Harbor Com'rs v. Kerber*, 152 Cal. 731, 93 P. 878;

"* * * "It is immaterial where the title—that is, the record title—is held, whether by the state at large, or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved for public

use, and the public use for which it is appropriated is immaterial. The same principles which govern the adverse holding of a street, a public square, a quay, a wharf, a common, apply to the adverse holding of a schoolhouse. *The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights.*" This rule has been often repeated in the opinions of this court. (Citing numerous California authorities.)" (Italics added by District Court of Appeal).

The rule was applied to the acquisition of an easement by prescription in *Reclamation Dist. No. 833 v. American Farms Co.*, 209 Cal. 74, 81, 285 P. 688. With respect to public and municipal corporations the rule is contained in section 1007 of the Civil Code without even the restriction to land devoted to a public use. (2 Cal.Jur. 2d 512, § 14.) However, the use as an airport, here involved, is at any rate a public use which excludes the acquisition of rights by prescription also independent of section 1007, *supra*. The right of local public agencies to acquire and use property for airports, the right to levy taxes to raise funds for that purpose and the powers of the agency in connection with airports are regulated in section 50470—'74 of the Government Code. Section 1238 of the Code of Civil Procedure mentions, subd. 20, Airports as one of the "public uses" for which the right of eminent domain may be exercised.

The above principle is mainly applied to prevent the acquisition by prescription of private rights of specific persons in property devoted to a public use, but we are of opinion that it applies also to the acquisition of an easement of public street. The public as a whole place the control over lands devoted to a public use in the hands of certain agents (in this case the Board and the Council); those who use a roadway over such public lands are only a small segment of the general public. Such small segment should not have the power to assume control and give part of the property a use that may be injurious to the one

to which the land was originally devoted and which was expressly entrusted to certain chosen or appointed agents, even if these agents were remiss in protecting said trust. Compare for a somewhat similar reasoning *Union Transp. Co. v. Sacramento County*, supra, 42 Cal.2d at page 244, 267 P.2d 10.

[11] Respondents contend that the City cannot rely on the above rules of public law in contesting their right to use Earhart Road as a public street because it defends its right to make the exclusive contract with Fialer's on the ground that it operates the Airport in proprietary and not in governmental capacity. We do not agree. The principle on which the City claims a right to make an exclusive transportation contract at the Airport is stated as follows in *Ex parte Houston, Okl.Cr. App.*, 224 P.2d 281, 292. "To us it appears reasonable that the power to acquire and operate a proprietary function implies all necessary power to operate it efficiently. This thought was advanced in the Florida case of *Miami Beach Airline Service v. Crandon*, 159 Fla. 504, 32 So.2d 153, 155, 172 A.L.R. 1425, 1430. And there the court said: 'When a governmental entity is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person would do.'" In the latter case this principle was used to uphold an exclusive contract of the same kind as that of Fialer's. It was evidently followed by the trial court in this case and is not attacked by respondents. It does not, however, follow from the recognition of the principle that a municipality acting in proprietary capacity must be allowed the powers necessary to perform it efficiently and to be free from restrictions which impede its efficiency that it must also be free from restricting provisions which do not impede its specific function, like the one restricting the manner in which it may open public streets over its

lands or that it cannot rely on rules advantageous to it like the one protecting it against the acquisition of prescriptive rights by third parties. Section 218 of the Oakland Municipal Charter does not contain any restrictions indicating that it does not apply to opening of streets over lands devoted to a public use of proprietary character, and the rule excluding acquisition of prescriptive rights against municipalities at most excepts lands not devoted to any public use, either governmental or proprietary in character.

[12] Our conclusion that Earhart Road on the above grounds has not become a public street is decisive of the appeal. The certificate of public convenience and necessity of respondent McCoy orders him to conduct his operations "over and along the most appropriate public streets and highways between the points authorized." Respondent McCoy urges the superior jurisdiction of the Public Utility Commission over the bus and limousine services on Earhart Road (Section 23, Art. XII of the California Constitution; Section 1033 of the Public Utilities Code) on the basis only that Earhart Road is a public street. The order does not contain any finding that Earhart Road is a public street, or any decision that the authorized service "from the Municipal Airport" must take place over Earhart Road. It is not contended that the Public Utilities Commission has any power of regulation over private roads and no constitutional or code provision gives it such power. Compare *Kuhn v. Ferry and Hensler*, 91 Cal.App.2d 805, 809-810, 206 P.2d 1.

Our holding that Earhart Road has not been shown to be a public street requires reversal of the judgment appealed from but does not necessitate a new trial.

The judgment is reversed with directions to amend the findings of fact, conclusions of law and judgment in accordance with the opinion herein expressed.

DOOLING and KAUFMAN, JJ., concur.

136 Cal.App.2d 697

**Dorris L. WHITFORD, Plaintiff and
Appellant,**

v.

**PACIFIC GAS & ELECTRIC CO., a corpora-
tion, and Walter B. Hill, Defend-
ants and Respondents.**

Civ. 16404.

District Court of Appeal, First District,
Division 1, California.

Nov. 2, 1955.

Rehearing Denied Dec. 2, 1955.

Hearing Denied Dec. 28, 1955.

Action by overtaken motorist against owner and driver of overtaking truck for injuries sustained when truck struck rear of motorist's automobile after motorist had stopped for stop sign. The Superior Court, Santa Clara County, Byrl R. Salsman, J., entered judgment on verdict for owner and driver, and motorist appealed. The District Court of Appeal, Bray, J., held that questions of negligence and contributory negligence were for jury.

Judgment affirmed.

1. Negligence ⇨136(14)

Negligence is usually a question of fact but may be one of law depending upon circumstances of the particular case.

2. Negligence ⇨136(8, 9)

In absence of conflicts in evidence or inferences to be drawn therefrom, question of existence of negligence becomes one of law.

3. Automobiles ⇨245(15)

In action by overtaken motorist against owner and driver of overtaking truck for injuries sustained when truck struck rear of motorist's automobile after motorist had stopped for stop sign, question whether, after truck driver allegedly saw motorist start up, he was justified in assuming that motorist would continue and in moving truck forward without determining whether motorist had again stopped was one of fact for jury.

4. Automobiles ⇨245(81)

In action by overtaken motorist against owner and driver of overtaking truck for injuries sustained when truck struck rear of motorist's automobile after motorist had

stopped for stop sign, question whether motorist, who knew there was a vehicle immediately behind him, was justified in making second stop at stop sign without regard to whether other vehicle had started to move was for jury.

5. Automobiles ⇨245(2, 67), 246(39, 58)

Where, in personal injury action arising from collision between automobile and truck, reasonable inference could be drawn either way upon issue of truck driver's negligence and motorist's contributory negligence, question was not one of law, and giving of instructions to jury on the subject was proper.

6. Automobiles ⇨150

Generally, it is negligence, as matter of law, for motorist to fail to look ahead before proceeding.

7. Negligence ⇨16

Degree of care required in watching movements of a particular machine depends upon facts and circumstances existing at time and place of accident.

8. Automobiles ⇨146

Motorist is required to use that degree of care which would be required of a reasonably prudent driver under similar circumstances.

9. Trial ⇨255(10), 264

Where issue of contributory negligence had been raised by the pleadings, plaintiff had duty to give court instructions on such subject at opening of trial, and, if it later developed that evidence did not justify giving of such instructions, plaintiff could have requested court to disregard them. West's Ann.Code Civ.Proc. § 607a.

10. Appeal and Error ⇨216(2)

Ordinarily, before appellant can complain of lack of an instruction, he must have made request that charge be made more specific or have asked for qualifying instructions.

11. Evidence ⇨98

Party who asserts affirmative of an issue must carry burden of proving it, and, if evidence is evenly balanced on any issue, jury must find against party asserting the affirmative of such issue.

12. Appeal and Error ⇐216(2)

If plaintiff, in negligence action, desired more specific instructions on subject of burden of proof and on burden of proving contributory negligence, it was plaintiff's duty to so inform the court, and, plaintiff, who failed to do so, would not be heard to complain of instructions given. West's Ann.Code Civ.Proc. § 607a.

James F. Boccardo, San Jose, Edward J. Niland, San Jose, of counsel, for appellant.

Robert H. Gerdes, John J. Briare, San Francisco, Campbell, Custer, Warburton & Britton, by Frank L. Custer, San Jose, Byron Snow, San Jose, of counsel, for respondents.

BRAY, Justice.

In an action for damages for personal injuries the jury brought in a general verdict in favor of defendants. Plaintiff appeals from the judgment entered thereon.

Questions Presented.

1. Was there any evidence of contributory negligence to support the court's instructions on that subject?

2. If contributory negligence was an issue, did the court err in failing to instruct specifically concerning the burden of proof on that issue?

Evidence.

The accident occurred about 7 o'clock on a dark but dry evening in January at the intersection of Stockton and Polhemus Avenues in San Jose. At the southeast corner of the intersection there is a small island, to the right of which a feeder lane curves into Polhemus from Stockton for the use of vehicles intending to proceed easterly on Polhemus and into the underpass which is located immediately east of the intersection. This lane is 15 feet wide and at the point where it connects with Polhemus there is a stop sign and a white line on the pavement. Traffic entering Polhemus by this lane does so at approximately a 30 degree angle. The white line and stop sign are approximately one-third of the distance down the slope of the underpass.

The only witnesses to the accident were plaintiff and defendant Hill, the driver of defendant corporation's truck. With the exception of the question of whether plaintiff's car came to a second unexplained stop after having begun to move ahead into the underpass or when struck by defendant's truck was at the original stopping point, there is practically no conflict in the evidence. Plaintiff testified that as he approached the intersection from the south and was about 300 to 400 feet therefrom, he noticed in his rear view mirror the lights of a vehicle following him "quite a ways back." He gave a right hand signal, turned into the lane and stopped at the stop sign. He then saw a car coming down Polhemus from his left and waited for it to cross his path. He could see in the glare of his rear view mirror the lights of the vehicle behind him. He said, "* * * just as I got ready to—the car passed, I stopped a few seconds to let the car pass, I had my car in low gear, so I was just getting ready to stop and all at once something came behind me and—well, it hit me pretty hard, and my neck flew back and my face flew down somewhere, I don't know where, and all I remembered, I was under the underpass." He then said that he was at a dead stop and had not moved ahead at all before being hit.

Defendant Hill testified that when he first saw plaintiff's car it was stopped with the front end at the white line. Defendant stopped his truck some 5 or 8 feet behind plaintiff's car. After he had stopped and while he was watching plaintiff's car it began to move ahead. Defendant then turned to look to his left up Polhemus to see if there was any approaching traffic. There was none. As he was turning to look he let his foot off the clutch and the truck started forward. When he turned his eyes towards plaintiff's car it had stopped and he was unable to prevent his truck striking it in the rear. After the collision the front of plaintiff's car was stopped 3 to 5 feet beyond the white line.

1. Contributory Negligence.

[1-5] The sole question on this issue is whether there was any substantial evidence

from which the jury could have found that plaintiff was contributively negligent. If there was it was proper to give the instruction on that subject. If there was not, it was improper. See *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 45 P.2d 183. Plaintiff contends that the fact that defendant knew plaintiff's car was in front of him and started his truck forward while looking to the left was negligence and the sole proximate cause of the accident as matters of law, and, likewise, that as a matter of law even if plaintiff started up and stopped as claimed by defendant, plaintiff was not guilty of contributory negligence. We do not agree with either contention. Negligence, while usually a question of fact, may be a question of law. Whether it is the latter depends upon the circumstances of the particular case. If there is no conflict in the evidence or in the inferences to be drawn therefrom, the question becomes one of law. But here there is not only a conflict in the evidence but in the inferences that may be drawn therefrom. Whether under the circumstances of this case a vehicle driver, seeing the car ahead of him start up and looking to the left to see if there are cars approaching which would cross the paths of both and seeing none, is justified in assuming that the car ahead of him will continue on and in starting his vehicle without determining that the other vehicle has not stopped, is a question of fact for the jury. Likewise, the question of whether the driver of a vehicle stopped at the type of intersection here and knowing there is a vehicle immediately behind him starting to enter a clear intersection is justified in suddenly stopping without regard to whether the other vehicle has started to move, is likewise a jury question. As to both questions a reasonable inference could be drawn either way. Therefore the question is not one of law, and the court properly instructed on the subject and left it to the jury to decide.

[6] Generally it is negligence as a matter of law for the driver of a car to fail to look ahead before proceeding. However, here the defendant observed the car ahead of him starting forward and that there was

nothing coming on Polhemus to cause that car to stop. As said in 7 Cal.Jur.2d p. 14: "Since it is manifestly impossible for one driving along a street to look in both directions at the same time, it ordinarily should be left to the jury to determine in each case what amount of vigilance would be required to constitute care. Usually, looking only in one direction without ascertaining whether the other direction is clear may be found to be a violation of duty. But if the driver looks first in one direction and then in the other, and sees no oncoming traffic that might affect his operations, the question of his due care should be left to the trier of the facts." Whether the fact that the first car started ahead was an invitation to defendants' truck to proceed and whether under the circumstances here, particularly the peculiar angle at which the lane debouches into the underpass and the necessity for a vigilant watch of the street ahead and to defendant's left, defendant had the right to assume, where there was no traffic to cause the lead car to stop, it would not do so, was a jury question. As said in 7 Cal.Jur.2d 14, *supra*: "Although the duty of ordinary care may not be satisfied in all cases by looking only once in a certain direction, ordinarily the question whether the driver should have looked or listened a second or third time before starting to cross the intersection, * * * is one of fact for the determination of the jury as one upon which ordinary minds may differ."

[7, 8] "The degree of care required in watching the movements of a particular machine depends upon the facts and circumstances existing at the time and place of the accident" and a driver is required to use that degree of care, only, which would be required of a reasonably prudent driver under similar circumstances. *Samuelson v. Siefer*, 62 Cal.App.2d 320, 325, 144 P.2d 879. See also *Dieckmann v. Signorini*, 47 Cal.App.2d 481, 118 P.2d 319, where it was held that whether a driver approaching an intersection and intending to make a left turn was negligent in not again looking to his rear after having looked some 360 feet from the intersection was a jury question.

2. Burden of Proof.

[9-12] While plaintiff offered no instruction upon the subject, he contends that the trial court's instruction on the burden of proof was not sufficient and that the court should have instructed in so many words that the burden of proving contributory negligence was on the defendant. The court on its own motion gave the usual general instruction that the party who asserts the affirmative of an issue must carry the burden of proving it and that if the evidence were evenly balanced on any issue the jury must find against the party asserting the affirmative of that issue. While the court gave a brief definition of contributory negligence, stating that one who is guilty of such may not recover from another for the injury suffered, it did not refer to the subject again, although on two occasions, in addition to considerable instruction on the question of negligence of the defendants, it specifically stated that a verdict should be rendered against the defendants if their negligence appeared. In *Abelseth v. City and County of San Francisco*, 129 Cal.App. 552, 19 P.2d 53, it was held that an offered instruction that the burden of proving contributory negligence rested on the defendants should have been given because a substitute instruction on the subject was not given. Here, however, the court did give an instruction on the burden of proof which covered the subject generally. If plaintiff desired a more specific instruction he should have offered it. As he points out in his brief, section 607a Code of Civil Procedure requires counsel, "before the first witness is sworn," to deliver to the court "all proposed instructions to the jury covering the law as disclosed by the pleadings." Here, the issue of contributory negligence was raised by the pleadings, so that it was plaintiff's duty to give the court instructions on that subject

at the opening of the trial. If it had developed that the evidence did not justify the giving of such instructions the plaintiff could then request the court to disregard them. We see no reason why the rule stated in *Ornales v. Wigger*, 35 Cal.2d 474, 478, 218 P.2d 531, should not be applied. "Ordinarily, before an appellant may complain of the lack of an instruction, he must have made a request that the charge be made more specific, or ask for qualifying instructions." The instruction given by the court was a correct one as to the definition of contributory negligence. Likewise the instructions on burden of proof were correct. If plaintiff desired them to be made more specific it was his duty to so inform the court. (See cases cited in 24 Cal.Jur. 796, and 10 Cal.Jur. 10 Yr.Supp. 659.) In *Ramos v. Service Bros.*, 118 Cal.App. 432, 5 P.2d 623, 624, it was held that if the appellant desired a definition of the words "preponderance of evidence" used in the court's instructions it was appellant's duty to offer an instruction on the subject. To the same effect, concerning "prima facie evidence", see *Hamm v. San Joaquin, etc., Canal Co.*, 44 Cal.App.2d 47, 111 P.2d 940, 947; "along the shoulders of the highway", *Mecham v. Crump*, 137 Cal.App. 200, 204, 30 P.2d 568, 570; and "highest degree of care and diligence", *Bezera v. Associated Oil Co.*, 117 Cal.App. 139, 144, 3 P.2d 622, 623. See also *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 44, 297 P. 884, where the instruction given by the court on the doctrine of last clear chance failed to include one of the elements usually in such instruction.

The judgment is affirmed.

PETERS, P. J., and DOOLING, J., assigned.

Hearing denied; CARTER, J., dissenting.

136 Cal.App.2d 729

Gene MANN, Appellant,

v.

NUTRILITE, Inc., a corporation, et al.,
Respondents.

Civ. 5052.

District Court of Appeal, Fourth District,
California.

Nov. 3, 1955.

Rehearing Denied Nov. 30, 1955.

Hearing Denied Dec. 28, 1955.

Action to recover for injuries sustained by girls' soft ball team's chaperone when she was struck, while assisting girls in pregame warm-up, by ball thrown by team member. The Superior Court, Orange County, Robert Gardner, J., granted a motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that in view of the only evidence in the record with respect to negligence, the court had been justified in finding that plaintiff had assumed the risk naturally involved in taking her position on the field of play.

Affirmed.

1. Theaters and Shows ⇨6(18)

The risk of being struck by batted or thrown balls is one of natural risks assumed by spectators attending ball game.

2. Theaters and Shows ⇨6(37)

To exempt girls' soft ball team's chaperone from effect of assumption of risk rule with regard to injuries sustained when she was struck by ball thrown by team member during a "warm-up" period preceding a game, there would have to be substantial evidence of negligence on part of team member involved.

3. Evidence ⇨5(2)

It is well known that in warm-up period preceding ball game balls are batted and thrown about, that several balls may be in use at the same time, and that there is usually a large amount of general activity.

4. Theaters and Shows ⇨6(37)

In action to recover for injuries sustained by girls' soft ball team's chaperone when she was struck while assisting girls

in pregame warm-up, by ball thrown by team member, there was no such substantial evidence of negligence on part of team member involved as would be sufficient to exempt chaperone from effect of assumption of risk rule.

5. Theaters and Shows ⇨6(37)

In action to recover for injuries sustained by girls' soft ball team's chaperone when she was struck, while assisting girls in pregame warm-up, by ball thrown by team member, there was no such substantial evidence of negligence on part of team manager in failing, if he did, to instruct members of team to shout warning when anyone was in way, as would exempt chaperone from effect of assumption of risk rule.

6. Master and Servant ⇨6

In action to recover for injuries sustained by girls' soft ball team's chaperone when she was struck, while assisting girls in pregame warm-up, by ball thrown by team member, there was insufficient evidence of agency, employment, or right of control over activities of team member involved, or team coach, to have justified holding liable for chaperone's injuries the manufacturing corporation whose name appeared on blouses of team members or the nonprofit charitable corporation through which the manufacturer indirectly contributed to support of team.

Robertson, Harney & Behr, Los Angeles, for appellant.

Head, Jacobs, Corfman & Jacobs, Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for injuries sustained by the plaintiff on July 24, 1952, while she was on a baseball field acting as chaperone for a girls' soft ball team, known as "The Pirates." During a "warm-up" period, preceding a game, a member of this team threw a ball which struck the plaintiff on the head. This action was based on the theory of respondeat superior, it being claimed that the four defendants sponsored and had the

right to control this team. A motion for a nonsuit was granted, and the plaintiff has appealed from the judgment which followed.

The complaint alleged that each of the four defendants, Nutrilite Products, Inc., Nutrilite Foundation, B. P. Kids, Inc., and Boys' Club of Buena Park, is a corporation with its principal place of business in Orange County; that on July 24, 1952, these corporations owned and operated a baseball team in the vicinity of Buena Park known as "The Pirates", one of whose players was Bessie Baker; that on said day Bessie Baker was the agent and employee of these four corporations and was acting within the scope of said agency and employment; that on said day the plaintiff was present at a certain school playground, at which place this team was to engage in a baseball game; that on said day Bessie Baker negligently and unlawfully threw a baseball; that these defendants negligently and unlawfully trained, managed and controlled the activities of Bessie Baker; and that as a direct and proximate result of such negligence said baseball hit and struck the plaintiff's head, causing the injuries complained of.

B. P. Kids, Inc. was a nonprofit corporation which promoted youth activities in Buena Park. Among other things it sponsored some ten or twelve soft ball teams for children from 10 to 18 years of age. These teams were managed by Raymond Thomas, who was Director of Recreation for B. P. Kids, Inc. and whose salary was paid from its general fund. B. P. Kids, Inc. is now defunct and has no assets, its successor being the Boys' Club of Buena Park. Nutrilite Products, Inc. is a manufacturing corporation which had made charitable contributions to the Nutrilite Foundation, a nonprofit charitable corporation. Nutrilite Foundation also had received donations from other individual donors. B. P. Kids, Inc. received contributions from Nutrilite Foundation and also from other sources, including the Community Chest, local merchants, Knotts Berry Farm, a newspaper, and various individuals. B. P. Kids, Inc. also carried on various activities to raise money for its

general fund, including dancing and other forms of entertainment. Nutrilite Foundation had at times been the largest single contributor to the B. P. Kids, Inc.

One of the teams sponsored by B. P. Kids, Inc. was "The Pirates", a soft ball team for girls under the age of 18 years. Blouses worn by the players on this team had the word "Nutrilite" sewed on the back. These blouses were ordered by Mr. Thomas under instructions from the board of directors of B. P. Kids, Inc., which consisted of fifteen members. This action was taken by that board in appreciation of the amounts contributed by Nutrilite Foundation to youth activities. The money to pay for these uniforms came from the general fund of B. P. Kids, Inc., and the board of directors of B. P. Kids, Inc. had not requested or received any authorization from Nutrilite Foundation or Nutrilite Products, Inc. to put the word "Nutrilite" on these blouses.

The plaintiff was secretary and treasurer of the Orange Empire Girls Soft Ball League, in which "The Pirates" were playing. She testified that Mr. Thomas acted as coach for the team and that she acted as chaperone, going with the girls to the games and seeing that they did not get into trouble. On this occasion, she went into the outfield with a group of seven or eight girls to whom balls were being batted for the purpose of "warming up". Her job as chaperone was on a voluntary basis. It was not usually her custom to assist the girls in warming up, and on this occasion she was not requested to do so. The balls were being batted from a position along the first base line to the girls who were some 100 or 110 feet distant in the outfield. A ball was hit and the plaintiff saw it caught by Miss Baker. The plaintiff testified that after seeing Miss Baker catch the ball she looked around to see if there was another ball coming from some other direction. About that time Miss Baker threw the ball back toward the batter, and the ball struck the plaintiff. Miss Baker testified that it was the custom when she got a ball that was knocked to the outfield in these warm-ups to throw it back toward the batter; that this is what she did on this occasion;

that besides Miss Mann there were seven or eight of "us girls" between her and the batter; that when she threw she intended the ball to go over the heads of these girls, intending it to land between where the girls were and the batter; that the ball, however, went up in the air at an angle and then came down; and that she knew that the plaintiff was in the direction in which she was throwing, but did not know that the plaintiff would "happen to be in the particular place she was". The plaintiff testified that she had played soft ball since she was eight years old and was familiar with the game; that it was customary for a team to warm up before a game; that she knew that balls would be batted around and thrown around during a warm-up; that she did not know that a ball would be thrown so close as to endanger her, because she had been taught that a warning such as "ball up" should be yelled before a player threw a ball to the batter; that she had heard the girls on this team give such a warning, "not every one of them, but the majority of them"; and that Miss Baker did not give such a warning. She also testified that she knew that when balls were thus being batted out the balls would be thrown back in; that she was standing about in a line between Miss Baker and the batter when this ball was thrown; that she knew that Miss Baker would throw the ball back; and that she turned her head away after she saw her catch the ball. Miss Baker testified that she had been a member of this team for two months and had never been told to give such a warning before throwing a ball. Mr. Thomas testified that "The Pirates" was the only girls' team that had "Nutralite" on their uniforms; that he had told the girls that when another person was in the way the ball should be thrown on a direct line, about ten feet high and with as little arc as possible; that the girls usually yelled "heads up" or "watch out" when they saw that anyone was in the way; and that he could not recall having instructed them to do so.

The appellant contends that the evidence does not show, as a matter of law, that she assumed the risk; and that there was suf-

ficient evidence of the existence of a relationship of sponsor or employer between the Nutralite defendants and "The Pirates" team to require the question of respondeat superior to be submitted to the jury. With respect to the assumption of risk the appellant concedes the usual rule relating to a spectator or participant, as found in such cases as *Quinn v. Recreation Park Ass'n*, 3 Cal.2d 725, 46 P.2d 144, and *Brown v. San Francisco Ball Club*, 99 Cal.App.2d 484, 222 P.2d 19, but argues that these rules are not applicable here since this case is based on the negligence of a player and the doctrine of respondeat superior. It is argued that one does not assume the risk of another's negligent conduct, citing *Bee v. Tungstar Corp.*, 65 Cal.App.2d 729, 151 P.2d 537; *Muskin v. Gerun*, 46 Cal.App.2d 404, 116 P.2d 105, and *Martin v. Clinton Const. Co.*, 41 Cal.App.2d 35, 105 P.2d 1029, 106 P.2d 629, and also that the appellant cannot be charged with assumption of the risk since she did not know that a ball would be thrown so close to her as to become a danger. It is argued that the appellant was unaware of her peril; that the injury occurred during a warm-up period rather than an actual game; that Miss Baker was negligent in attempting to return the ball from a position twelve feet to the rear of the appellant without giving a warning, and in attempting to throw the ball in a manner which she knew exposed those in front of her to an unreasonable risk of harm; and that the appellant was justified in expecting that a warning would be given before the ball was thrown. It is argued that a distinction is to be made between the intent and the result; that in any game a certain margin of error is expected; that it is expected that the intent of the player will be to attempt to perform his feat without creating an unreasonable risk to others; that if the intent is proper the error will not be one of negligence, but if the intent is one which may be considered an improper exercise of care and reckless disregard of the safety of others, the error amounts to negligence; that the testimony justifies the inference that Miss Baker intended to throw just over the heads of the girls to a spot in front of the

batter, which she had been trained to do; that this constituted negligence; that knowing the likelihood of inaccuracy a reasonable method of returning the ball would have been to intend to throw it in a high arc well over the heads of those in between the thrower and the batter; and that the evidence was sufficient to require the submission of the issues of negligence and assumption of the risk to the jury. With respect to the liability of Nutrilite Products, Inc. and Nutrilite Foundation, it is argued that the evidence shows that these corporations had the right to control the activities of B. P. Kids, Inc., whether or not they exercised that right; that one of the owners of Nutrilite Products, Inc. had taken a large part in securing for Mr. Thomas his job as director of recreation for B. P. Kids, Inc.; that certain officers of Nutrilite, Inc. attended meetings of the board of directors of B. P. Kids, Inc. during 1952; that having the word "Nutrilite" on the uniforms used by "The Pirates" team was of great benefit to Nutrilite Products, Inc. by way of advertising; and that the appellant's grandmother testified that Mr. Thomas had told her that one of the officers of Nutrilite Products, Inc. had agreed to furnish the uniforms on the condition the word "Nutrilite" would be put on them. It is argued that this case is similar in principle to the case of Bonetti v. Double Play Tavern, 126 Cal.App.2d Supp. 848, 274 P.2d 751.

[1] The general rule is well established that the risk of being struck by batted or thrown balls is one of the natural risks assumed by spectators attending a ball game, in the absence of a sufficient showing that ordinary care was not exercised by the management. The rules established in that connection should be much more applicable where the injured person goes on the field of play and is, in effect, in the position of a participant. The appellant here assumed such a position with full knowledge of the natural and inherent risks involved. The situation here differs materially from that in Bonetti v. Double Play Tavern, 126 Cal. App.2d Supp. 848, 274 P.2d 751, where the victim was an outsider, there was a strong

showing of negligence, and adequate proof of agency.

[2-4] Conceding the usual rule that one does not assume the risk of another's negligent conduct, substantial evidence of such negligence is required in such a case as this. We find no substantial evidence of negligence on the part of Miss Baker which would be sufficient to exempt the appellant from the effect of the assumption of risk rule. There is no evidence that she attempted to throw this ball in a manner which she knew exposed those in front of her to an unreasonable risk of harm, and all of the evidence is to the contrary. We see no material difference because this accident occurred during a warm-up period rather than an actual game. It is well known that in such a period balls are batted and thrown about, several balls may be in use at the same time, and there is usually a large amount of general activity. In a warm-up, as in a game, balls are thrown quickly and with speed and, inevitably, they do not always follow the path the thrower intended. All of these facts were well known to the appellant, who concedes that in such a case the intent of the player is of the greatest importance, that a certain margin of error is to be expected, and that if the intent is proper the error will not be one of negligence. There is no evidence that the intent of Miss Baker on this occasion included any reckless disregard for the safety of others. There is a conflict as to whether she caught the ball or chased it on the ground, and as to how far behind the appellant she was when the ball was thrown, and the only inference justified by the evidence is that she acted in good faith and honestly attempted to return the ball toward the batter in the usual manner. This is the normal and usual conduct to be expected in such a case and, as usual in a ball game and more frequently in a warm-up, such balls have to be thrown over the heads of other participants. While there is evidence that a warning was sometimes called out before returning such a ball this was not always done, and there is no evidence that Miss Baker should have known that it was necessary in this instance. A

warning would have been unnecessary if the ball had gone as she intended it to do. The appellant testified that she saw Miss Baker catch the ball and, knowing that it would be thrown back, turned her head in another direction. Miss Baker returned the ball, as the appellant knew she was expected to do, and the evidence indicates merely that an unintentional error occurred, the sort of mistake which naturally and frequently occurs in any ball game or warm-up.

[5] In view of all the circumstances it cannot be held that negligence appears on the part of Thomas, as an agent of B. P. Kids, Inc. in failing, if he did, to instruct the members of the team to shout a warning when anyone was in the way. He had instructed them to throw the ball about ten feet high in such a case, which would be sufficient in the ordinary case, and this is in accord with the usual and well-known practice. Quick play is expected, if not essential, in a warm-up period, a warning would not be necessary except in unusual cases and, viewed as a whole, we cannot regard the evidence as sufficiently substantial to have supported a finding of negligence. It may be observed, however, that in any event any possible finding of negligence would have applied only to the defendant B. P. Kids, Inc. as the employer of Thomas. It rather conclusively appears from the record that the appellant is not interested in obtaining any judgment against B. P. Kids, Inc., and that there is no evidence which would support a judgment against the Boys' Club of Buena Park. In view of the only evidence in the record with respect to negligence, the court was justified in finding that the appellant assumed the risk naturally involved in taking her position on this field of play.

[6] With respect to Nutrilite Products, Inc. and Nutrilite Foundation, we find no evidence in the record which would have supported a finding that Miss Baker was an agent or employee of these corpora-

tions, or that either of these corporations had the right to control the activities of B. P. Kids, Inc. or, in turn, of Mr. Thomas or of Miss Baker. Aside from one piece of hearsay there is no evidence that either of these corporations had anything to do with the placing of the name "Nutrilite" on these uniforms, and there is no evidence that the presence of that name gave them any right of control. If, as argued, the evidence justifies the inference that they must have known that this had been done and that they derived some advertising value therefrom, this was not sufficient to show that a right of control existed. The evidence conclusively shows that neither of these corporations furnished or paid for these uniforms. While there was evidence that Nutrilite Foundation was a substantial contributor to the civic program carried on by the B. P. Kids, Inc. it was only one of such contributors, and the fact that certain persons connected with these corporations at times took an interest in the civic activities being conducted by B. P. Kids, Inc. shows no more than a commendable interest on the part of those individuals in the youth activities of the community. All of these factors taken together fall far short of showing such a right of control over the activities of B. P. Kids, Inc., or of Miss Baker, as would be necessary in order to impose liability upon these corporations for anything that here occurred, under the doctrine of respondeat superior. If the contrary were to be held, under such facts as here appear, it would be unsafe for any individual or corporation to make contributions to any such charitable work or to permit any expression of appreciation coming from the recipients of the favor thus conferred. The evidence received was not sufficiently substantial to require the court to submit these various issues to the jury.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.
Hearing denied; CARTER, J., dissenting.

136 Cal.App.2d 794

PACIFIC WESTERN OIL CORPORATION,
a corporation, Successor in Interest to
George F. Getty, Inc., Plaintiff and Appel-
lant,

v.

FRANCHISE TAX BOARD, State of Cali-
fornia, Defendant and Respondent.

Civ. 8521.

District Court of Appeal, Third District,
California.

Nov. 8, 1955.

Rehearing Denied Dec. 2, 1955.

Hearing Denied Dec. 28, 1955.

Action by Delaware corporation to re-
cover franchise taxes paid under protest.
The Superior Court, Sacramento County,
Grover W. Bedeau, J., rendered judgment
for defendant, and plaintiff appealed. The
District Court of Appeal, Van Dyke, P. J.,
held that evidence, including evidence on
issue whether corporation's dealings in se-
curities were separate from its principal oil
business, supported findings which support-
ed conclusion that commercial domicile of
corporation was in California rather than
in state of incorporation or in New Jersey,
where corporation also had offices.

Judgment affirmed.

1. Taxation ☞543(7)

In action by Delaware corporation to
recover franchise taxes paid under protest,
evidence, including evidence on issue
whether corporation's dealings in securities
were separate from its principal oil busi-
ness, supported findings which supported
conclusion that commercial domicile of cor-
poration was in California rather than in
state of incorporation or in New Jersey,
where corporation also had offices. St.1929,
p. 19, § 1 et seq., as amended.

2. Taxation ☞397

Where foreign corporation's commer-
cial domicile was in California, income re-
ceived from intangible assets which were
held in connection with principal business
but which were located outside California
could be included in determining measure
of franchise tax. St.1929, p. 19, § 1 et seq.,
as amended.

Musick, Peeler & Garrett, Joseph D.
Peeler, John P. Pollock, Los Angeles, for
appellant.

Edmund G. Brown, Atty. Gen., James E.
Sabine, Asst. Atty. Gen., Irving H. Perluss,
Asst. Atty. Gen., Ernest P. Goodman, Dep-
uty Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in
favor of defendant Franchise Tax Board
in an action brought to recover franchise
taxes paid by plaintiff under protest. The
franchise taxes so paid are attributed to
George F. Getty, Inc., a Delaware corpora-
tion, hereinafter generally referred to as
the taxpayer. Appellant, Pacific Western
Oil Corporation, another Delaware corpo-
ration, is the successor in interest to the
taxpayer.

The taxes relate solely to income received
by the taxpayer and a predecessor corpora-
tion, Getty, Inc., at their offices in Jersey
City, New Jersey, from intangible assets
(stocks, bonds and notes) located outside
of California. The controversy centers
around the propriety of including, in the
measure of the franchise tax imposed by
California, income received by the taxpay-
er, George F. Getty, Inc., and its predeces-
sor, Getty, Inc., from these various intangi-
ble assets. The income was included in the
measure of the franchise tax because, ac-
cording to the commissioner's contentions,
the commercial domicile of the taxpayer
and of Getty, Inc., was in the State of Cali-
fornia and the security holdings of these
corporations were related to and useful in
the business activities carried on by them in
this state. The issues presented by the ap-
peal relate primarily to the location of the
commercial domicile of the taxpayer and of
Getty, Inc., and the relationship of their
security holdings to their operations in the
production and sale of petroleum.

The appellant, Pacific Western Oil Cor-
poration, is a Delaware corporation which
on May 31, 1946, succeeded by merger to
the assets and liabilities of George F. Getty,
Inc., the taxpayer. George F. Getty, Inc.,
was formed under the laws of the State

of Delaware on December 30, 1936. This corporation succeeded under an agreement of consolidation to the assets and liabilities of three corporations, namely: George F. Getty, Incorporated, a California corporation; George F. Getty Oil Company, a Delaware corporation; and George F. Getty Petroleum Corporation, a Delaware corporation. On August 31, 1937, George F. Getty, Inc., also succeeded by merger to the assets and liabilities of Getty, Inc., a Delaware corporation.

Director Meetings Before and After Merger

For many years prior to June of 1936, all the meetings of stockholders and directors of the corporations which were parties to the consolidation were held in California. Between the latter part of June, 1936 and the date of consolidation, meetings of stockholders and directors of George F. Getty Oil Company and George F. Getty Petroleum Corporation were held in the State of New Jersey. In the case of George F. Getty, Incorporated, such meetings were held in California until the date of consolidation on December 30, 1936. In the case of Getty, Inc., the meetings of shareholders and directors were held in California during the period March 1, 1934, through June 4, 1936. After June 26, 1936, to the date of the merger on August 31, 1937, the meetings of stockholders and directors of Getty, Inc., were held in New Jersey. The meetings of the directors and stockholders of taxpayer, George F. Getty, Inc., were held in New Jersey during the period here in controversy.

In the period between January 1, 1936, and June of 1936, Mr. Emil Kluth, who resided in California, was president of Getty, Inc., and of the three corporations which were consolidated to form George F. Getty, Inc. During June of 1936, Mr. Kluth was succeeded as president of all of the companies, except George F. Getty, Incorporated, by Mr. Harold Rowland who resided in New Jersey. Mr. Kluth remained president of George F. Getty, Incorporated, until the date of the consolidation in December of 1936.

Income from Intangibles

The source of the intangible income here involved was primarily dividends on stock held by George F. Getty, Inc., and Getty, Inc., in various oil companies. In addition, a portion of the income was received as a result of sales of Tide Water Associated Oil Company stock and Pacific Western Oil Corporation stock and from the sale of Pacific Western notes. Finally, a portion of the income consisted of interest on Pacific Western Oil Corporation notes and interest on German bonds. The income from intangibles for the period 1937 through 1939 was as follows:

Dividends	\$2,061,332.50
Interest	327,911.26
Profit on sales of stocks and notes	351,078.11
Making a total of	\$2,740,321.87

The dividends were received primarily from Tide Water Associated Oil Company and Pacific Western Oil Corporation. Additional dividends were received from Minnehoma Oil & Gas Company and Richfield Oil Corporation.

How the Intangibles Were Acquired

On December 31, 1939, George F. Getty, Inc., held 372,454 shares of Tide Water Associated Oil Company stock. All the shares of Tide Water Associated Oil Company stock held by George F. Getty, Inc., were received at the time of its formation from its predecessor corporation, George F. Getty, Incorporated, or from Getty, Inc., at the time of its merger with the taxpayer on August 31, 1937. Neither the taxpayer, George F. Getty, Inc., nor Getty, Inc., purchased any shares of Tide Water Associated Oil Company stock in the years 1937, 1938 and 1939. No shares of Tide Water Associated Oil Company stock had been purchased by George F. Getty, Incorporated, after January 1, 1934. Getty, Inc., had not acquired any shares of Tide Water stock after June 25, 1935. On December 31, 1939, George F. Getty, Inc., held 679,019 shares of Pacific Western Oil Corporation stock. Of these shares, approximately

6,200 were purchased by George F. Getty, Inc., in the period June 7, 1939 to August 31, 1939. All of the remainder of the Pacific Western stock was acquired by George F. Getty, Inc., from George F. Getty Oil Company upon the consolidation on December 30, 1936, or from Getty, Inc., upon the merger of August 31, 1937, or from Minnehoma Oil & Gas Company on its liquidation in December of 1938. None of the shares received from George F. Getty Oil Company, Getty, Inc., or Minnehoma Oil Company had been purchased by any of these corporations after March 20, 1935. George F. Getty, Incorporated, a predecessor corporation, had acquired 643,664 shares of stock of Minnehoma Oil Company in February of 1933 and 2,270 shares of Minnehoma Oil & Gas Company stock in April of 1934. Upon the consolidation, George F. Getty, Inc., succeeded to these shares of Minnehoma stock. No additional Minnehoma stock was acquired by George F. Getty, Inc., during the period here in controversy. In 1937, George F. Getty, Inc., received a small amount of Richfield Oil Corporation stock which produced a total of \$259.50 in dividends. This stock was received in satisfaction of a claim of a predecessor corporation against Richfield Oil Corporation. All the German bonds held by George F. Getty, Inc., were received from Getty, Inc., at the time of the merger on August 31, 1937; of the 666,000 German bonds held by George F. Getty, Inc., on December 31, 1939, approximately 18,000 were acquired by Getty, Inc., during the period here in controversy. George F. Getty, Inc., owned stock in two other corporations, Santa Fe Investment Company and the Getty Realty Corporation. No income derived from either of these corporations is here in controversy. George F. Getty, Inc., received 200,000 shares of stock in the Santa Fe Investment Company from J. Paul Getty on July 27, 1938, in exchange for a \$236,420 note of Pacific Western Oil Corporation. Getty Realty Corporation, a New York corporation, was organized by the taxpayer to own and operate the Hotel Pierre in New York City. George F. Getty, Inc., purchased 500 shares of Getty Realty Corporation stock on October 11, 1938 for \$50,000. This

represented all the outstanding stock of Getty Realty Corporation. In 1938 the taxpayer loaned Getty Realty Corporation \$2,-310,100.

Payrolls and Employees

In 1937 taxpayer, George F. Getty, Inc., had 496 employees, of whom an average of 463 were employed in California; out of a total payroll of \$1,066,638.53, California employees received \$993,933.72. During the period here in controversy, George F. Getty, Inc., had four employees in the New Jersey office of that company. These were Mr. Rowland, Mr. Krug and two secretaries. These employees in the New Jersey office worked for a number of other corporations as well as for George F. Getty, Inc.

Records

At the Los Angeles office of George F. Getty, Inc., the assistant secretary of that company and five other employees were engaged in keeping the accounting records of the taxpayer. The general ledger of the company and the detailed accounting records with relation to oil and gas production were kept at the Los Angeles office. The financial and operating statements of the taxpayer were prepared in the Los Angeles office and forwarded to New Jersey. The annual reports were prepared by the assistant secretary in the Los Angeles office. Each of the offices of the taxpayer kept its own records of cash, receipts, and disbursements which were sent to Los Angeles to be collated and entered into the final operating statement. The accounting records kept by the New Jersey office of the taxpayer consisted of the cash receipts and disbursements book, the stock records of the company, and a record of activities relating to the investments and financing of the company.

Salaries of Officers

During 1939, Mr. Rowland received a total salary of \$6,770, of which \$6,415 was paid to him as vice-president, treasurer, and director of Pacific Western Oil Corporation, and \$255 was paid for his work as president and director of the taxpayer. He also received \$100 as vice-president and director of Mission Corporation. During 1939, Mr. Emil Kluth, vice-president of the

taxpayer, received a total salary of \$11,300, of which half was charged to the taxpayer and half to Pacific Western Oil Corporation. Mr. H. M. Macomber, another vice-president of the taxpayer, received a total salary of \$9,700, of which \$6,466.62 was charged to Pacific Western Oil Corporation and the remainder was charged to the taxpayer.

Oil Business in California

During the year 1937, the oil, gas, and gasoline sales of the taxpayer in California amounted to \$1,425,659.23, while sales in other states amounted to \$258,716.46. In 1938, California sales of the taxpayer were \$1,533,061.05; sales in other states were \$231,101.41. In 1939, the taxpayer's sales in California amounted to \$1,435,517.95; sales in other states totaled \$232,761.54. In 1937, Getty, Inc., made sales of oil, gas, and gasoline in the sum of \$161,696.77; all of its sales were made in California. In 1937, the taxpayer produced a total of 2,181,043 barrels of oil, of which 1,810,660 were produced in California. In 1938, its total oil production was 2,095,648 barrels, of which 1,789,559 barrels were produced in California. In 1939, the total oil production of the taxpayer was 1,959,113 barrels, of which 1,657,470 were produced in California.

Fixed Assets

At the time of the formation of the taxpayer in December of 1936, the total net fixed assets of the corporation in California were valued at \$592,166.81. On December 31, 1939, the value of the net fixed assets in California was \$1,236,406.19. The value of net fixed assets in other states was \$499,066.17 on December 31, 1936, and \$534,002.13 on December 31, 1939. At the time of the merger, the value of the oil properties of Getty, Inc., in California was \$234,418.87, and in other states, \$2,681.04.

Oil Income

The taxpayer claimed net losses on its California Franchise Tax returns for 1937 and 1938; and reported a net income of \$26,244.02 on its 1939 return. However, the revised net income to be attributed to California for franchise tax purposes, by virtue

of the taxpayer's oil operations during the period here involved, was as follows:

For 1937	\$304,577.01
For 1938	185,721.20
For 1939	152,214.67

Returns

The federal income tax returns of George F. Getty, Inc., for the years 1937, 1938, and 1939 were filed in Los Angeles, California. By Section 536, Subdivision 2, of the Internal Revenue Code, these returns are to be made to the collector of the district in which is located the principal place of business of the corporation.

Taxes by Other States

No other state than California has attempted to impose a tax on, or measured by, the income from intangibles here in controversy. (In this connection, it should be stated that the taxpayer contends this factor is the by-product of an exemption clause in the New Jersey franchise tax laws which enabled the corporation to be exempt from New Jersey taxes; and that it does not mean that because no tax was collected by New Jersey, that state thereby indicated in any way that the same income here taxed could not properly be taxed by New Jersey save for the express exemption.) Neither the taxpayer nor Getty, Inc., paid ad valorem property taxes to any state on the intangibles here in controversy.

Business in State of Creation

The taxpayer did not engage in any business activities in Delaware, the state of its creation, at any time during the period December 30, 1936 to and including December 31, 1939. Likewise Getty, Inc., did not engage in any business activity in Delaware at any time during the period January 1, 1937 to and including August 31, 1937, the date of its merger with the taxpayer.

Ownership of Taxpayer's Stock

Mr. J. Paul Getty owned all the stock of the taxpayer, either individually or as a trustee. During the years 1937, 1938 and 1939, the legal domicile of Mr. J. Paul Getty was in California, but he leased, and when not traveling, lived in a penthouse in

New York City and used the corporate offices in New Jersey.

There is no substantial disagreement between the parties hereto as to the existence of the foregoing facts. The controversy centers around inferences which may be drawn from those facts. The trial court found that the taxpayer and Getty, Inc., had their "commercial domicile" in California during the tax period; that the stockholdings of the taxpayer and Getty, Inc., in other oil companies were connected with the taxpayer's and Getty, Inc.'s petroleum business and were useful in advancing the interests of the taxpayer and Getty, Inc., in the petroleum business. The trial court therefore concluded that inclusion of the income from the intangibles owned by the taxpayer and Getty, Inc. during the taxing period in the measure of the franchise tax assessed against the taxpayer was valid and that the taxpayer was entitled to no relief in this action.

The concept of a commercial domicile of a corporation has been recognized in this state in the case of *Southern Pacific Co. v. McColgan*, 68 Cal.App.2d 48, 156 P.2d 81. In that case, income which the Southern Pacific Company, a Kentucky corporation, received from intangible assets was included in the measure of the tax imposed on the company under the provisions of the California Bank and Corporation Franchise Tax Act, St.1929, p. 19, § 1 et seq. as amended. There the court determined that the Southern Pacific Company, although not incorporated in California, had a "commercial domicile" in this state and also determined that California had the power to tax income received by the Southern Pacific Company from its intangible assets. The statutory provisions which the court construed in the *Southern Pacific Co.* case were, for the purposes of this case, the same as those in effect during the greater part of the period here involved. Although the statute was amended during the tax-paying period here in controversy, those amendments do not affect the applicability of the rule of *Southern Pacific Co.* case to the issues presented in this case.

In the *Southern Pacific Co.* case, the taxpayer contended that income from its in-

tangibles could not legally be a part of the measure of its tax, under the California Franchise Tax Act, because such income was produced by the taxpayer's stockholding activities and investment activities in connection therewith, which activities, in turn, constituted a separate business from its operations otherwise; and that, therefore, New York, though not the state of its incorporation, was yet its "commercial domicile" with respect to such activities. Here, the taxpayer contends that its activities in respect of its intangibles constituted a separate business from its petroleum business and that not Delaware, the state of its incorporation, but New Jersey, where it maintained offices and where its directors met and where its intangible assets were physically held, was its "commercial domicile" with respect to such activities. Conversely, the taxpayer insists that its petroleum business conducted in California and for most of the tax-paying period also in the mid-continental field, was a business separate and apart from its intangible assets activities. The holding in the *Southern Pacific Company* case is not challenged as a rule of law. The contention of the taxpayer is that the rule has no application under the facts disclosed by the record here. Says the appellant: "* * * [T]his appeal, as did the trial court's determination below, depends upon the factual inferences, the ultimate findings of facts and the legal conclusions to be made from such inferences and findings in a record where there is no real dispute as to the detailed facts."

Appellants claim it conducted an investment business. In support of its claim that, during the taxing period involved, taxpayer was engaged in a separate business, distinct from its oil production business, consisting of the handling, the investing, and the managing of its intangible assets, taxpayer points to the following matters appearing in the testimony:

At the time of its organization, taxpayer acquired oil properties in the State of California carried on its books at \$592,166.81 and oil properties in other states carried on its books at \$499,066.17, or a total of \$1,091,232.98. Current assets were valued at \$882,880.62, prepaid and deferred charges

at \$34,353.61 and total investments were carried on its books at \$8,355,871.39. These investments included the following:

	Book Value
316,000 shares Pacific Western Oil Corp.	\$2,130,493.57
337,700 shares Tide Water Associated Oil Co.	2,240,545.00
645,934 shares Minnehoma Oil & Gas Co.	1,614,835.00
Notes of Pacific Western Oil Corp.	2,391,997.82
Stock Purchase Options	45,000.00

For purposes of the consolidation, a valuation was made of the various assets as of December 30, 1936. This valuation reflected a total value of \$4,500,000 for all the oil properties in California and other states, as compared with a total value of \$21,913,216.32 for the intangibles. On August 31, 1937, taxpayer acquired by statutory merger all the assets and liabilities of Getty, Inc., a Delaware corporation, qualified to do business in New Jersey and California. At the time of the merger, Getty, Inc., carried on its books California oil properties at a net cost of \$234,418.87 and oil properties outside of the State of California at \$2,681.04, or a total of \$237,099.91. In addition, it had current assets of \$63,319.03 and investments which it carried on its books at a cost of \$2,779,956.26. A valuation of these assets for the purpose of the merger showed the oil properties of Getty, Inc., were worth \$237,099.91, as compared with a value of \$7,331,905.66 for the investments. As of the date of the merger, the oil properties of George F. Getty, Inc., in all states were valued at \$5,500,000.00, while the investments were valued at \$23,166,324.04. For some time prior to 1936, predecessor corporations of the taxpayer had concluded that it was much more advantageous for them to expand by acquiring securities and possible control of other corporations than to put their money into actual oil operations. In furtherance of this decision, they had started out by acquiring control of Pacific Western Oil Corporation and were making investments

in Tide Water Associated Oil Company and Mission Corporation. After acquiring a substantial block of Tide Water Associated Oil Company, directly and through Mission Corporation, they had endeavored with Mission Corporation to obtain influence in the management of that corporation. This developed into a proxy fight early in 1936 which was lost. Such predecessor corporations concluded that in order to protect and enhance their investment in Tide Water Associated Oil Company and to carry on their other investment activities, it was essential to remove the principal office from California to the East, inasmuch as the headquarters of Tide Water was in New York, the bankers they had to do business with were in New York, and most of the stockholders in Tide Water were located east of the Mississippi River. They decided to engage a Wall Street firm of attorneys and enlist the assistance of New York bankers in an endeavor to assert a larger influence on Tide Water to protect and enhance their investments in that company. They decided it made good business sense to move to the East so that the general head office would be close to the pulse of the activities in their expanding program. Accordingly, in March, 1936, the predecessor corporations of the taxpayer established their executive office and headquarters at 15 Exchange Place, Jersey City, New Jersey, across the river from New York City and within five minutes commuting time on the Hudson Tube. On June 26, 1936, the directors of Getty, Inc., adopted a resolution establishing 15 Exchange Place, Jersey City, New Jersey, as "the principal office of this company outside of the State of Delaware". At the same meeting the directors changed the by-laws to provide that meetings of the stockholders of the corporation be held at the New Jersey office and elected Harold L. Rowland, a resident of the State of New Jersey, as President in place of Mr. Kluth. The directors passed at this meeting a resolution authorizing the California officers to handle "the operation of this corporation's oil properties in California", but providing that they should have no power, without the express direc-

tion and approval of the head office in New Jersey, to (a) acquire new leases, (b) execute contracts, or (c) sell any oil except "spot oil". At the first meeting of the board in New Jersey, Harold L. Rowland, Millard F. Tompkins, Jr., and Charles F. Krug, Jr., all residents of New Jersey, were elected directors of the company while Mr. Rowland was elected President and Mr. Krug was elected Secretary and Treasurer.

Authority was also given to various persons, all located in the East, to handle brokerage accounts and to arrange for loans. The by-laws provided that board meetings and stockholders' meetings were to be held at the New Jersey office. From the inception of the taxpayer and throughout the years 1937, 1938 and 1939, the business activities carried on, in or from the Jersey City, New Jersey, office by the taxpayer included the following: Holding of all directors' and stockholders' meetings; activities in connection with the purchase and sale of securities, the collection of dividend and interest income and profits from the sale of securities; the obtaining of financing; activities in connection with enhancing and protecting of taxpayer's investments. In summation, appellant points out that during the years 1937, 1938, and 1939 the purchases, sales, loans, etc., as described, all in the New Jersey office, amounted to total transactions of more than \$7,000,000.00 and resulted in capital gains of more than \$300,000.00.

Neither the taxpayer, nor Getty, Inc., was a California corporation; and neither was a New Jersey corporation. Both were incorporated under the laws of Delaware, and neither at any time here material, conducted any business operations in that state. Thus the domiciliary status of both corporations with respect to the State of Delaware was no more than a paper status.

With the foregoing evidence before it, the trial court made the following findings of fact:

That the three corporations, George F. Getty, Incorporated, George F. Getty Oil Company and George F. Getty Petroleum Company, which were consolidated to form

the taxpayer, George F. Getty, Inc., were primarily interested and engaged in the petroleum business for many years immediately prior to the consolidation of these corporations. By far the greater portion of their business affairs and activities were carried on and managed in, and protected by, the State of California. Throughout the period December 30, 1936 to and including December 31, 1940, the taxpayer George F. Getty, Inc., was engaged in business in the State of California. Throughout the period December 30, 1936 to and including December 31, 1939, among all the states in which it carried on business activities, the taxpayer George F. Getty, Inc., received the greatest protection and benefits from the State of California. In that state were kept the principal accounting records of the taxpayer. Throughout the critical period the taxpayer was primarily and principally engaged in the petroleum business and was not engaged in the investment business. Throughout the same period, by far the larger portion of the activities of the taxpayer, George F. Getty, Inc., were carried on, conducted, managed, and controlled by the taxpayer in the State of California. On, and after, May 1, 1938, the effective date of an agreement with the Skelly Oil Company, the taxpayer had no employees engaged in oil production activities outside of California. The corporations in which the taxpayer held stock (outside of the Getty Realty Co.) were connected with the petroleum business of said taxpayer and these stockholdings were useful to the taxpayer in advancing its petroleum business. The taxpayer permanently held stock in other corporations in the petroleum industry in order to advance its interests in the petroleum industry and did not acquire stock for the purpose of trading in shares; no substantial sales of stock were made by the taxpayer. The holding of stock in other corporations engaged in the petroleum business was useful to the taxpayer in providing a proper and sufficient marketing outlet for its petroleum products. The activities of the taxpayer in the petroleum industry were not managed or controlled by the New Jersey officers of taxpayer, but

were managed and controlled by the California officers. The taxpayer during the critical period engaged in no business activities in the State of Delaware. Neither Delaware nor New Jersey, nor any other state, collected or levied a property tax on the intangibles of the taxpayer, nor did any state other than California collect or levy any tax on the income or measured by the income received by the taxpayer from these intangibles. Finally, the court found that throughout the tax period the commercial domicile of the taxpayer, George F. Getty, Inc., was in California; that said taxpayer did not have a commercial domicile either in the State of New Jersey or in the State of Delaware, or in any other state than California; and that throughout the period the principal place of business of the taxpayer was in California.

It is not seriously contended that if the record furnishes support for the fact findings of the trial court hereinbefore related, then those findings justify and support the conclusions of law and the judgment which has been appealed. Respondent, contending that the factual support is sufficient, states the following summary of facts:

The commercial domicile of the taxpayer was in California during the tax period because: (1) The revenue from sales of gas, oil and gasoline in California was many times greater than the revenue derived from sales in all other states combined. (2) The value of the fixed assets of the taxpayer in California were several times the value of fixed assets in other states. (3) Throughout the period here in controversy between 90% and 99% of the employees of the taxpayer were performing their services in California. (4) The income from intangibles here in controversy has not been taxed by any state other than California. (5) The day to day management of the oil, gas, and gasoline production and sales activities of the taxpayer was carried on in California. (6) Payments in connection with the maintenance and operation of plaintiff's petroleum business were made from its Los Angeles office, including payrolls. (7) The principal accounting records of the taxpayer were

kept in California. (8) The predecessor corporations which were consolidated to form the taxpayer were managed and controlled in California and their principal activities were carried on in this state. (9) The taxpayer did not carry on any business activity in Delaware, the state in which it was incorporated. (10) The taxpayer filed its federal income tax returns in California (such returns under the provisions of the Internal Revenue Code must be filed in the district where the taxpayer has its principal place of business or principal office or agency). (11) Mr. J. Paul Getty, who held all of the shares of the corporation either individually or as a trustee, had his legal domicile in California during the years 1937 to 1939 inclusive. (12) The directors of the taxpayer followed a practice of ratifying the completed acts of the California officers of the corporation with respect to oil production activities rather than directing the California officers in advance with respect to the procedures they should follow. In 1939, in its annual report, the taxpayer stated: "The principal transactions for the year 1939 were in connection with direct oil operations." The same report pointed out that in 1939 the taxpayer realized a 17.8% profit on its direct oil operations as opposed to a 6.1% return on its other investments; throughout the tax period California was the center of oil production activity of the taxpayer as is shown by the record of oil production, in barrels, hereinbefore stated. The net oil, gas and gasoline sales of the taxpayer during the tax period in California totaled about 4,500,000 barrels, while such sales in other states during that period totaled about 750,000 barrels. During the period January 1, 1937 through August 31, 1937, the net income of Getty, Inc., from sales of oil, gas and gasoline was \$161,696.77, all of which was realized from sales made in California.

[1,2] From an examination of the entire record, we are satisfied that the factual findings of the trial court all find substantial support therein. And of course when we say this, we are deciding this appeal for the reason that, as heretofore noted, the parties do not dispute but that if the trial

court's findings are supported by the evidence then the judgment appealed from must be affirmed. There is no doubt but that there is in the record much that supports the trial court's findings and there is also much that militates against those findings. But this situation of the record does not aid or comfort the appellant.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



136 Cal.App.2d 638

Harold LLOYD, Plaintiff and Appellant,
v.

R.K.O. PICTURES, Inc., Respondent.

California Pictures Corporation,
et al., Defendants.

Civ. 20959.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1955.

Action for breach of contract against three defendants. All of the defendants demurred. The Superior Court, Los Angeles County, Philbrick McCoy, J., sustained the demurrer of one defendant without leave to amend and plaintiff appealed. The District Court of Appeal, Doran, J., held that where plaintiff had originally entered into contract with one defendant whereby in consideration for his services in a photoplay he was to be given star billing, and publicity, and where contract was later assigned, complaint, alleging that assignee had given written assurance to plaintiff that the terms of contract would be faithfully kept and performed, and that plaintiff had relied on said written assurance which was not kept, with result that value of plaintiff's name in motion picture

industry had diminished stated a cause of action.

Judgment reversed with instructions to overrule demurrer and allow reasonable time to answer.

1. Appeal and Error ⇨917(1)

On appeal from a judgment sustaining a demurrer to a complaint, the allegations of the complaint must be regarded as true.

2. Pleading ⇨1

Perfection in pleading is no more expected or required than in other realms of endeavor.

3. Assignments ⇨131

Where plaintiff originally entered into a contract with one defendant whereby in consideration for his services in a photoplay, he was to be given star billing and publicity, and where contract was later assigned, complaint, alleging that assignee had given written assurance to plaintiff that the terms of contract would be faithfully kept and performed, and that plaintiff had relied on said written assurance which was not kept, with result that value of plaintiff's name in motion picture industry had diminished, stated a cause of action.

4. Appeal and Error ⇨863

Upon an appeal from a judgment sustaining demurrer to the complaint it is not necessary to determine which, if any, of plaintiff's theories may bear fruit.

5. Estoppel ⇨85

The promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

6. Estoppel ⇨107

Where plaintiff originally entered into a contract with one defendant whereby in consideration for his services in a photoplay, he was to be given star billing and publicity, and where contract was later assigned, complaint, alleging that assignee

had given written assurance to plaintiff that the terms of contract would be faithfully kept and performed, and that plaintiff had relied on said written assurance which was not kept, with result that value of plaintiff's name in motion picture industry had diminished, sufficiently pleaded facts from which promissory estoppel could arise.

Fendler & Lerner, Beverly Hills, and Harold A. Fendler; Robert Haves, Beverly Hills, of counsel, for appellant.

Mitchell, Silberberg & Knupp, and George Benedict, Jr., Los Angeles, for respondent.

DORAN, Justice.

On September 10, 1945, a contract was entered into between the Lloyd Corporation, plaintiff's assignor, and the defendant California Pictures, for the services of Harold Lloyd in a photoplay later known as "Mad Wednesday". On the same day, in connection therewith, Harold Lloyd contracted with Lloyd Corporation to furnish to California Pictures "artistic and stellar services", the agreement provided that plaintiff must "receive star billing and screen credit, advertising credit, and publicity credit as star" of the photoplay.

According to plaintiff's complaint, California Pictures agreed with Lloyd Corporation to be bound by the contractual undertakings of the Lloyd Corporation to Harold Lloyd, and expressly agreed to "give and guarantee the giving, directly and personally to the plaintiff, Harold Lloyd, of star billing and screen credit, advertising credit, publicity credit, and exploitation credit as the star" of the photoplay. These obligations were made binding on California's successors, assigns, licensees, distributors and exhibitors. Plaintiff Harold Lloyd guaranteed performance by Lloyd Corporation, agreed to complete the picture and gave California the right to use plaintiff's name, likeness and voice in connection with the photoplay.

It is further alleged that in return for such guarantee and undertaking, California

Pictures agreed on behalf of its successors or assigns, that it would "mention the name of Harold Lloyd as star on the positive prints of, and in all paid advertising and publicity thereafter issued in connection with the production or distribution of said motion picture photoplay". It is alleged that plaintiff, and plaintiff's assignor, Lloyd Corporation, fully performed all obligations under the contracts.

The complaint avers that California released the film in 1947 through United Artists, at which time all contractual obligations were complied with by California. However, the film was withdrawn from release prior to December 1, 1947, and was not again publicly shown until October 10, 1950, after respondent RKO Radio Pictures took over distribution of the picture. It is alleged that about December 13, 1947, California Pictures entered into a written security contract with the defendant Hughes Tool Company which agreed to pay certain debts of California; that as a part of such agreement California assigned the photoplay "Mad Wednesday" to Hughes as security, with rights of distribution, "subject to the duties and obligations of said rights and contracts assigned as aforesaid".

The complaint, as amended, alleges that on November 10, 1950, defendants Hughes and RKO "confirmed by letter agreement in writing a previous and pre-existing oral agreement entered into prior to October 11, 1950, wherein and whereby Hughes granted to R.K.O." world-wide distribution rights to the photoplay, "upon substantially the same terms and conditions as those contained in the distribution agreement dated December 19, 1944, previously entered into between California and United Artists Corporation".

As stated in respondent's brief, "In respect to many matters, including screen credits, advertising and publicity * * * RKO agreed to follow 'the wishes and instructions' of Hughes." RKO is alleged to have had knowledge of the California-Lloyd contract and Hughes' assumption thereof; in reference to "Mad Wednesday", the defendants RKO, Hughes and Cali-

fornia are alleged to have "jointly participated in or authorized or concurred in or ratified each and every action taken, and things done".

It is also to be noted that Howard Hughes is alleged to be the sole stockholder in California Pictures, as well as being a majority stockholder, president and director of the defendant Hughes Tool Company, and controlling stockholder, director of and in control of the defendant RKO, "particularly with respect to the distribution, exploitation, publicity and advertising of the photoplay 'Mad Wednesday'".

There are allegations that about October 11, 1950, plaintiff and the Lloyd Corporation notified defendants that objection would be made to any departure from the original contracts "with respect to the advertising and publicity credit to be given Harold Lloyd as the star". Defendant RKO replied by letter on October 18, 1950 that RKO had received "full notice, advice and knowledge" of the provisions in question, and that RKO "had complied and would continue to comply with, and to faithfully keep and perform the terms and provisions of said contract", and that all advertising and publicity would be in accordance with the original contract, which acknowledgments and assurances were made by RKO "for the purpose of inducing plaintiff and plaintiff's assignor to forego and forbear" the commencement of legal or equitable proceedings, which representations were relied upon. In this connection it is claimed that the defendant RKO is therefore "estopped to deny that it is bound by said provisions".

The defendants, and each of them, are alleged to have "impaired, and diminished the value of the name and reputation of the plaintiff, Harold Lloyd, in the motion picture industry and in the mind of the general public * * * by subordinating or eliminating the name * * * from advertising and publicity issued and caused to be issued * * * and in such a manner as to conceal from the entertainment industry and from the general public throughout the world that the plaintiff, Harold

Lloyd, was the 'star' of and in said motion picture photoplay", to plaintiff's damage in the sum of \$250,000.

Defendants demurred generally and specially to the complaint; the trial court deferred submission of the demurrer pending the filing of amendments by plaintiff, and thereafter sustained the demurrer of RKO without leave to amend. The case is at issue in respect to the other two defendants, and RKO is the only respondent on this appeal.

Four theories are presented by appellant on which recovery might be had, namely, (I) "Respondent, having acquired only the right and license to distribute the photoplay, is bound by notice and knowledge to the obligations of billing and credit connected with the use of plaintiff's name, likeness and voice; (II) "Respondent was contractually bound, under the rules of promissory estoppel, to give plaintiff star billing"; (III) "Respondent has assumed the obligation to give plaintiff star billing in all paid advertising and publicity", and is liable for having failed to do so; and (IV) "Respondent, having directly caused a breach of contract, is liable".

It is the respondent's contention that RKO, not being a party to the original Lloyd-California contract, and never having assumed liability thereunder, was under no duty to perform the obligations thereof; that the complaint states no cause of action either on the theory of promissory estoppel, or otherwise; that the complaint shows on its face that it is incapable of amendment, and therefore there was no abuse of discretion in sustaining the demurrer without leave to amend.

[1] As hereinbefore indicated, the merits of plaintiff's complaint, and likewise the merits of any defense offered by the defendants, are matters in no manner involved in the present appeal. According to the long established rule, as stated in *Roberts v. Wachter*, 104 Cal.App.2d 281, 231 P.2d 540, 544, and elsewhere, "On appeal from a judgment sustaining a demurrer to a complaint the allegations of the complaint must be regarded as true. * *

All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief". The reviewing court in such an appeal "is confined to the allegations of the complaint", and as said in *San Juan Gold Co. v. San Juan Ridge Mutual Water Ass'n*, 34 Cal.App.2d 159, 174, 93 P.2d 582, 591, "the evidence plays no part in determining the correctness of a ruling on a demurrer".

It is appellant's contention that the ruling in the instant case, sustaining the demurrer without leave to amend, resulting in a dismissal as to the respondent RKO, determines as a matter of law, issues of fact which should only be decided after a plenary hearing on the merits. The case is at issue as to the other defendants. If this dismissal as to RKO be sustained, appellant points out that "the other two defendants will be perfectly free to claim that R K O is the wrongdoer and that they endeavored mightily to obtain performance by R K O".

[2] Perfection in pleading is no more expected or required than in other realms of endeavor. As said in *Kauffman v. Bobo & Wood*, 99 Cal.App.2d 322, 323, 221 P.2d 750, 751, "It is well established that a general demurrer must be overruled if, on any theory, it states a cause of action". The same case points out that "pleadings and amendments thereto should be allowed and construed liberally with the object of affording every litigant his day in court and to render substantial justice between the parties". And "Generally, it is held to be an abuse of discretion to sustain without leave to amend a demurrer to an original complaint, unless the complaint shows on its face that it is incapable of amendment." *Temescal Water Co. v. Dept. of Public Works*, 44 Cal.2d 90, 280 P.2d 1, 11.

[3] An application of the rule of liberal construction leads to the conclusion that plaintiff's amended complaint sufficiently states a cause of action on one or more of several theories. The sustaining of defendant RKO's demurrer without leave to amend was therefore reversible error.

As before indicated, whether the plaintiff will be able to prove the allegations made, is entirely immaterial on the present appeal since against a demurrer the allegations of the complaint must be taken as true.

As is often the case, plaintiff in the present litigation is confronted with the activities of several different defendants, and at a trial on the merits might recover judgment against one or more defendants, or against none. In a case such as the present, where it appears from the complaint that all three defendants were in some manner involved in causing the alleged loss, plaintiff should be accorded the opportunity to confront all of such defendants in court and present the case in its entirety. This course of procedure would not only benefit the plaintiff but would be of inestimable aid in enabling the trial court to view the entire picture and to thus arrive at the correct result.

To require RKO to go to trial along with the other two defendants seems particularly fitting in view of plaintiff's allegations as to the interlocking nature of the three corporate defendants, in all of which Howard Hughes is alleged to be a majority or controlling stockholder. Proof of this relation between the three defendants might conceivably be of importance in reference to plaintiff's theory of promissory estoppel. RKO is likewise charged with having induced a breach of contract by the other defendants. The knowledge and conduct of RKO, as alleged by plaintiff, forms an integral part of the general picture. To limit plaintiff's litigation to a two-thirds survey of the situation by dismissing the case against RKO without trial, would, under the peculiar circumstances here present, deprive the plaintiff of substantial rights.

[4] No case has been cited by either party dealing with either an identical or parallel situation. Indeed the fundamental law of the case seems to be reasonably well settled; its final application to the facts of this case should be left to the trial court or jury at a hearing on the merits, partic-

ipated in by all defendants. Nor is it necessary to now determine which, if any, of plaintiff's theories may bear fruit. If however, plaintiff is able to prove the facts alleged, recovery on one or more of such theories would follow.

Promissory estoppel, one of the theories relied upon in the plaintiff's complaint, is expounded in the Restatement of Contracts, Section 90 (1932), as follows: "A promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise".

[5] The courts of this state have adopted this doctrine, as evidenced by the opinion in *Edmonds v. County of Los Angeles*, 40 Cal.2d 642, 653, 255 P.2d 772, 779; "By their conduct they led everyone to believe that the exception had been accepted. Plaintiffs made an oral promise on which defendants relied to their detriment, and justice can be done only by the enforcement of the promise. The situation presented is therefore the ordinary one of promissory estoppel".

[6] Plaintiff's amended complaint has pleaded facts from which such an estoppel could arise. RKO is alleged to have given assurance to plaintiff that the terms of the Lloyd-California contract would be complied with, which assurance is claimed to have been relied upon to plaintiff's detriment. Whether plaintiff's forbearance to sue was or was not requested by RKO, would appear to be immaterial. It is unnecessary to enter into a detailed discussion of the various theories presented in the complaint. As against the demurrer, the complaint is sufficient.

The judgment is reversed with instructions to overrule the demurrer, and allow a reasonable time for respondent RKO to file an answer.

WHITE, P. J., and DRAPEAU, J., concur.

136 Cal.App.2d 657

Maxine V. JUE, Individually and as Administratrix of the Estate of San You Jue, also known as Sam Y. Jue, deceased, Maxine May Jue, June C. Jue, Leatrice Jue Guan, Dorothy Jue Moe, and Rush M. Bledget, as Executor of the Estate of Jue Joe, deceased, Plaintiffs and Appellants,

v.

SAN TONG JUE, also known as Jow Sun Tong, Ping Jue, his wife, Jack Jue, Joan Jue, Leong Shee Jue, Corinne Jue Kwok; Jue Joe Co., a joint venture or partnership, Defendants and Respondents.

Civ. 21124.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1955.

As Modified on Denial of Rehearing

Nov. 22, 1955.

Hearing Denied Dec. 28, 1955.

Action for a declaratory judgment declaring duties and obligations between son of deceased and other heirs. Defendants demurred, and the Superior Court, Los Angeles County, Philbrick McCoy, J., sustained the demurrer without leave to amend and plaintiffs appealed. The District Court of Appeal, Doran, J., held that complaint, filed by plaintiffs who were allegedly defrauded by son by his action in concealing father's will, and in preventing plaintiffs from receiving their share of father's estate including their share of profits from his business, sufficiently alleged facts entitling plaintiffs to a trial on merits.

Judgment reversed and cause remanded with directions.

Declaratory Judgment §314

Complaint, filed by plaintiffs who were allegedly defrauded by son of deceased father, by his action in concealing father's will, and in preventing plaintiffs from receiving their share of father's estate including their share of profits from his business, sufficiently alleged facts entitling plaintiffs to a trial on merits.

Robert A. Waring, Andrew J. Copp, Jr.,
Los Angeles, for appellants.

John N. Hurtt, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment sustaining the demurrer without leave to amend.

Jue Joe, the father, and San Tong Jue, the son, were in the wholesale produce business. The business was extensive and alleged to be valued at several hundred thousand dollars. According to the record, upon the father's death the son took over the business. As stated in appellants' brief and alleged in substance,

"Upon the death of Jue Joe, said San Tong Jue held a dominating and influential position with the surviving members of the Jue Joe family; they being female, respected him and his judgment and placed and reposed great confidence and trust in him and in his word and conduct in relation to the Estate of Jue Joe, deceased. Said San Tong Jue coveted the entire estate of Jue Joe, deceased, sought to obtain possession of and title to the same, to the total exclusion of all other heirs of Jue Joe, deceased. To accomplish this, on the day of Jue Joe's death, San Tong Jue, not having access to his father's safety deposit box in the bank with which Jue Joe had carried on his banking business, took his two sisters who did have joint access to said box, and without disclosing to the bank the fact of his father's death, obtained possession of the contents of said box which included the decedent's last Will and Testament that had been prepared by plaintiff, Rush M. Blodget and executed under Mr. Blodget's direction. In order to prevent probate administration of said decedent's estate, defendant San Tong Jue concealed the Will and instructed his sisters never to disclose to anyone that he had obtained possession of it or that it, in fact, existed. He succeeded in concealing the Will and the fact of its existence, from the County Clerk, from the Executor therein named, plaintiff Rush M. Blodget, and all other interested persons, for a period of ten years, at which time one of the sisters disclosed the foregoing facts to her counsel and as a result, defendant was

compelled to deliver the Will to court, same was admitted to probate and Rush M. Blodget was appointed and duly qualified as Executor thereof.

"In furtherance of said defendant's plan to appropriate all of the assets of the decedent, to the exclusion of the other heirs-at-law, the defendant San Tong Jue approached his sister, the plaintiff Dorothy Jue Moe, and under threat of death, procured a deed from her to property in Tulare County which had been given to her by her father, the decedent Jue Joe, as a gift during his lifetime, and had been paid for by her father out of his earnings in the Jue Joe Company.

"In furtherance of his plan to acquire title to and possession of all of the property belonging to said decedent, to the total exclusion of the other heirs-at-law, said defendant San Tong Jue persuaded his sister Corinne Jue Kwok to convey to his son, the defendant Jack Jue and deliver to him, possession of certain property in Los Angeles County, State of California which had been given to her by her father, the decedent Jue Joe, as a gift during his lifetime and had been paid for by her father out of his earnings in the Jue Joe Company. Title to said property was conveyed to said Jack Jue as a convenience to defendant San Tong Jue, his son Jack having been born in this country, was qualified to hold real property in California, while the defendant San Tong Jue having been born in China, was not so qualified under the California Alien Land Act [West's Ann.Civ.Code, § 671 note]. Defendant San Tong Jue persuaded his sister, defendant Corinne Jue Kwok to make such reconveyance under the false and fraudulent promise that he made to her that he would hold said property in trust and manage the same for the sole use and benefit of all members of the family who were the heirs-at-law of decedent.

"After acquiring title to and possession of all of the assets of the estate of Jue Joe, deceased, defendant San Tong Jue did the following things:

"He continued to operate the partnership business without change of name or loca-

tion and without an accounting to the executor or to anyone else; appropriated all the monies obtained from that lucrative business and now claims that he is the sole owner thereof to the exclusion of all other members of the family."

Other acts alleged to be unlawful and fraudulent are also alleged.

The complaint alleges that,

"In the first cause of action plaintiffs alleged that three actual controversies existed between the plaintiffs on the one side and defendants on the other, * * *

"In said first cause of action plaintiffs alleged that they desired to have a declaration of plaintiffs' rights or duties with respect to the said defendant, San Tong Jue concerning said three actual controversies.

"In said second cause of action, the facts concerning the actual controversy above mentioned * * * were set forth in greater detail.

"In said third cause of action the facts concerning the actual controversy above mentioned * * * were set forth in greater detail.

"In said fourth cause of action the facts concerning the actual controversy above mentioned * * * were set forth in greater detail.

"The primary purpose of the several causes of action was and is to obtain from the Court a declaration of rights, duties and obligations as between plaintiffs on the one side and defendants on the other, in relation to the actual controversies specified."

Respondent argues that the complaint does not state a cause of action for declaratory relief; that the action is barred by the statute of limitations and that defendant is not estopped from raising the question also that the court has not abused its discretion in sustaining the demurrer to the fourth amended complaint without leave to amend.

As stated in the trial court's opinion,

"The third amended complaint was filed October 27, 1953, and with the filing of de-

fendants' demurrer and motion to strike the court had its first opportunity to examine the pleadings. The matter having been fully briefed and argued, the demurrer was sustained on May 10, 1954, with leave to amend in sixty days." The opinion also set forth,

"I am not unmindful of the other contentions made by plaintiffs, including those contained in their extensive memorandum of points and authorities filed in support of their third amended complaint. On careful re-examination of the entire file I can find no ground and no theory on which the complaint can be held to allege facts sufficient to constitute one or more causes of action either for declaratory relief or for any other relief sought by the prayer. When this matter was submitted, counsel for both sides most courteously and properly indicated their intention to seek a review of whatever ruling I might make. It seems to me that the time has come for such a review. I can find no warrant for allowing any further recourse to the amending process.

"The demurrer to the Fourth Amended Complaint is sustained without leave to amend."

Respondents' contentions are of course technical. From a review of the record it appears that appellants are entitled to their day in court and that the question of fact, as alleged in the complaint, should be tried on the merits. The law applicable to such situations is discussed and cited somewhat at length in *Lloyd v. California Pictures Corporation*, Cal.App., 289 P.2d 295. An examination of that opinion as to the questions of law herein involved discloses that the demurrer should have been overruled.

The judgment is therefore reversed and the cause remanded for further proceedings with instructions that the demurrer to the fourth amended complaint be overruled and that defendants have a reasonable time to file their answer thereto.

WHITE, P. J., and DRAPEAU, J., concur.

136 Cal.App.2d 756

**PEOPLE of the State of California,
Plaintiff and Respondent**

v.

**Samuel D. COLLINS, Defendant and
Appellant.**

Cr. 5233.

District Court of Appeal, Second District,
Division 2, California.

Nov. 7, 1955.

Hearing on motion by convicted defendant in the nature of a writ of *coram nobis*. From order denying motion to vacate judgments, defendant appealed. The District Court of Appeal, Fox, J., held that where defendant was allegedly convicted on the basis of illegal evidence before Supreme Court decision that evidence obtained by unconstitutional search and seizure was inadmissible, such admission of testimony was merely an error of law which could have been raised by motion for new trial, but not by motion for writ of *coram nobis*.

Motion denied.

1. Criminal Law ☞997(1)

Circumstances under which a court may grant a motion for a writ of error *coram nobis* are confined within narrow limitations.

2. Criminal Law ☞997(6)

Writ of error *coram nobis* is not intended to authorize court to revise and review its opinions, but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court.

3. Criminal Law ☞997(6)

A writ of error *coram nobis* does not lie to correct errors of law.

4. Criminal Law ☞997(2)

Where defendant was allegedly convicted on the basis of illegally obtained evidence before decision of Supreme Court

that evidence obtained by unconstitutional searches and seizures was inadmissible, such admission of illegal evidence was merely an error of law which could have been raised by motion for new trial, but not by motion for writ of error *coram nobis*.

Samuel D. Collins, in pro. per., William Bronsten, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

This is a motion, filed by defendant in propria persona,¹ which is in the nature of a writ of *coram nobis*.

People v. Smith, 120 Cal.App.2d 531, 534, 261 P.2d 306. Defendant seeks to set aside judgments of conviction rendered against him in 1946 (in two separate trials) on three counts of abortion and on one count of homicide growing out of an illegal operation. The judgments and the orders denying his motions for a new trial were affirmed in People v. Emery (Collins, appellant), 79 Cal.App.2d 226, 179 P.2d 843, and People v. Collins, 80 Cal.App.2d 526, 182 P.2d 585. A hearing was denied by the Supreme Court in each case.

Defendant seeks to have the judgments set aside on the ground that the evidence admitted against him was "illegally obtained through unlawful and unreasonable search and seizure." He relies on People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

[1-3] Preliminarily it should be pointed out that the circumstances under which a court may grant a motion in the nature of a writ of error *coram nobis* are confined "within narrow limitations". People v. Sica, 116 Cal.App.2d 59, 62, 253 P.2d 75, 77. As stated in People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13, 15, "*coram nobis* is a remedy of narrow scope." The writ "is not intended to authorize any court to revise and review its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before

1. At the request of defendant, this court appointed counsel to represent him in this proceeding.

the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court." (Emphasis added.) *People v. Gilbert*, 25 Cal.2d 422, 442, 154 P.2d 657, 667; *People v. McCoy*, 115 Cal.App.2d 565, 567, 252 P.2d 371; *People v. Smith*, supra. Conceding that certain portions of the evidence on which defendant's conviction was based were obtained illegally, it does not follow that his motion to set aside the judgment should be granted. The problem here was simply one relating to the admission of evidence. The asserted error was one for correction on a motion for a new trial or upon appeal. Actually the admissibility of the evidence about which defendant now complains was challenged by him on his appeal, see *People v. Collins*, supra, where, at pages 535 and 536 of 80 Cal.App.2d, at page 591 of 182 P.2d, the court said: "We find no merit in the contentions of defendant that the testimony of Lorna Adams, the district attorney's stenographer who listened in and took notes over the concealed microphone equipment, was improperly admitted into evidence. * * * Nor do we find any prejudicial or reversible error * * * in admitting the defendant's catheters and surgical instruments into evidence." It may not, therefore, be reviewed on a motion to vacate the judgment or for a writ of *coram nobis* for "the writ does not lie to correct errors of law". *People v. Tuthill*, 32 Cal.2d 819, 822, 198 P.2d 505, 506; *People v. Cook*, 97 Cal.App.2d 284, 285, 217 P.2d 498; *People v. Martinez*, 88 Cal.App.2d 767, 771, 199 P.2d 375.

[4] The Cahan case, supra, announced a new rule in this state that evidence secured by unconstitutional search and seizure was not admissible in a criminal prosecution. It is simply, as the court pointed out, 44 Cal.2d 442, 282 P.2d 910, "a judicially declared rule of evidence." The admission of evidence against the defendant in his trials in 1946, contrary to the newly stated rule of exclusion in the Cahan case, may not be reviewed in this proceeding for it was no more than an error of law which could have been raised by motion for a new

trial or on appeal. *People v. Tuthill*, supra; *People v. Mooney*, 178 Cal. 525, 528, 174 P. 325. This conclusion finds support in the most recent Cahan case—*People v. Cahan*, 135 Cal.App.2d 287, 287 P.2d 6, where the defendant sought unsuccessfully to vacate a judgment against him on the identical grounds here urged.

The motion is denied.

McCOMB, Acting P. J., and ASHBURN, J. pro tem., concur.



136 Cal.App.2d 741

PEOPLE ex rel. Lorraine Shirley WEBER,
Ward of the Juvenile Court, Plaintiff
and Respondent,

v.

Mrs. Marle Weber FIFIELD, Guardian
Ad Litem, Defendant and Appellant.

Cr. 3129.

District Court of Appeal, First District,
Division 2, California.

Nov. 4, 1955.

Proceeding was brought by the State, on the relation of a ward of the Juvenile Court, against a guardian ad litem. The Superior Court, County of Alameda, Allen G. Norris, J., entered judgment adverse to the guardian ad litem, and she appealed. The District Court of Appeal, Dooling, J., held that in proceeding to have minor declared a ward of the Juvenile Court and committed to Youth Authority because she had allegedly violated the Vehicle Code and the Penal Code, minor was not entitled to trial by jury and to be advised that she was entitled to be represented by counsel, since a proceeding before the Juvenile Court is not a criminal proceeding and constitutional and statutory rights given to persons charged with crime are not applicable to such proceedings.

Judgment affirmed.

Infants ⇐ 16.9

In proceeding to have minor declared a ward of the Juvenile Court and committed to Youth Authority because she had allegedly violated the Vehicle Code and the Penal Code, minor was not entitled to trial by jury and to be advised that she was entitled to be represented by counsel, since a proceeding before the Juvenile Court is not a criminal proceeding and constitutional and statutory rights given to persons charged with crime are not applicable to such proceedings. West's Ann.Const. art. 1, § 13; Vehicle Code, § 501; Welfare and Institutions Code, § 700(m); Pen.Code, §§ 484, 499b, 858, 987.

Walker & Choulos, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of Cal.,
Clarence A. Linn, Chief Asst. Atty. Gen.,
Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

After a full hearing on a petition before the Juvenile Court of Alameda County the juvenile court judge found that the appellant, a minor, born December 3, 1938, comes within the provisions of section 700 (m) of the Juvenile Court Law Welfare and Institutions Code, in that she had committed the following offenses: violation of Vehicle Code, section 501, and of Penal Code, sections 484 and 499b. The court declared her a ward of the Juvenile Court and committed her to the Youth Authority.

On this appeal no contention is made, as on the record none could be made, that the evidence does not support the findings of the court. The sole contentions made are that the minor was denied the constitutional right to a jury trial and to be represented by counsel.

Our courts have held that proceedings before the Juvenile Court, even in cases where it is charged that the minor has committed a crime or crimes, are not criminal trials, but are in the nature of guardianship proceedings in which the state as *parens patriae* seeks to relieve the minor

of the stigma of a criminal conviction and to give him corrective care, supervision and training to the end that he may become an honorable and useful citizen. In *re* Daedler, 194 Cal. 320, 228 P. 467; In *re* Dargo, 81 Cal.App.2d 205, 183 P.2d 282.

It is appellant's position that because the basis of the petition filed with the Juvenile Court was that she had violated certain provisions of the criminal law she was entitled to the constitutional rights to trial by jury and to be represented by counsel. The rationale of all of the decisions on the subject in this state is that because a proceeding before the Juvenile Court is not a criminal proceeding the constitutional and statutory rights given to persons charged with crime are not applicable to such proceedings. So it was held in *In re* Daedler, supra, 194 Cal. 320, 228 P. 467, that the guaranty of the right to trial by jury in criminal cases is not applicable to a Juvenile Court proceeding.

Similarly it has been held that the right to bail, In *re* Magnuson, 110 Cal.App.2d 73, 242 P.2d 362, to be warned against self-incrimination, In *re* Dargo, supra, 81 Cal. App.2d 205, 183 P.2d 282, and the right not to be placed twice in jeopardy for the same offense, *People v. Silverstein*, 121 Cal.App. 2d 140, 262 P.2d 656, have no application to proceedings in the Juvenile Court.

By a parity of reasoning the guaranty of the right to counsel in criminal cases is likewise not applicable. Cf. In *re* O'Day, 83 Cal.App.2d 339, 189 P.2d 525.

It should be noted that this is not a case such as In *re* Rider, 50 Cal.App. 797, 195 P. 965, and In *re* McDermott, 77 Cal.App. 109, 246 P. 89, where counsel had been engaged to represent the minors and the juvenile judge refused to let the minors consult with their attorneys. Of course no person can be deprived of the right to be represented by an attorney in any court proceeding if he has an attorney whom he wishes to represent him. The complaint here is, not that the court refused to permit appellant to be represented by counsel, but that the court did not expressly advise the minor that she was entitled to be represented by counsel. Cal.Const. Art. I,

sec. 13; Pen.Code secs. 858 and 987. No such duty was cast on the court by those provisions since they apply only to prosecutions for crime.

There is nothing in *In re Contreras*, 109 Cal.App.2d 787, 241 P.2d 631, contrary to this conclusion. The court in that case reversed because the lower court had acted entirely on incompetent evidence. Here, as in *In re Dargo*, supra, 81 Cal.App.2d 205, 183 P.2d 282, the minor freely admitted her criminal acts and there was other competent testimony to the same effect.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.



136 Cal.App.2d 846

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John Le Roy WALES, Defendant
and Appellant.

Cr. 5387.

District Court of Appeal, Second District,
Division 3, California.

Nov. 9, 1955.

Rehearing Denied Nov. 21, 1955.

Hearing Denied Dec. 8, 1955.

Prosecution for abortion. After trial in Superior Court, Los Angeles County, Joseph M. Maltby, J., defendant was found guilty by a jury and appealed from the judgment and from order denying new trial. The District Court of Appeal, Parker Wood, J., held that the trial judge had erred prejudicially in refusing to give an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

Reversed.

289 P.2d—20

1. Abortion ⇨11

In prosecution for abortion, evidence was sufficient to sustain conviction. Pen. Code, §§ 21, 1108.

2. Abortion ⇨11

In prosecution for abortion, evidence was sufficient to corroborate testimony of prosecuting witness. Pen.Code, § 1108.

3. Abortion ⇨12

In prosecution for abortion, question whether corroborative evidence was as compatible with innocence as it was with guilt was a question for trier of fact. Pen. Code, § 1108.

4. Criminal Law ⇨784(1), 1173(2)

In prosecution for abortion, trial judge erred prejudicially in refusing instruction embodying principle that to justify conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with theory of guilt but inconsistent with any other rational conclusion.

5. Criminal Law ⇨821(2)

In prosecution for abortion, wherein requested instruction to effect that if there was any reasonable hypothesis based upon circumstances of whole evidence in the case then it was duty of jury to adopt such hypothesis was incomplete, trial judge was not required to give such incomplete instruction.

6. Criminal Law ⇨784(4)

In prosecution for abortion, it would have been proper for trial court to give requested instruction embodying principle that when evidence is susceptible of two reasonable interpretations, one pointing to guilt and one to innocence, it is duty of jury to adopt the interpretation pointing to innocence.

C. Ransom Samuelson and Clarence Hengel, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with the crime of abortion. In a trial by jury he was found

guilty. Probation was granted on condition that he serve 90 days in the county jail, and proceedings were suspended. Defendant appeals from the judgment (order granting probation) and from the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to sustain the conviction; and that the court erred prejudicially in refusing to give certain instructions.

Mrs. Malone (upon whom the abortion was allegedly performed) testified in part as follows: She had a physical examination by Dr. Dach who stated that he believed she was pregnant. He told her to come back the following Saturday for a more thorough examination. She did not go back for the examination. About June 10 she talked to a man friend, by the name of Lionel, about an abortion, and he gave her the name of defendant. On June 16 she telephoned defendant's office and made an appointment to go there on June 17. At the time appointed she went to defendant's office and asked defendant to examine her to determine whether she was pregnant. She gave him information about her physical condition, age and family history. She was placed in a chair which was equipped with stirrups. The chair was then let down like a table, and she was in a "lying position." Defendant made a manual examination, using a vaginal speculum, which took about 10 minutes. He stated that it looked like she was pregnant. She told him that she could not have the baby because she was not married, and she asked him to help her. He asked her if she "would keep quiet," and she said "Yes." He then made an appointment for her to return at 11 a. m. on Saturday (June 19), and told her that she would be in his office about an hour and a half. She asked how much it would be, and he said \$200—and to bring it in cash. He told her to bring a sanitary belt. On Saturday, about 11 a. m., her friend Dorothy took her in an automobile to defendant's office, and Dorothy said that she would return at 12:15 o'clock. She (witness) entered the office. Defendant was in his private office with the door open, and no one else was present. He asked her for the money. She told him that she was able to get only \$175, and she

handed the money to him. He returned \$5.00 to her and said that she might need it. He did not give her a receipt for the money. He told her to go into the dressing room, remove her clothes except certain things, put on the sanitary belt and a dressing gown and then come into the examining room. After she complied with those directions, he placed her in the chair in approximately the same position she was in when he examined her, placed her legs in the stirrups, and put a sheet over her. Then he gave her a hypodermic injection in the arm. He said that the injection was a drug which was used for women who were beginning labor, to make them relax. He pulled a small table over by her. Defendant sat between her feet, at the end of the table, and, with his hands and instruments, contacted her uterus and vaginal tract. She felt a scraping sensation in her pelvic tract. Defendant said he "was scraping it out." She told him it hurt, and she cried a little. He worked on her in this manner about 30 minutes. The hypodermic injection had a relaxing effect but she was fully conscious. After defendant completed what he was doing, he carried out an oblong pan which contained "blood clots, or whatever it was." He helped her into the dressing room, and told her to lie down. He gave her an injection in the hip, and told her it was penicillin which would stop any infection. She lay there about 25 minutes, and then she dressed. Defendant told her to take aspirin if she had pain like menstrual cramps. He said there would be "spotting" for a few days then she would be over her pregnancy. He told her to come back if she wanted further examination to see if everything was all right. Dorothy came after her and took her home. On Sunday she was in considerable pain. On Monday the pain was worse and by Wednesday night (June 23) it became unbearable. She called Dr. Brown's office but he was not in, and Dr. Posson came to see her. She told him that she had an abortion, and he examined her. He told her that she should go to the hospital for further examination, and for her to see Dr. Brown. She saw Dr. Brown the next day, and he examined her and gave her medical treatment.

Dr. Posson, called as a witness by the People, testified that he is an osteopathic physician. He examined Mrs. Malone on June 23. She said that she had something done about a possible pregnancy. From her history and the (his) findings, he thought she had been pregnant or was pregnant. He formed an opinion, based upon her history, that she had been aborted or was miscarrying. Her temperature was a little below normal and he did not think that she had an infection. She was having cramps, bleeding and clots.

Dr. Brown, called as a witness by the People, testified that he is an osteopathic physician. On June 24 he gave Mrs. Malone an examination. She told him that she had been pregnant and had been aborted. Her uterus was slightly enlarged, boggy and soft which, with her history, indicated that she had been recently pregnant. There was slight bleeding from the cervix but there was no infection there. He came to the conclusion, based upon his objective physical findings, that she had aborted. He treated her until July 22. On cross-examination he testified that Mrs. Malone told him that she was aborted in a doctor's office, and that the doctor had used some instrument on her. He (witness) examined her cervix for marks or scars, and found none. If an instrument has been used to procure an abortion, generally there are marks on the cervix 5 days thereafter. Excluding the history which Mrs. Malone gave him, he would assume that she had been aborted but he would not definitely know, and he would not know whether the abortion was spontaneous or induced.

Dr. Dach, called as a witness by the People, testified that he specializes in obstetrics and gynecology. He examined Mrs. Malone on May 19, 1954. He made an examination of the uterus and cervix of her vaginal tract by using a speculum. He also made a digital and bimanual examination. After he completed the examination, he was of the opinion that she was pregnant—about 7 weeks pregnant.

Dorothy, called as a witness by the People, testified that Mrs. Malone told her that she was pregnant and had an appoint-

ment with defendant on Saturday (June 19) for the purpose of having an abortion performed. On June 19 she took Mrs. Malone in an automobile to the building where defendant's office was located. About 12:10 p. m., she (witness) went to defendant's office and saw defendant and Mrs. Malone in the "inner" office.

Officer Thiele testified that he and Officer Finch went to defendant's office on June 29. They looked through the appointment book, went through all the files and made a search of everything "in the way of a record" but could not find the name of Mrs. Malone. Finch told defendant that they (officers) were there regarding a criminal abortion—that defendant was the suspect and Mrs. Malone was the victim. Defendant stated that he did not know anyone by that name and that he had not performed any abortions. After further conversation with defendant, defendant said, "Couldn't I give the girl back her money and take care of her medical expenses"—that he would rather pay her what the officers said she had lost than to take the publicity that would follow his arrest. They took defendant to the police station where they had a further conversation with him. Defendant asked them if they could not "fix it up with the district attorney so that he would pay a fine," and would not be prosecuted. He also said, "Well, couldn't I go through you and you pay the girl off so that I won't be arrested." Officer Finch told the defendant that all they wanted was the truth. Defendant then replied, "If I do tell the truth, what can you do for me, what can you guarantee me."

Officer Finch testified in substance the same as Officer Thiele had testified.

Defendant testified that he is 74 years of age, and has been a physician and surgeon since 1914. He gave Mrs. Malone a bimanual physical examination on June 17. She told him that she thought she was pregnant, and he replied that there was a little swelling on the right side of the uterus but that there was no evidence of pregnancy. She asked him how much he would charge to take care of her during her confinement, and he stated that most obstetricians were

charging \$250, but that if she would pay in advance he would take care of her for \$200. He told her to wait a week and come back for a rabbit test and they would know for sure whether she was pregnant. She said that she would talk to her husband and would probably be back. The following Saturday (June 19) she returned and said that she had "quite a little pain." He examined her, and the cervix and the vault of the vagina were inflamed and red, and there was a little mucus. He decided that she had some infection. He attached a piece of cotton to an applicator and, using an antiseptic, he swabbed the cervix and the vault of the vagina. Then he gave her terramycin to stop the infection. He had her lie on the bed in the dressing room, and gave her penicillin. When she left, he told her to come back in two or three days for a rabbit test, and that if she did not feel better to come back the next day. She did not come back. He did not abort her. She gave him \$175 on Saturday, and he returned \$5.00 to her. He stated that they would settle the balance of \$30 when he completed his diagnosis. He did not give her a receipt for the money because he did not expect to need all of it for he was not sure that she was pregnant. His secretary keeps all his records, but she was not at the office Saturday. When she is absent, he makes notes and she later makes the entries in the books. He did not make a note of Mrs. Malone's visit because he wanted a rabbit test so he would know what his diagnosis might be. When he talked with the officers at the police station he did not know Mrs. Malone by name but he remembered her when he saw her at the preliminary hearing.

Dr. Gates, called as a witness by defendant, testified that he specializes in gynecology and, until two years ago, he also specialized in obstetrics. Without a history of an abortion, a slightly boggy, enlarged uterus with bleeding would be no positive evidence that an abortion had been performed. Five days after an abortion has been performed, he would expect to find abrasions or scars in the mouth of the uterus—the cervix has to be grasped (in performing an abortion) with a tenaculum, an

instrument with sharp claws that will leave a mark.

[1] "An essential element of the crime [of abortion] is a criminal intent on the part of the accused to procure an abortion, and such intent must be specific. The requisite guilty intent cannot exist unless the defendant has actual knowledge or actually believes that the woman is pregnant, since the intent must be to procure a miscarriage. However, it is the belief and purpose of the defendant which is involved, not whether pregnancy in fact exists." (1 Cal.Jur.2d 159, sec. 10.) Whether defendant believed that Mrs. Malone was pregnant would, of course, have an important bearing on the question of his intent. Section 21 of the Penal Code provides that "The intent or intention is manifested by the circumstances connected with the offense * * *." Some of the circumstances herein, relating to the question of intent on the part of appellant to procure an abortion, were: Mrs. Malone was about 7 weeks pregnant, according to testimony of Dr. Dach; appellant told her (according to her testimony) that "it looked like" she was pregnant, and he asked her if she would keep quiet if he helped her; he told her (according to her testimony) that he was scraping "it out," and that she would be "spotting" for a few days and then she would be over her pregnancy; payment of \$170 cash to defendant for which he gave no receipt; absence of her name upon his records; she had been aborted or was miscarrying, according to testimony of Dr. Posson; she had been pregnant and had been aborted, according to testimony of Dr. Brown; defendant told the officers that he did not know anyone by the name "Malone," and he asked them if they could "fix it up" with the district attorney, and what they could guarantee him if he told the truth. Appellant denied that he performed an abortion. He also testified to the effect that when he examined Mrs. Malone there was no evidence of pregnancy; he treated her for an infection; the money was to pay for taking care of her during her confinement in the event she was pregnant; he did not give her a receipt for the money because he did not think he would need all

of it. There was also testimony of Dr. Gates (on behalf of appellant) that, in performing an abortion, the cervix has to be grasped with the sharp claws of an instrument which leave marks; and that he would expect to see the marks 5 days after the abortion had been performed. Also there was testimony by Dr. Brown (witness called by the People) to the effect that if an instrument had been used, generally there would be marks on the cervix 5 days thereafter; and he examined her cervix for marks and found none. Viewing the evidence in the light most favorable to the People, it was legally sufficient to support the conviction.

[2, 3] Appellant argues further that the corroborative evidence herein was as compatible with innocence as it was with guilt. Whether such evidence was as compatible with innocence as it was with guilt was a question for the trier of fact. See *People v. Allen*, 104 Cal.App.2d 402, 412, 231 P.2d 896; *People v. Estes*, 99 Cal.App.2d 745, 747, 222 P.2d 454. A defendant may not be convicted of the crime of abortion upon the testimony of the woman upon whom the offense was committed unless she is corroborated by other evidence. Penal Code, § 1108. It could be inferred from the evidence herein, exclusive of the testimony of Mrs. Malone, that appellant believed that Mrs. Malone was pregnant, and that he intended to procure an abortion. It therefore appears that such evidence was legally sufficient to corroborate her testimony. Appellant relies upon *People v. Murphy*, 60 Cal.

App.2d 762, 141 P.2d 755, wherein it was held, as a matter of law, that the corroborative evidence was insufficient to establish that defendant believed that the prosecutrix was pregnant; and that the corroborative circumstances were as compatible with innocence as they were with guilt. In the present case it cannot be said, as a matter of law, that the corroborative evidence was insufficient to establish that defendant believed that Mrs. Malone was pregnant.

Appellant contends further that the court erred prejudicially in refusing to give certain instructions (Nos. 19 and 27),¹ requested by appellant, to the effect: (1) When the evidence is susceptible of two reasonable interpretations—one pointing to guilt and one to innocence—it is the duty of the jury to adopt the interpretation pointing to innocence; and (2) a verdict of guilty may not be based upon circumstantial evidence alone unless the proved circumstances are consistent with the hypothesis of guilt and are irreconcilable with any other rational conclusion. Appellant asserts that circumstantial evidence was substantially relied upon herein for proof of guilt; and that the requested instructions were necessary to enable the jury to properly consider the circumstantial evidence. The theory of the prosecution was that appellant believed that Mrs. Malone was pregnant, and that he intended, by the acts performed by him, to procure an abortion. The theory of the defense was that appellant did not believe that Mrs. Malone was pregnant, and that he treated her for

1. No. 19—"Where the facts of the case, considering the evidence as a whole, are susceptible of two reasonable interpretations, one looking toward the guilt and the other toward the innocence of the defendant, it is your duty to give such facts and the evidence the interpretation which makes for the innocence of the defendant, rather than to adopt the one looking toward his guilt.

"If there is any reasonable hypothesis based upon the consideration of the whole evidence in this case, then it is your duty to adopt such hypothesis, and to find him not guilty; for it is your duty not to look for some theory upon which you can convict the defendant, but, on the contrary, it is your duty, and the law requires you,

if you can consistently and reasonably do so, to reconcile any and all circumstances and the whole evidence of the case that have been shown with the innocence of the defendant, and if by doing so, the innocence of the defendant appears, or if a reasonable doubt of his guilt arises, the jury must acquit him."

No. 27—"I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the [any] crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion."

an infection and he did not intend to procure an abortion. Such theories, of course, required a determination of appellant's belief and intent. It is clear that, in the matter of determining his belief and intent, the prosecution relied substantially upon circumstantial evidence.

In *People v. Yrigoyen*, 45 Cal.2d 46, 286 P.2d 1, 3, wherein defendant was charged with issuing a check with intent to defraud, the prosecution relied upon circumstantial evidence to show criminal knowledge and intent. In that case a judgment of conviction was reversed for failure to give an instruction embodying the principle "that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." It was said therein, 45 Cal.2d at page 49, 286 P.2d at page 3: "[W]e declared in *People v. Bender*, 27 Cal.2d 164, 174 et seq., 163 P.2d 8, that the court on its own motion must give an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." It was also said therein: "It is true that in the *Bender* case proof of guilt was entirely circumstantial, whereas in the present case there was direct evidence that defendant issued the check without sufficient funds in or credit with the bank, and *circumstantial evidence was relied upon to show his criminal knowledge and intent.*" (Italics added.)

In *People v. Bender*, 27 Cal.2d 164 at page 175, 163 P.2d 8, at page 15, it was also said: "It cannot be too strongly emphasized that such quoted statement [referring to statement to effect that circumstantial evidence must not only be consistent with theory of guilt but must be inconsistent with any other rational conclusion] enunciates a most important rule governing the use of circumstantial evidence. In unequivocal language it should be declared to the jury in every criminal case wherein circumstantial evidence is received."

In *People v. Candiott*, 128 Cal.App.2d 347, 355-356, 275 P.2d 500, it was held that such an instruction must be given when criminal knowledge is shown only by circumstantial evidence.

In *People v. Hatchett*, 63 Cal.App.2d 144, at page 155, 146 P.2d 469, at page 475, it was said: "Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies *the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence* in order to furnish a sound basis for conviction." (Italics added.)

[4] In the present case the trial judge erred prejudicially in refusing to give an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

[5, 6] With reference to appellant's requested instruction No. 19 (regarding two reasonable interpretations of the evidence), it appears that some words have been omitted from the first part of the second paragraph. It is there stated: "If there is any reasonable hypothesis based upon the circumstances of the whole evidence in this case, then it is your duty to adopt such hypothesis * * *." Of course, the trial judge was not required to give that incomplete instruction. In *People v. Bender*, supra, 27 Cal.2d 164, at page 177, 163 P.2d 8, at page 16, it was said: "They [jury] were told that 'If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which

points to his guilt.' This instruction is eminently *proper as far as it goes. To it should have been added a direct statement of the precise principle* under discussion [the principle that where circumstantial evidence is relied upon for proof of guilt it must be irreconcilable with the theory of innocence].” (Italics added.) As indicated in the Bender case, *supra*, it would have been proper to give an instruction embodying the principle stated in the first paragraph of said instruction No. 19—regarding two reasonable interpretations of the evidence.

In view of the above conclusion, it is not necessary to discuss appellant's other requested instructions (Nos. 20 and 21—pertaining to circumstantial evidence) which were refused.

The judgment (order granting probation), and the order denying the motion for a new trial, are reversed.

SHINN, P. J., and ASHBURN, J. pro tem., concur.

Hearing denied; SHENK, EDMONDS and SPENCE, JJ., dissenting.



136 Cal.App.2d Supp. 925

Warren L. ERWIN et al., Plaintiffs
and Respondents,

v.

ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, etc., De-
fendant and Appellant.

C. A. 8669.

Appellate Department, Superior Court,
Los Angeles County, California.

Oct. 18, 1955.

Owners of automobile brought action against railroad to recover for damage to automobile as result of collision. The Municipal Court of San Antonio Judicial District, F. B. Mullendore, J., entered judgment adverse to railroad, and railroad appealed. The Appellate Department of

the Superior Court of the County of Los Angeles, Swain, J., held that where railroad crossing was protected by red flashing signal lights and automatic gates, which were activated when a train was 4,500 feet from the crossing, and motorist did not see signal lights, which were operating, until gates started to descend when she was three to six automobile lengths away, and, without stopping, she drove onto tracks where automobile stalled, and automobile was struck by train, motorist was guilty of contributory negligence as a matter of law because of failure to keep a lookout and because of failure to stop as required by the Vehicle Code.

Judgment reversed.

1. Railroads ⇄327(2)

Failure of motorist to see red flashing signal lights at railroad crossing, though they were operating properly as motorist approached crossing, was negligence as a matter of law.

2. Railroads ⇄327(2, 7)

Where railroad crossing was protected by red flashing signal lights and automatic gates, which were activated when a train was 4,500 feet from the crossing, and motorist did not see signal lights, which were operating, until gates started to descend when she was three to six automobile lengths away, and without stopping, she drove onto tracks where automobile stalled, and automobile was struck by train, motorist was guilty of contributory negligence as a matter of law because of failure to keep a lookout and because of failure to stop as required by the Vehicle Code. Vehicle Code, §§ 575(a), 670.

Robert W. Walker and Henry M. Moffat,
Los Angeles, for appellant.

John B. Moore and Robert G. Irvin, Los
Angeles, for respondents.

SWAIN, Judge.

The defendant appeals from a judgment of \$1,715 and costs in favor of the two plaintiffs (husband and wife) for damage to their automobile caused by a collision

between it and a train of the defendant. The accident happened where Anaheim-Telegraph Road crosses defendant's track at grade near Santa Fe Springs station. The crossing is protected by red flashing signal lights and automatic gates which are activated when a train is 4,500 feet from the crossing. In addition to that, the engine whistle was properly blown and its bell rung. The trial court found that "there was no negligence on the part of defendant railroad in the arrangement, design, installation, timing, maintenance, repair or operation" of the signal devices of the defendant. The signal lights were operating as the plaintiff driver (Mrs. Erwin) approached the crossing but she did not stop as required by Vehicle Code, section 575(a), although she had time to do so had she kept the lookout rule. Instead, she drove onto the track where her car stalled. Fortunately she and her passengers got out of the car before the collision but the automobile was struck by the engine and badly damaged.

[1] The evidence most favorable to respondents upon which the above statement that the plaintiff driver had time to stop had she kept the lookout rule is as follows. There was an interval of three seconds between the moment the crossing signals started to flash and the moment the crossing gates started to descend and it takes the gates three seconds to descend. Despite the adequate warning afforded plaintiff driver of the approach of the train she proceeded upon her course to a point where her car was under the descending arm of the gate, and although she then had ample opportunity to stop, she did not do so for the reason, as she stated, that she did not want the arm of the gate to strike her car. This, however, does not excuse her failure to stop before she reached this point, because the arm, when down, is "only a few feet" from the track. She was required to stop "within 50 feet but not less than 10

feet from the nearest track". Vehicle Code, sec. 575(a). As she approached the track she should have been driving at a rate of speed so that she could have stopped as required. Her testimony is that she was going 25-35 miles per hour and then slowed down after she saw the signals. The testimony most favorable to her is that she was driving 25 miles per hour. At that rate she traveled approximately $37\frac{1}{2}$ feet per second or approximately $112\frac{1}{2}$ feet after the lights started flashing and before the gates started to descend. At that speed she should have been able to stop in 58 feet, Vehicle Code, sec. 670. From her own testimony, however, she did not see the lights during that period nor until the gates started to descend. At that time she was three to six car lengths away or 50-100 feet. She knew she was approaching a railroad crossing. It was negligence as a matter of law to fail to see signals which were operating properly as she approached the crossing. *Huetter v. Andrews*, 1949, 91 Cal. App.2d 142, 204 P.2d 655; *Pate v. Pickwick Stages System*, 1932, 125 Cal.App. 670, 14 P.2d 174. "'All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking, would constitute negligence as a matter of law.'" *Holibaugh v. Kishero Ito*, 1937, 21 Cal.App. 2d 480, 485, 69 P.2d 871, 873.

[2] The plaintiff driver was guilty of negligence as a matter of law in two respects: (1) she failed to keep the lookout rule, and (2) she failed to stop as required by the Vehicle Code.

The judgment is reversed. Appellant is awarded its costs of appeal.

SHAW, P. J., and PATROSSO, J., concur.

136 Cal.App.2d Supp. 928

Gerald Ray CHAFFIN, by Katie Landeros,
his Guardian ad Litem, Plaintiff
and Appellant,

v.

WALLACE FINANCE COMPANY, a Part-
nership, and K. P. Wallace and F. E.
Looschen, dba Wallace Finance Company,
Defendants and Respondents.

C. A. 24.

Appellate Department, Superior Court,
San Bernardino County,
California.

Nov. 2, 1955

Action by minor for damages allegedly resulting from conversion of an automobile. The Municipal Court of San Bernardino Judicial District, W. E. Balcom, J., entered judgment for defendant and minor appealed. The Appellate Department of the Superior Court, San Bernardino County, Hilliard, J., held that where the settled statement left the reviewing court to speculate and conjecture as to the evidence, if any, upon the precise point raised by appellant, the judgment was presumed correct.

Affirmed

1. Appeal and Error ⇨931(1)

The reviewing court must presume that judgment of trial court is correct and is supported by evidence, and all intendments and presumptions are indulged to support judgment on matters as to which the record is silent.

2. Appeal and Error ⇨931(1)

Where settled statement left reviewing court to speculate and conjecture as to whether minor contracted with defendant to repair automobile so that minor, not having effectively disaffirmed contract, would be liable for cost of repair, or gave defendant a delegation of power to have automobile repaired so that minor would not be liable for cost of repair in that delegation was void under statute, correctness of judgment for defendant sued by minor for conversion of automobile which de-

fendant had refused to turn over to minor refusing to pay cost of repair was presumed. West's Ann.Rules on Appeal from Municipal Courts—Civil Cases, rule 7; West's Ann.Civ.Code, §§ 33, 35.

Hector J. Rosso, San Bernardino, for appellant.

Stephen Bedford, San Bernardino, for respondents.

HILLIARD, Judge.

On May 2, 1953 appellant, a minor over the age of eighteen years, and one Bob J. Lee, an adult, purchased a 1950 Mercury automobile under conditional sales contract from one C. E. Bradley. The automobile was delivered to appellant, and thereafter Bradley sold the contract to respondents. Appellant paid one monthly installment upon the contract, but prior to the due date of the second installment contacted respondents, advising he was going in the military service, and requested respondents to sell the car for him. Respondents' manager, Traxler, agreed to attempt to sell the automobile, but recommended that the vehicle be first painted and repaired. Appellant agreed to this procedure and delivered the automobile to respondents for such purpose.

Upon the due date of the second installment, appellant contacted Traxler and a heated argument ensued over the costs of painting and repairs. Appellant demanded possession of the automobile and tendered the installment payment then due. Respondent refused this demand, but offered to return the car upon reimbursement of the cost of painting and repairs, together with the amount of installment due. This offer was rejected by appellant.

[1,2] It is appellant's contention that, as a minor over eighteen years of age, his purported delegation of power to respondents to paint, repair and sell the automobile was prohibited by Civil Code Section 33 and, therefore, void. Respondent asserts that the transaction was within the

definition of contracts by minors governed by Civil Code Section 35, which provides:

"* * * and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent."

If considered as a contract for repair, painting and sale of the car rather than a delegation of power, it must be conceded that appellant did not effectively disaffirm the contract since he made no effort to restore the consideration or its equivalent to respondents.

The only question then to be determined is whether the transaction was a delegation of power by appellant to respondent. Any attempt upon the part of appellant to appoint Traxler as his agent for contractual purposes would, of course, fall within the prohibition of Civil Code Section 33, and be a void act.

A settled and engrossed statement of facts was filed pursuant to Rule 7 of Rules on Appeal from Municipal Courts in Civil Cases. Such statement fails to disclose with particularity the testimony or other evidence of the transaction between appellant and Traxler. It sets forth that appellant "took the automobile to Mr. Traxler" and "requested Traxler to sell the car for him"; that "Traxler recommended" paint-

ing and repairing the car; and that "the car was left with Traxler to be painted, repaired and sold."

Findings of fact and conclusions of law were adopted by the trial Court, and constitute a portion of the record on appeal. Such findings, however, are limited to a determination that appellant was in default under the conditional sales contract, and by reason thereof, respondents were lawfully entitled to possession of the automobile.

We are not able to determine from the record whether Traxler, acting on behalf of respondents, was to do the painting and repairing himself, or to act as appellant's agent in having the work done by other persons. The settled statement does not meet the requirements of Rule 7 and leaves this Court to speculate and conjecture as to the evidence, if any, upon the precise point raised by appellant.

Under familiar and well settled principles of appellate practice, we must presume that the judgment of the trial Court is correct, and is supported by the evidence. All intendments and presumptions are indulged to support it on matters as to which the record is silent. *Walling v. Kimball*, 17 Cal.2d 364, 110 P.2d 58.

Judgment is affirmed.

COUGHLIN, P. J., and MITCHELL, J., concur.

45 Cal.2d 518

Harry SEARS, Trustee, and Nevada Investment and Finance Corporation, a corporation, Plaintiffs and Appellants,

v.

COUNTY OF CALAVERAS, State of California, George G. Braddock, A. J. Gianelli, Marvin L. Waters, Frank A. Crespi, Claude T. Smith, Frank Langford and Board of Supervisors of Calaveras County, Defendants and Respondents.

Sac. 6332.

Supreme Court of California.

In Bank.

Nov. 15, 1955.

Rehearing Denied Dec. 14, 1955.

Proceeding to challenge validity of a deed issued to state for taxes. The Superior Court, Calaveras County, Ralph McGee, J., sustained defendants' demurrers, and plaintiffs appealed. The Supreme Court, Shenk, J., held that one-year statute of limitations barred property owners' proceeding to challenge deed issued to state by reason of delinquent property taxes, even though owners were in exclusive and undisputed possession of property.

Judgment affirmed.

Opinion, 274 P.2d 901, vacated.

1. Taxation ☞805(4)

Statutes providing that tax deeds to state shall be conclusively presumed valid unless held invalid in a proceeding instituted within one year after execution of deed, and that a proceeding challenging a tax deed can only be commenced within one year after date of recording of deed are statutes of limitation. Revenue and Taxation Code, §§ 175, 3521.

2. Limitation of Actions ☞5(3)

As a general rule, a general statute of limitations does not run against a landowner who is in exclusive and undisputed possession to remove a cloud upon his title.

3. Taxation ☞805(4)

One-year statute of limitations barred property owners' proceeding to challenge deed issued to state by reason of delinquent property taxes, even though owners

were in exclusive and undisputed possession of property. Revenue and Taxation Code, §§ 175, 3521; St.1943, p. 1993.

Francis T. Cornish, Berkeley, for appellants.

Edmund G. Brown, Atty. Gen., E. G. Benard and Irving H. Perluss, Asst. Attys. Gen., Edward P. Hollingshead, Deputy Atty. Gen., and Joseph S. Huberty, San Andreas, for respondents.

SHENK, Justice.

This is an appeal from a judgment for the defendants following an order sustaining their demurrers without leave to amend.

The main purpose of the action is to have it declared that a deed issued to the State of California for delinquent ad valorem taxes for the fiscal year 1935-1936 is invalid. The real property consists of patented mining claims on four parcels of land and the minerals underlying another parcel.

It is alleged that the Calaveras Central Mining Corporation was the owner of the property on and prior to the first Monday in March, 1935; that on November 20, 1928, the corporation conveyed the property to one K. W. Cannon, as trustee, under a deed of trust recorded on December 4, 1928, for the benefit of one Helen Roesch in order to secure payment of money loaned to the corporation; that by virtue of that instrument Cannon was empowered to sell the property to satisfy the corporation's obligation to Roesch in the event of default, and that on February 9, 1938, the then trustee, Frank A. Trachsler sold the real property and improvements to one John S. DeLancey, who thereupon became the owner thereof and declared himself, prior to August 8, 1940, to hold the property in trust under the terms of a judgment of the Calaveras County Superior Court. The plaintiff Sears derives his title through John S. DeLancey as trustee by substitution effected on September 23, 1944, after the death of DeLancey. The interest of the plaintiff Nevada Investment and Finance Corporation stems from its purchase, as trustee, of all the placer gold in place in

the five parcels of property from Sears on October 10, 1944.

It is further alleged that the Assessor of Calaveras County assessed these five parcels of real property separately for the year 1935-1936 and that the total ad valorem taxes levied for that year amounted to \$750.50. The taxes were not paid and the property was sold to the state on June 29, 1936. There was no redemption. On July 2, 1943, the Tax Collector executed and recorded a deed to the state. It is alleged and therefore an admitted fact that the plaintiffs were in the exclusive and undisputed possession of the property during all of the times involved.

The plaintiffs seek the annulment of the tax deed on the ground that the tax proceedings supporting the right of the county to deed the property to the state and the deed itself were invalid. They assert that the tax levied against the property exceeded the lawful rate levied generally in the county for 1935-1936; that the purchase price for which the property was sold to the state exceeded the legal amount, and that the separate parcels were improperly sold and deeded to the state as a single unit.

[1] The defendants interposed demurrers alleging that the action is barred by the limitations contained in sections 175 and 3521 of the Revenue and Taxation Code. Section 175, enacted in 1945, provides that "All deeds heretofore and hereafter issued to the State of California * * * by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later." Section 3521 provides that "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later."

Both of these sections are statutes of limitation. *People v. Chambers*, 37 Cal.2d 552, 233 P.2d 557; *McCaslin v. Hamblen*, 37 Cal.2d 196, 231 P.2d 1; *Tannhauser v. Adams*, 31 Cal.2d 169, 187 P.2d 716; *Sheeter v. Lifur*, 113 Cal.App.2d 729, 249 P.2d 336. The defendants argue that the action is barred because the plaintiffs filed their complaint in 1948, more than one year after the enactment of section 175 and more than one year after the tax deed was executed and recorded. It is obvious that if these sections are applicable the plaintiffs are precluded from asserting the invalidity of the tax deed in this action. The plaintiffs contend, however, that the sections do not foreclose an owner in exclusive and undisputed possession of the taxed property from attacking the asserted validity of the deed. The contention is based upon implications which they draw from the opinions of this court in *Tannhauser v. Adams*, supra, 31 Cal.2d 169, 187 P.2d 716, and *McCaslin v. Hamblen*, 37 Cal.2d 196, 231 P.2d 1.

[2] The contention that a statute limiting the time for the commencement of an action to set aside a deed to the state for delinquent taxes does not apply to an owner in exclusive and undisputed possession of the property taxed, is largely based on a rule stated to be that a general statute of limitations does not run against such an owner to remove a cloud upon his title. It may be assumed that such is the general rule. See *Maguire v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062; *Newport v. Hatton*, 195 Cal. 132, 231 P. 987; *Secret Valley Land Co. v. Perry*, 187 Cal. 420, 202 P. 449; *San Francisco Unified School Dist. v. City and County of San Francisco*, 54 Cal.App.2d 105, 128 P.2d 696; *Crane v. French*, 39 Cal.App.2d 642, 104 P.2d 53; *Faria v. Bettencourt*, 100 Cal.App. 49, 51-52, 279 P. 679.

[3] But the general rule does not apply as against a special statute of limitation foreclosing the commencement of an action to set aside a deed to the state for delinquent taxes beyond one year from and after the recording of the deed to the state. Here the facts stated as constituting the alleged defects in the deed all occurred prior to the execution and recordation of the deed.

None of the alleged defects in the deed were jurisdictional in the sense that the curative act of 1943, Stats.1943, page 1993, would not apply; nor is the deed claimed to be void on its face. If the contention of the plaintiffs should prevail the finality of tax proceedings would be thrown into confusion. The validity of tax deeds as against an owner in possession of real property would be placed in suspension for an indefinite period and until at his election he chose to attack it. Without limit of time he could defend against it. There appears to be no reason why an owner of land, although in exclusive and undisputed possession, should not be required to be alert to protect his rights as against his own delinquency in the payment of taxes. He is charged with notice that if he claims the invalidity of a tax deed to the state or of the proceedings leading up to it he must bring his action for that purpose within the statutory time.

The improper creation of the tax lien and recordation of the deed to the state do more than merely give rise to a permissible cause of action in favor of the landowner. They also start the running of the special statute of limitations applicable to such an owner. If he does not move to protect his rights as against the tax by payment, redemption, or timely and successful attack upon the tax deed or the proceedings leading up to it, he is divested of his title. After the statutory period has run the tax deed transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant.

It is contended by the plaintiffs that this court, at least by implication, has ruled otherwise or recognized a contrary rule in *Tannhauser v. Adams*, supra, 31 Cal.2d 169, 187 P.2d 716. It was said in that case, 31 Cal.2d at page 176, 187 P.2d at page 721: "Regardless of what may be the law under other circumstances it appears to us that there is no sound reason why the right of one out of possession to attack a tax title for the defect here relied upon, whether it be considered jurisdictional or otherwise, should not be barred if his action is not instituted within the prescribed statutory period, provided that such period is a reasonable one."

It is not claimed that this court or any court of this state has directly and finally decided that sections 175 and 3521 of the Revenue and Taxation Code do not apply to an owner in possession. Nor is it contended that any case decided in this state directly involved the point. But it is contended that by indirection the courts of the state have approved the rule contended for by the plaintiffs. It is true as stated by them that what was said in the cases in this state on the subject was obiter. The plaintiffs say that "In *McCaslin v. Hamblen*, 37 Cal.2d 196, 231 P.2d 1, the dictum in *Tannhauser v. Adams* was approved, the court saying: 'Assuming that the rule might have application in a case where the plaintiff is the original tax-delinquent owner in undisturbed possession, it would seem right to conclude that a generalization applicable merely to "owners in possession" is too broad.'" See *Elbert, Ltd. v. Gross*, 41 Cal. 2d 322, 260 P.2d 35. Such an expression is not to be taken as the announcement of a rule that an owner in possession of real property is not bound by a valid statute of limitations with reference to tax-delinquent proceedings, the same as an owner not in possession. There is no contention that it is not within the power of the state, through its legislature, to provide for such statutes of limitations as those now before us. As applied to the facts in this case there can be no question of their validity and proper application. This necessarily includes the proceedings leading up to the issuance of the tax deed, such as the alleged fraudulent and otherwise overvaluation of the land, the excessive tax rate and sale price, and the sale in block instead of in parcels.

It is concluded that the plaintiffs are barred by statute from attacking the tax deed and all proceedings prior to its issuance and recordation. Since the state's title to the property has not been successfully attacked, the plaintiffs asserted objections to the assessments made after the execution and delivery of the deeds are futile.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

45 Cal.2d 469

Frank DRAGNA, Plaintiff and Appellant,
v.

Lynn WHITE, H. E. Roberson and B. D.
Unland, Defendants and Respondents.

L. A. 23738.

Supreme Court of California.

In Bank.

Nov. 4, 1955.

Action against police officers for false arrest and imprisonment. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., granted defendants' motion for judgment on the pleadings and plaintiff appealed. The Supreme Court, Gibson, C. J., held that where the complaint stated that the police officers told newspaper reporters that plaintiff was a mobster and member of a criminal gang, but complaint did not allege that such statement to reporters was true, and, on contrary, complaint alleged in effect that statement to reporters was false and that the defendants knew true facts, complaint did not as matter of law show probable cause for arrest and did not fail to state cause of action.

Reversed.

Opinions 280 P.2d 817 and 281 P.2d 566, vacated.

1. Pleading ⚡343

If complaint stated a cause of action, it was error to grant defendants' motion for judgment on the pleadings.

2. False Imprisonment ⚡7(3)

A police officer who makes an arrest without a warrant and without justification may be held civilly liable for false arrest and imprisonment. Pen.Code, § 836.

3. False Imprisonment ⚡20(1)

A complaint which alleges that there was an arrest without process, followed by imprisonment and damages, states a cause of action for false imprisonment based on unlawful arrest. Pen.Code, § 836.

4. False Imprisonment ⚡22

When plaintiff in an action for false imprisonment has proved an arrest without process, followed by imprisonment and dam-

ages, burden rests upon defendant to prove justification for the arrest. Pen.Code, § 836.

5. False Imprisonment ⚡20(1)

Where complaint for false arrest and imprisonment stated that the defendant police officers told newspaper reporters that plaintiff was a mobster and member of criminal gang, but complaint did not allege that statement to reporters was true, and, on contrary, complaint alleged in effect that statement to reporters was false and that the defendants knew true facts, complaint did not as matter of law show probable cause for arrest and did not fail to state cause of action. Pen.Code, § 836.

6. False Imprisonment ⚡20(1)

Complaint alleging that plaintiff was arrested by officers on February 13, 1950 without warrant or process, was removed to city jail and kept there without opportunity to communicate with an attorney or anyone else until his release on February 16th without filing of charges, alleged sufficient facts to state cause of action on theory of unnecessary delay in bringing plaintiff before magistrate. Pen.Code, §§ 825, 849.

7. Appeal and Error ⚡863

False Imprisonment ⚡39

In an action for false arrest and imprisonment, wherein period of detention in city jail was a disputed matter, such period was a matter for determination by trier of facts and not matter to be decided by reviewing court on appeal after granting of motion for judgment on pleadings. Pen.Code, §§ 825, 849.

8. Arrest ⚡70

Statute providing that defendant must in all cases be taken before magistrate without unnecessary delay, and, in any event, within two days after arrest, excluding Sundays and holidays, does not authorize two days' detention in all cases but provides maximum limitation, and detention of less than two days, if unreasonable under circumstances, is violative of statute. Pen.Code, § 825.

9. Arrest ⚡70

Duty to bring prisoner before magistrate without delay is particularly impera-

tive where arrest is made without a warrant. Pen.Code, §§ 825, 849.

10. Arrest ⇨70

Where arrest is lawful, subsequent unreasonable delay in taking person before magistrate will not affect legality of the arrest, though it will subject offending person to liability for so much of imprisonment as occurs after period of necessary or reasonable delay. Pen.Code, §§ 825, 849.

11. Appeal and Error ⇨837(4)

In determining whether trial court properly granted judgment on pleadings for failure of complaint to state cause of action, reviewing court did not need to consider assertions contrary to facts alleged in complaint.

William W. Shaw, Riverside, and Robert H. Green, Los Angeles, for appellants.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Robert B. Burns and Ralph J. Eubank, Deputy City Attys., Reed & Kirtland and Robert C. Packard, Los Angeles, for respondents.

GIBSON, Chief Justice.

[1] Plaintiff sued three members of the Los Angeles Police Department seeking damages for false arrest and imprisonment. Defendants did not demur, but when the case came on for trial they objected to the introduction of any evidence on the ground that the complaint did not state a cause of action. The objection was sustained, and defendants' motion for judgment on the pleadings was granted without leave to amend. It was, of course, error to grant the motion if the complaint states a cause of action. *Chas. L. Harney, Inc. v. Contractors' State License Bd.*, 39 Cal.2d 561, 565, 247 P.2d 913; *Budrow v. Wheatcraft*, 115 Cal.App.2d 517, 522, 252 P.2d 637; see 2 Witkin, *California Procedure* (1954), pp. 1500, 1704; cf. *MacIsaac v. Pozzo*, 26 Cal. 2d 809, 812-813, 161 P.2d 449.

The complaint alleges as follows: About 10 p. m. on February 13, 1950, defendants unlawfully arrested plaintiff without a war-

rant or process of any kind, and against his will they caused him to be taken to the offices of the Los Angeles Police Department. They locked him in a room, and, about 3 a. m., without his consent and with intent to injure and humiliate him, they admitted a large number of newspaper reporters and photographers and caused him to be photographed, knowing that his picture would be published throughout the United States as that of a criminal held for the commission of a felony. Defendants then removed him to the Los Angeles City Jail and, without permitting him to communicate with an attorney or anyone else, kept him in a cell until they released him on February 16. No charges were filed against plaintiff either prior or subsequent to his arrest. While he was in custody defendants stated to newspaper reporters that he was being held for suspicion of conspiracy to commit murder, that he was a member of a criminal gang and a mobster, that he had been under police observation for the nine months immediately preceding his arrest and that they found an arsenal of firearms in his home at the time of his arrest. Plaintiff has always been a law-abiding citizen and has never been a mobster or a member of any criminal gang. No firearms were found in or maintained in his home or removed from it by defendants, and had they kept him under observation they would have discovered no evidence to sustain his arrest or the wrongful statements which were made by defendants to the reporters. Plaintiff since his birth has resided in the city of Los Angeles, where he attended grammar school, high school and the University of Southern California. He served in the United States Army in World War II, had an eye shot out in enemy action and was honorably discharged upon the conclusion of the war. Defendants were at all times aware of and had full knowledge of the foregoing facts, and in making the arrest they acted with deliberate and premeditated malice and with intent to injure plaintiff. The complaint prays for actual damages in the sum of \$250,000 and punitive damages in the amount of \$100,000.

[2-5] A police officer who makes an arrest without a warrant and without justifica-

tion may be held civilly liable for false arrest and imprisonment. *Miller v. Glass*, 44 Cal.2d 359, 282 P.2d 501; *Hughes v. Oreb*, 36 Cal.2d 854, 857, 228 P.2d 550; *Gomez v. Scanlan*, 155 Cal. 528, 102 P. 12; *Oppenheimer v. City of Los Angeles*, 104 Cal.App. 2d 545, 232 P.2d 26; *Kaufman v. Brown*, 93 Cal.App.2d 508, 209 P.2d 156. A cause of action for false imprisonment based on unlawful arrest is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendants to prove justification for the arrest. *Hughes v. Oreb*, 36 Cal.2d 854, 858, 228 P.2d 550; *Kaufman v. Brown*, 93 Cal.App.2d 508, 511-513, 209 P.2d 156; *Collins v. Jones*, 131 Cal.App. 747, 750, 22 P.2d 39; see 1 Cooley on Torts [4th ed. 1932]; § 112, pp. 360-361; 22 Am.Jur. 422, 427; cf. *People v. Agnew*, 16 Cal.2d 655, 661-664, 107 P.2d 601. The complaint contains the essential averments for false imprisonment on this theory, but it is argued that the additional allegations regarding the statements made by defendants to the reporters show as a matter of law that defendants had reasonable cause to make the arrest.¹ It is not alleged that the statements made by defendants were true or that defendants believed them to be true or had reasonable cause for such belief. To the contrary, it is in effect alleged that the statements were untrue and that defendants were aware of the true facts. The allegations regarding defendants' declarations to the press, which may have been directed to the claim of punitive damages, do not negative the cause of action for false arrest.

[6] The complaint also alleges sufficient facts to state a cause of action on the theory

that there was unnecessary delay in bringing plaintiff before a magistrate. Section 849 of the Penal Code provides: "When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person, must be laid before such magistrate." In the light of this section it has been held that an action for false imprisonment may be maintained if the defendant unlawfully detains the prisoner for an unreasonable period of time and unnecessarily delays taking him before a magistrate. *Kaufman v. Brown*, 93 Cal.App.2d 508, 511, 209 P.2d 156 [24 hours]; *Williams v. Zelzah Warehouse Co.*, 126 Cal.App. 28, 30-31, 14 P.2d 177 [32 hours]; *Vernon v. Plumas Lumber Co.*, 71 Cal.App. 112, 117-118, 234 P. 869 [2-3 hours]; see *Gomez v. Scanlan*, 155 Cal. 528, 531, 102 P. 12 [3 or 4 hours]; *Peckham v. Warner Bros. Pictures, Inc.*, 36 Cal.App.2d 214, 218-219, 97 P.2d 472.

[7-9] Defendants contend that section 849, quoted above, must be read with section 825 of the Penal Code, which provides that the defendant "must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays * * *." It is claimed that under this provision a prisoner may be held in all cases for two days without being taken before a magistrate.² The statute, however, does not authorize a two-day detention in all cases but, instead, places a limit upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances,

1. Section 836 of the Penal Code provides that an officer may make an arrest without a warrant "1. For a public offense committed or attempted in his presence. 2. When a person arrested has committed a felony, although not in his presence. 3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. 4. On a charge made, upon a reasonable cause, of the commission of

a felony by the party arrested. 5. At night, when there is reasonable cause to believe that he has committed a felony."

2. Defendants assert that plaintiff filed with the city a verified claim stating that he was released on February 15, whereas the complaint alleges that he was released on the 16th. The claim is not before us, and the period of plaintiff's detention must be determined by the trier of the facts.

is in violation of the statute. *People v. Stroble*, 36 Cal.2d 615, 624-625, 226 P.2d 330 [about 24 hours]. Moreover, the duty to bring the prisoner before a magistrate without delay is even more imperative where, as here, the arrest is made without a warrant. *Williams v. Zelzah Warehouse Co.*, 126 Cal.App. 28, 30-31, 14 P.2d 177.

[10] Citation herein of *Kaufman v. Brown*, 93 Cal.App.2d 508, 513, 209 P.2d 156, and *Peckham v. Warner Bros. Pictures, Inc.*, 36 Cal.App.2d 214, 218, 97 P.2d 472, should not be construed as implying our approval of language in the opinions in those cases to the effect that, when there is unreasonable delay in taking a person before a magistrate after a lawful arrest, the false imprisonment dates from the time of the arrest. There is also similar language in *Korkman v. Hanlon Drydock, etc., Co.*, 53 Cal.App. 147, 156, 199 P. 880. We are satisfied that the better rule is that where the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay. See *Rest., Torts*, § 136, Comment d; *Atchison, T. & S. F. Ry. v. Hinsdell*, 76 Kan. 74, 90 P. 800, 12 L.R.A.,N.S., 94; *Oxford v. Berry*, 204 Mich. 197, 170 N.W. 83; *Stromberg v. Hansen*, 177 Minn. 307, 225 N.W. 148; *Teel v. May Department Stores*, 348 Mo. 696, 155 S.W.2d 74, 137 A.L.R. 495; *Brown v. Meier & Frank Co.*, 160 Or. 608, 86 P.2d 79; see also *Bohlen and Shulman, Effect of Subsequent Misconduct Upon a Lawful Arrest*, 28 *Columb.L.Rev.*(1928) 841, 849, 852, 858.

[11] Defendants' assertion that their custody of plaintiff ceased when he was placed in the city jail and that they were not responsible for his subsequent detention is contrary to the facts alleged in the complaint and therefore need not be considered by us.

The judgment is reversed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER and SPENCE,
JJ., concur.

Pelrson M. HALL, Petitioner,
v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Gertrude M. Hall, Real Party In Interest
and Respondent.

L. A. 23450.

Supreme Court of California.
In Bank.

Oct. 28, 1955.

Petition for writ of mandate to require trial court to determine amount of permanent alimony petitioner was obligated to pay under interlocutory divorce decree and to restrain court from proceeding to hear order to show cause for temporary alimony. The Supreme Court, Edmonds, J., held, *inter alia*, that where reviewing court had reversed judgment granting wife divorce on ground that alimony had been improperly awarded, wife did not waive procedural rights to have retrial on issues so as to authorize court to determine alimony issue on basis of evidence at former trial, by her waiting more than five months after remittitur was filed to have cause set for retrial and by not moving to strike husband's motion that permanent alimony be fixed by court.

Alternative writ discharged and peremptory writ denied.

Carter and Schauer, JJ, dissented in part.

Opinion, 278 P.2d 124, vacated.

1. Appeal and Error ⇨1210(1)

In a civil action, partial reversal of portion of judgment from which appeal was taken, without direction, remands cause for new trial.

2. Appeal and Error ⇨1180(1), 1195(1)

An unqualified reversal remands cause for new trial and places parties in trial court in same position as if cause had never been tried, with the exception that opinion of court on appeal must be followed so far as applicable, even if there has been only a partial reversal of judgment.

3. Divorce ⇨287

Partial reversal of judgment in wife's action for divorce on basis that needs of parties did not justify amount of alimony awarded to wife necessarily rested upon evidence before court, and such opinion did not affect scope of retrial, but wife at retrial would have right to produce evidence tending to show different circumstances than shown by record in former trial.

4. Divorce ⇨287

Where reviewing court had partially reversed judgment in wife's action for divorce on basis that needs of parties did not justify alimony award, trial court could not, on husband's motion, determine amount of permanent support and maintenance solely on basis of record in former trial, without consent of parties.

5. Mandamus ⇨51

Where reviewing court had partially reversed judgment granting wife divorce on ground that needs of parties did not justify alimony award, husband was not entitled to writ of mandate to compel court to fix amount of permanent alimony without retrial, on claim that procedure for setting matters for retrial would cause hardship by delay. West's Ann.Superior Court Rules, rules 6, 12.

6. Mandamus ⇨51

Where reviewing court partially reversed judgment granting wife divorce on ground that alimony had been improperly awarded, wife did not waive procedural rights to having retrial on issues so as to enable former husband to proceed by writ of mandate to require court to redetermine issue on basis of evidence at former trial by waiting more than five months after remittitur was filed to have cause set for retrial and by not moving to strike husband's motion that permanent alimony be fixed by court, in view of fact that husband had equal opportunity to have cause set for retrial and that husband had created uncertainty by having final judgment of divorce entered ex parte, which judgment was later vacated.

7. Appeal and Error ⇨948

Where record did not include transcript of proceedings, court would not presume

abuse of discretion in rulings on various motions.

8. Divorce ⇨287

Where reviewing court partially reversed judgment granting wife divorce on ground that alimony had been improperly determined, trial court had power during pendency of proceedings to affix amount of permanent alimony to be awarded her, to allow wife temporary alimony, costs and attorneys' fees. West's Ann.Civ.Code, §§ 137.2, 137.3; West's Ann.Code Civ.Proc. § 1049.

9. Divorce ⇨231

In theory, alimony is considered compensation to injured spouse for loss resulting from other's breach of obligations of marital relationship, but right to receive it depends not alone upon granting of divorce for fault of opposing party, but also upon showing that circumstances of both parties justify award made. West's Ann.Civ.Code, §§ 137.2, 137.3, 139; West's Ann.Code Civ.Proc. § 1049.

10. Divorce ⇨234

Despite his prevalence in divorce action, spouse may acquire no right to permanent alimony in absence of provision for it in decree. West's Ann.Civ.Code, §§ 137.2, 137.3, 139; West's Ann.Code Civ.Proc. § 1049.

11. Divorce ⇨241

It is considered better practice in awarding permanent alimony to specify periodic payments, though court may declare payment of lump sum. West's Ann.Civ.Code, § 139.

12. Divorce ⇨235

Although generally periodic payments of alimony commence with effective date of decree, it is not abuse of discretion to direct payment from appearance of defendant or from commencement of action or to reserve jurisdiction to consider it at time after entry of judgment. West's Ann.Civ.Code, § 139.

13. Divorce ⇨287

Trial judge in affixing award of permanent alimony, on retrial of cause following reversal may consider practically everything which has legitimate bearing upon

present and prospective matters relating to lives of both parties and is not limited to consideration of circumstances existing at time of original trial.

Irving M. Walker, James C. Sheppard and Sheppard, Mullins, Richter & Balthis, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

William J. Currer, Jr., Los Angeles, for real party in interest and respondent.

EDMONDS, Justice.

Peirson M. Hall appealed "from that part of an interlocutory decree which ordered him to pay alimony and the fees of Mrs. Hall's attorneys." This court ordered that "[i]nsofar as the judgment awards Mrs. Hall \$350 per month for support and maintenance, it is reversed; in all other respects it is affirmed." Hall v. Hall, 42 Cal. 2d 435, 436, 442, 267 P.2d 249, 253.

On the same day that the remittitur was filed, upon the ex parte application of Hall, a final judgment of divorce was granted, incorporating by reference the provisions of the interlocutory decree. Mrs. Hall attempted unsuccessfully to have execution on the judgment issued. She then moved to vacate the judgment. While that motion was pending, she obtained orders to show cause why Hall should not be required to pay temporary alimony, costs and attorneys' fees "during the pendency of this action." Before the time set for the hearing upon these orders, Hall filed written opposition and gave notice of motions for entry of final judgment and for orders determining his existing liability, if any, and fixing the amount of permanent alimony.

There have been no rulings made on the orders to show cause nor upon subsequent motions by Mrs. Hall for temporary alimony and attorneys' fees. However, the final judgment has been set aside upon the grounds that it was void and obtained by inadvertence. Hall noticed an appeal from the order of vacation but later abandoned it.

A minute order recites that the "Motion of defendant for Order Determining Liability of Defendant, if any, and Fixing Amount thereof" came on for hearing and that the "Oral motion of counsel for defendant to fix amount of permanent alimony is argued and denied." Thereafter, the court denied a motion to reconsider that ruling. It also denied a motion later made to "reconsider its decision re: Liability of Defendant and the fixing of permanent alimony;" and denied a "renewed motion" to fix permanent alimony.

By his present petition, Hall seeks a writ of mandate commanding the superior court "to hear and determine the motion of your petitioner for an order fixing the amount of permanent alimony" to be paid to Mrs. Hall and requiring it to "desist and refrain" from hearing her application for temporary alimony, costs and attorneys' fees. But the record shows that the superior court has heard and determined adversely to Hall his motion to fix permanent alimony as well as three subsequent motions to reconsider its ruling. By his demand for affirmative action he is endeavoring to compel the court to hear a motion which has been ruled upon.

However, the memorandum of points and authorities and briefs in support of the petition state that the order made upon his motion to determine his liability for permanent alimony was erroneous. His position is that the remittitur in Hall v. Hall, supra, commands the trial court to fix permanent alimony and that it has no jurisdiction to give any other relief.

[1,2] The judgment and order of this court on the appeal was a partial reversal of the portion of the judgment from which the appeal was taken, without directions. In a civil action such a reversal remands the cause for a new trial. Erlin v. National Union Fire Ins. Co., 7 Cal.2d 547, 549, 61 P.2d 756; In re Estate of Pusey, 177 Cal. 367, 371, 170 P. 846. "[A]n unqualified reversal remands the cause for a new trial [citation] and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable." Central

Sav. Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 P. 521, 523. This principle is equally applicable to a partial reversal of a judgment. Cf. Pillsbury v. Superior Court, 8 Cal.2d 469, 472, 66 P.2d 149.

[3] In Hall v. Hall, supra, the partial reversal of the judgment was unqualified, and the opinion in no way restricts the scope of a retrial of the issues set at large. The basis of the order was the conclusion that "the needs of the respective parties do not justify the amount of alimony here allowed to the wife." 42 Cal.2d at page 442, 267 P.2d at page 253. Necessarily that conclusion rests upon the evidence then before the court. Cf. Erlin v. National Union Fire Ins. Co., supra, 7 Cal.2d at page 548, 61 P.2d 756. Mrs. Hall now may be able to present evidence tending to show different circumstances than those shown by the record in the former trial, and she so asserts in affidavits in support of her motions for temporary alimony and counsel fees.

[4, 5] Hall does not allege, and the record does not show, that he has complied with the rules governing a setting for trial in the superior court. Rule 6, Rules for Superior Courts. Essentially, by this proceeding he is seeking to compel the superior court to fix the amount of permanent alimony without a retrial. But, without the consent of the parties, the trial court could not determine that matter solely on the basis of the record in the former trial. Blache v. Blache, 37 Cal.2d 531, 535, 233 P.2d 547. To do so would be prejudicial error, Heinfelt v. Arth, 4 Cal.App.2d 381, 384, 41 P.2d 191, and there is no legal basis for compelling by writ of mandate action by the trial court which should be obtained under established procedure. If, as Hall claims, the procedure for setting the matter for trial may cause hardship through delay, there is available to him a method of advancing the date of a trial. Rule 12, Rules for Superior Courts.

[6, 7] The further contention is made that Mrs. Hall waived her procedural rights by waiting more than five months after the remittitur was filed to have the cause set for retrial and by not moving to strike Hall's motion that permanent alimony be

fixed by the court. During that period, however, Hall had equal opportunity to have the case set for retrial, and the trial judge was justified in concluding that Mrs. Hall's failure to do so resulted from the uncertainty created by her husband's entry of a final judgment of divorce and the necessity of contesting that order. No authority is cited for the proposition that Mrs. Hall waived her right to object to Hall's motion by proceeding to argue it at the time set for a hearing upon it instead of interposing a motion to strike. In any event, all of these objections, at most, would be grounds for showing an abuse of discretion by the trial judge in failing to dispense with the procedure required for setting the case for trial. The record does not include a transcript of the proceedings in which rulings upon the various motions were made, and an abuse of discretion may not be presumed. Meyer v. State Board of Equalization, 42 Cal.2d 376, 387, 267 P.2d 257.

[8] Hall's petition for mandate also is directed toward prohibiting a hearing upon Mrs. Hall's motions for temporary alimony, costs and attorneys' fees. The court is authorized to make those awards "[d]uring the pendency of any action" for divorce. Civ.Code, §§ 137.2, 137.3. Section 1049 of the Code of Civil Procedure states that an action is pending "from the time of its commencement until its final determination upon appeal".

Sections 137.2 and 137.3 are a restatement of former section 137 of the Civil Code. Lerner v. Superior Court, 38 Cal.2d 676, 242 P.2d 321, considered the authority of the superior court to award counsel fees and costs in connection with the application of the wife for a writ of prohibition pending an appeal from an order of modification of the terms of a final decree of divorce relating to the custody of the children. It was pointed out that "under section 137 * * * the phrase therein, 'When an action for divorce is pending,' embraced many diverse proceedings growing out of the divorce action and arising after entry of the final decree." 38 Cal.2d at page 685, 242 P.2d at page 326. After reviewing several

decisions involving awards of counsel fees and costs made during the pendency of proceedings to enforce or modify awards of permanent alimony or to construe the provisions of a property settlement agreement, the court concluded that attorneys' fees and costs properly were allowed. "On principle," it was said, "there is no difference between actions in which a woman is compelled by her former husband to resist by an appeal a proceeding brought by him to modify a custody or alimony award and actions in which she is compelled to seek prohibition to prevent improper modification of such awards." 38 Cal.2d at pages 685-686, 242 P.2d at page 326. The Lerner case and authorities cited support the contention that the trial court in the present action has authority to award to Mrs. Hall the attorneys' fees and costs necessary to enable her to prosecute her demand for permanent alimony. Accord: *Dexter v. Dexter*, 42 Cal.2d 36, 44, 265 P.2d 873; *Wilson v. Wilson*, 33 Cal.2d 107, 115, 199 P.2d 671.

Similarly, awards of temporary alimony made after the entry of an interlocutory decree have been upheld. *Nelson v. Nelson*, 7 Cal.2d 449, 453, 60 P.2d 982 (during the appeal by the husband from an order granting the wife's motion to vacate the final decree); *Bernard v. Bernard*, 79 Cal.App. 2d 353, 358, 179 P.2d 625 (pending a hearing upon the wife's application for permanent alimony made after the interlocutory decree but before a final decree); *De Leshe v. De Leshe*, 80 Cal.App.2d 517, 518, 181 P.2d 931 (pending appeal from an order modifying the interlocutory decree); cases cited in *Kellett v. Kellett*, 2 Cal.2d 45, 49, 39 P.2d 203 (pending appeal from the interlocutory decree). By the same principles, here, during the pendency of the proceeding to fix the amount of permanent alimony to be awarded to Mrs. Hall, the trial court has power to allow temporary alimony.

Neither *Wilson v. Superior Court*, 31 Cal.2d 458, 189 P.2d 266, nor *Harrold v. Harrold*, 43 Cal.2d 77, 271 P.2d 489, states a contrary rule. The *Wilson* case considered the effect of a failure to incorporate expressly in the final decree the provisions of the interlocutory judgment relating to per-

manent alimony. The rule applied in the controversy between the Harrolds was that a final decree might be entered under the circumstances there presented despite the pendency of litigation as to rights of the parties to the community property. The court did not decide whether such action would be proper if an issue relating to permanent alimony is pending, or, if such a judgment could be entered, what its effect might be upon the right to receive either temporary or permanent alimony.

An additional question is raised by Hall as to the circumstances which may be considered in fixing the amount of permanent alimony and the time when such an award should become operative. It is his position that the portions of the interlocutory decree from which no appeal was taken are now final and fix the right of Mrs. Hall to support as of the time specified therein for the commencement of his payments therefor. Upon a retrial to determine the amount of such payments, he maintains, the trial judge will be limited to a consideration of the circumstances existing at the date of the original trial. Mrs. Hall asserts that all of the circumstances, including those arising between the trial and a retrial, properly may be considered.

[9, 10] In theory, alimony is considered to be compensation to the injured spouse for the loss resulting from the other's breach of the obligations of the marital relationship. *Arnold v. Arnold*, 76 Cal.App. 2d 877, 885-886, 174 P.2d 674. But the right to receive it depends not alone upon the granting of a divorce for the fault of the opposing party, but also upon a showing that the circumstances of the parties justify the award made. Civ.Code, § 139; *Bowman v. Bowman*, 29 Cal.2d 808, 811, 178 P.2d 751, 170 A.L.R. 246. Despite his prevalence in the divorce action, a spouse may acquire no right to permanent alimony in the absence of a provision for it in the decree. *Puckett v. Puckett*, 21 Cal.2d 833, 841, 136 P.2d 1; *Howell v. Howell*, 104 Cal. 45, 47, 37 P. 770.

In *Hall v. Hall*, supra, the portion of the interlocutory judgment dealing with permanent alimony provided that "the defendant

pay to the plaintiff for her support and maintenance the sum of Three Hundred Fifty (\$350.00) per month on or before the 6th day of each calendar month, commencing July 6, 1952; and until the further order of the Court. * * *

Implicit in the judgment is the determination that the circumstances justified the award made but not that Mrs. Hall was entitled to some other, undisclosed, amount in the event of a retrial upon that issue. Hall's appeal from "that part of the judgment * * * rendered in favor of plaintiff Gertrude M. Hall, awarding said plaintiff Three Hundred Fifty Dollars (\$350.00) per month for her support and maintenance * * *" placed in issue the sufficiency of the evidence to justify that portion of the judgment. The reversal of the judgment was predicated upon the conclusion that the circumstances did not justify the award; but this court did not decide nor infer that the wife would be entitled to some lesser amount when evidence was again presented in regard to her rights. On the contrary, and particularly in view of other circumstances which might be shown, justification might be found for awarding *no* amount for support and maintenance.

[11, 12] Under section 139 of the Civil Code, the trial judge has a broad discretion in fixing both the amount of alimony and the manner in which it shall be paid. It is considered to be the better practice to specify periodic payments, see *Tremper v. Tremper*, 39 Cal.App. 62, 65, 177 P. 868, but the court may also require the payment of a lump sum. *Honey v. Honey*, 60 Cal.App. 759, 762, 214 P. 250. The only limitations placed by the section upon the time in which the order for support shall be operative are that the allowance must be made to a spouse "for his or her life, or for such shorter period as the court may deem just"; also that the allowance terminates "upon the death of the obligor or upon the remarriage of the other party." Generally, periodic payments commence with the effective date of the decree; but it is not an abuse of discretion to direct payment of permanent alimony "from the appearance of the defendant in the action, or from its commencement", *Sharon v. Sharon*, 75 Cal. 1,

46, 16 P. 345, 365, or to reserve jurisdiction to consider it at some time after entry of the judgment of divorce. See *McCaleb v. McCaleb*, 177 Cal. 147, 149, 169 P. 1023.

[13] The circumstances which the trial judge may consider in fixing permanent alimony include "practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties." *Hall v. Hall*, supra, 42 Cal.2d 442, 267 P.2d 253. To limit the court to a consideration of the circumstances existing at the time of the original trial would place an artificial and wholly unjustified restriction upon the exercise of his discretion. Necessarily, an award of alimony looks to the future. Unquestionably, if the trial judge were to fix alimony as of the date of the interlocutory decree without considering the presently existing circumstances he would be entitled to consider them in connection with a possible modification of the award. To restrict him in the manner suggested by Hall could result only in a superfluous modification proceeding.

Finally, some concern is expressed that payments previously made to Mrs. Hall by stipulation and pursuant to an award of temporary alimony pending a retrial may overlap those required under an award of permanent alimony. It is to be presumed that the court will consider such payments in framing any decree for permanent alimony and give such proper credit for them as may be just.

The alternative writ is discharged and the peremptory writ denied.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the conclusion that petitioner is not entitled to a writ of mandate here. I do not agree, however, with the holding therein that the trial court, in fixing the amount of permanent alimony, should not be limited to a consideration of the circumstances existing at the time the interlocutory decree of divorce was granted.

Section 139 of the Civil Code provides that the trial court may make such suitable allowance to the wife as the court may "deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects. * * *" In Hall v. Hall, 42 Cal.2d 435, 267 P.2d 249, we reversed the judgment of the trial court insofar as it awarded Mrs. Hall \$350 per month for her support and maintenance. Such a reversal set the matter of permanent alimony at large and remanded that part of the cause for a new trial. On the retrial of the amount of alimony to be awarded, I see no escape from the conclusion that the trial court is limited to a consideration of the circumstances of the parties as they existed at the time the original award was made. We held that the amount awarded to Mrs. Hall at that time constituted an abuse of discretion on the part of the trial court under the facts then prevailing. The code provides that the court may, from time to time, modify its orders with respect to the support provisions made by it. The modification must, however, be made upon a proper showing, Bradley v. Bradley, 40 Cal.App. 638, 181 P. 237, that conditions have changed since the entry of the initial order, Grant v. Grant, 52 Cal.App.2d 359, 126 P.2d 130; Triest v. Triest, 67 Cal.App. 2d 320, 154 P.2d 2; and only such facts as have arisen or have become known to the party since the entry of the decree may be the basis of modification. Bradley v. Bradley, 40 Cal.App. 638, 181 P. 237; Ralphs v. Ralphs, 86 Cal.App.2d 324, 194 P.2d 592.

At the time the interlocutory decree was granted and the allowance for permanent support made to Mrs. Hall, the circumstances then prevailing led us to conclude that the award was excessive and constituted an abuse of discretion. Since that time, Judge Hall, as a federal district judge, has received an increase in salary. Had

there been no reversal by this Court, Mrs. Hall, upon proper application for modification, might have been able to show that because of changed circumstances she was entitled to a modification of the prior order for alimony as to future installments. The earlier order would, however, have been final as to accrued installments. Zaragoza v. Zaragoza, 48 Cal.App.2d 27, 119 P.2d 162; Stevens v. Stevens, 88 Cal.App.2d 654, 199 P.2d 314; Steele v. Steele, 108 Cal.App. 2d 595, 239 P.2d 63. It seems most obvious here that on the retrial of the matter of support, the trial court must be limited to a consideration of the circumstances as they originally existed and that any modification must be made upon a proper showing of changed circumstances *and date from the time of such changed circumstances*. This is not to say that a new action must be brought because to avoid multiplicity of suits, a court, sitting in equity, may consider all related matters brought to its attention. It should be clearly understood, however, that any increase in salary received by Judge Hall since the time of the interlocutory decree should not be considered by the trial court in its retrial of the matter of permanent alimony as originally awarded. If this increase in salary should prompt the trial court to feel that an increase in support allowance should be made to Mrs. Hall, such increase should not be retroactive to the time the original award was made because of the circumstances *then* prevailing. In other words, it is my view that an award of permanent alimony must be based upon the circumstances of the parties existing at the date of the interlocutory decree, and any modification of such award may not take effect until the date a change in such circumstances is shown to exist. The trial court may, of course, retry the issue of permanent alimony and hear any application for modification at the same time.

SCHAUER, J., concurs.

45 Cal.2d 325

The ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, a (California) Corporation, Petitioner,

v.

CITY OF PIEDMONT, a Municipal Corporation, and R. H. Barrett, as Building Inspector and as Building Official of said City of Piedmont, Respondents.

S. F. 19149.

Supreme Court of California.

In Bank.

Oct. 27, 1955.

As Modified on Denial of Rehearing

Nov. 23, 1955.

Mandamus proceeding to compel issuance of building permit for construction of a parochial school. The Supreme Court, Carter, J., held that where zone A of the city was composed of 98.7% of the entire area of the city and contained public schools, and, in all other zones, only two parcels of land were unimproved, an ordinance prohibiting construction of any schools in zone A except public schools under jurisdiction of the Board of Education of the city was unreasonable and discriminatory.

Writ issued.

Opinion, 278 P.2d 943, vacated.

Schauer, Edmonds and Spence, JJ., dissented.

Edmonds, Schauer and Spence, JJ., also dissented from denial of rehearing.

1. Schools and School Districts ☞160

As respects power of municipal corporation to classify land for zoning purposes, parents have right to send their children to private schools which are located in their immediate locality or general neighborhood. West's Ann.Education Code, § 16624; West's Ann.Const. art. 11, § 11.

2. Constitutional Law ☞38

Schools and School Districts ☞160

No law within broad areas of state interest may be unreasonably discriminatory or arbitrary, and state's interest in public education, e. g., does not empower

legislature to compel school children to receive instruction from public teachers only. West's Ann.Education Code, § 16624; West's Ann.Const. art. 11, § 11.

3. Parent and Child ☞3(1)

Parents have a right to direct the upbringing and education of children under their control. West's Ann.Education Code, § 16624.

4. Municipal Corporations ☞625, 626

Where zone A was composed of 98.7% of entire area of city, and contained public schools and, in all other zones, only two parcels of land were unimproved, an ordinance prohibiting construction of any schools in zone A except public schools under jurisdiction of board of education of the city, was unreasonable and discriminatory as to private schools, notwithstanding city would not have had power to exclude public schools from such zone. West's Ann.Education Code, § 16624; West's Ann.Const. art. 11, § 11.

Andrew F. Burke, San Francisco, for petitioner.

Irving Shore, Marvel D. Shore, San Francisco, Lawrence Speiser, Philip Adams, Wayne M. Collins, William Coblentz, Kamina K. Gupta, Ruth Church Gupta, George G. Olshausen, Albert C. Agnew, Ira W. Barr, San Francisco, Leo Pfeffer and Philip Baum, New York City, amici curiæ, on behalf of petitioner.

J. Marcus Hardin, City Atty., Oakland, and Cyril Viadro, San Francisco, for respondents.

J. W. O'Neill, Oakland, amicus curiæ, on behalf of respondents.

CARTER, Justice.

This is a proceeding in mandamus by petitioner, the Roman Catholic Welfare Corporation of San Francisco, to compel the issuance of a building permit for the construction of a building to be used for an elementary school in which secular and religious subjects were to be taught. The building permit was denied on the sole ground that a zoning ordinance of the

city of Piedmont prohibited the construction of any school within Zone A, where petitioner's land is located, except public schools under the jurisdiction of the board of education of the city of Piedmont. In Zone A, there are three elementary schools, one junior high school and one high school, all under the jurisdiction of the board of education of the city. The ordinance in question was passed by the city council and approved by a large majority of the voters at a general election.

There is only one question involved: Whether the city of Piedmont may, by ordinance, constitutionally prevent the construction of a building to be used for private school purposes in an area where public schools are located.

"It is well settled that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power, * * *. Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power." *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 337, 175 P.2d 542, 547.

We must then determine whether, in the instant case, there is a reasonable basis for the ordinance prohibiting private schools in an area where public schools are permitted. Petitioner acquired its property subsequent to the time the ordinance was passed. It is conceded that the question is one of first impression in this state.

The record shows that Zone A is composed of 98.7% of the entire area of the city of Piedmont and is populated by approximately 98.2% of the entire population of the city of Piedmont. Zone B has .59% of the area of the city and consists of three non-contiguous parcels of land none of which is unimproved; Zone C has .24% of the area of the city and consists of ten non-contiguous parcels of land none of

which is unimproved; Zone D has .46% of the total area of the city and consists of five non-contiguous parcels of land two of which are unimproved. Private schools are permitted in Zones B, C, and D. The land owned by petitioner and on which it is contemplated the private school in question will be constructed is immediately adjacent to Corpus Christi (Roman Catholic) Church.

Petitioner argues that the ordinance in question is unconstitutional and void because of its arbitrary and unreasonable discrimination against private schools. Respondents, on the other hand, argue that the ordinance constitutes a reasonable exercise of the city's police power in that the city is primarily residential in character, that in excluding private schools, the city council could consider such factors as the character of the district, the conservation of property values, public opinion, matters affecting traffic control, size of streets, parking, noise, fire protection, over-burdening of water mains and sewers, and the peace, comfort and quiet of the district. It is contended that private schools may be located in the three remaining zones; that the proposed school would be attended by children from both Oakland (the adjacent city) and Piedmont and perhaps children from other communities while the public schools in the zone would be attended by only Piedmont children and that the larger number of children would bring about more noise and traffic hazards with the necessity for more traffic control. Respondents rely on *State ex rel. Wisconsin Lutheran High School Conference v. Sinar*, 267 Wis. 91, 65 N.W.2d 43, 47, a mandamus action by a private, nonprofit corporation to compel the city building inspector to issue a permit for the construction of a private high school in a class "A" residential zone where public schools were permitted. It was there held, with two justices dissenting, that "* * * tangible differences material to the classifications of the ordinance can be readily pointed out which sustain the distinction made by the ordinance between the schools. To begin with, the term 'public' is the antithesis of 'private'. The public school is not a

private one. They serve different interests and are designed to do so. The private school is founded and maintained because it is different. Is that difference material to the purpose of zoning? In many respects the two schools perform like functions and in probably all respects concerning noise, traffic difficulties and the other objectionable features already mentioned they stand on an equality, so that in several of the objects of zoning ordinances,—the promotion of health, safety and morals, as laid down by sec. 62.23(7) (a), Stats., and developed by respondent's brief, we may not say that the two schools differ. But when we come to 'the promotion of the general welfare of the community',—'Ay, there's the rub.' The public school has the same features objectionable to the surrounding area as a private one, but it has, also, a virtue which the other lacks, namely, that it is located to serve and does serve that area without discrimination. Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not. Anyone in the district of fit age and educational qualifications may attend the public high school. It is his right. He has no comparable right to attend a private school. To go there he must meet additional standards over which the public neither has nor should have control. The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same manner or to the same extent. If the private school does not make the same contribution to public welfare this difference may be taken into consideration by the legislative body in framing its ordinance. If education offered by a school to the residents of an area without discrimination is considered by the council to compensate for the admitted drawbacks to its presence there, that school may be permitted a location which is denied to another school which does not match the offer, and we can not say that such a distinction is arbitrary or unreasonable or that such discrimination between the two schools lacks foundation in a difference

which bears a 'fair, substantial, reasonable and just relation' to the promotion of the general welfare of the community, which is the statutory purpose of zoning laws in general and of the ordinance in question." The dissenting opinion pointed out that the primary purpose of all schools was to educate the students; that the state was interested in having educated children to the end that they eventually become good citizens; that private schools as well as public ones promote the general welfare and that there was no substantial difference in the purpose which they served. The dissenting opinion quoted from the case of *Catholic Bishop of Chicago v. Kingery*, 371 Ill. 257, 20 N.E.2d 583, 584, where it was said: "We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact such a school, conducted in accordance with the educational requirements established by State educational authorities, is promotive of the general welfare."

[1] Petitioner argues that parents have the basic constitutional right to have their children educated in schools of their own choice, subject to reasonable regulations as to subjects required to be taught, manner of instruction, etc. In *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S.Ct. 571, 572, 69 L.Ed. 1070, it was held that the Act of 1922 which required every parent, guardian, etc. of a child between eight and sixteen years to send him "to a public school for the period of time a public school shall be held during the current year", Laws Or.1923, p. 9, § 1, " * * * unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which

has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Respondents seek to distinguish the *Pierce* case on the ground that it involved an established business conducted for a substantial profit which would be destroyed had the act in question been enforced; and on the ground that the Oregon statute sought to keep private schools out of the entire State of Oregon. It is argued that here in the event the ordinance is enforced, Piedmont parents will continue to send their children to those private schools which are in existence outside the city limits of Piedmont. Respondents' argument is based on the theory that in the *Pierce* case it was considered unreasonable to expect Oregon parents to send their children out of the state to attend private schools while it is not unreasonable to expect Piedmont parents to send their children to private schools outside the city limits. This begs the question. Parents have the right to send their children to private schools, rather than public ones, which are located in their immediate locality or general neighborhood. It is also argued by the city that even the constitutional right of parents to educate their children as they choose, *Pierce v. Society of Sisters*, supra, 268 U.S. 510, 45 S.Ct. 571, must yield to a reasonable exercise of the police power. This argument adds nothing to the ones heretofore made. The question of the reasonableness of the ordinance is the primary one involved here.

In *Yokley*, *Zoning Law and Practice*, 2d Ed., vol. 1, section 57, at page 89, it is said "In the light of a well known Illinois decision [*Catholic Bishop of Chicago v. Kingery*, 371 Ill. 257, 20 N.E.2d 583] affecting discrimination between classes of schools permitted in certain zones, it is

well to again state the general principle that a zoning ordinance restricting the property rights of an individual without having any direct or substantial relationship to the promotion of the public health, safety, morals or welfare, is invalid. In this case a village zoning ordinance expressly permitting the maintenance of public schools but impliedly prohibiting private or parochial schools in a residential section was declared to be invalid as having no substantial relationship to the promotion of the public health, safety, morals or welfare, the court holding that the restriction amounted to a capricious invasion of property rights.

"There are many other cases which have been reported that uniformly follow this rule that discrimination between public and private schools will not be tolerated.
* * *

In *Mooney v. Village of Orchard Lake*, 333 Mich. 389, 53 N.W.2d 308, 310, a suit was brought by the Roman Catholic Archbishop to enjoin defendants from enforcing a zoning ordinance which prohibited churches and schools in a certain residential area. The court held it would not indulge in a presumption that the " * * * exclusion of school and church from an entire municipality is conducive to public health, safety, morals or the general welfare, * * * A thesis so inconsistent with the spirit and genius of our free institutions and system of government and the traditions of the American people will not be accepted by way of presumption, nor at all in the absence of competent evidence establishing a real and substantial relationship between the attempted exclusion and public health, safety, morals or the general welfare and, hence, the reasonableness and validity of the restriction upon use of private property as a legitimate exercise of the state's police powers." In the *Mooney* case, the facts show that there, as here, the zoning ordinance had the practical effect of excluding private schools from the entire community.

In *State v. Northwestern Preparatory School*, 228 Minn. 363, 37 N.W.2d 370, 371, it was held that a city zoning ordinance permitting public schools in a residential

area while prohibiting private schools violated the equal protection clauses of the federal Constitution and the Minnesota Constitution. It was noted that a private school has "no effect upon a residential area different from that of a public or parochial one." In *Lumpkin v. Township Committee of Bernards Tp.*, 134 N.J.L. 428, 48 A.2d 798, it was held that a township zoning ordinance permitting premises in a residential A zone to be used as a school by a church, but prohibiting use of such premises for a private boarding school for boys, was invalid because it bore no substantial relation to the public health, morals, safety, or general welfare. It was also held that such an ordinance denied the fundamental rights guaranteed by the Fourteenth Amendment to the federal Constitution. In *Concordia Collegiate Institute v. Miller*, 301 N.Y. 189, 93 N.E.2d 632, 21 A.L.R.2d 544, it was held that an amendment to a zoning ordinance which permitted a school in a residential district after the petitioner had filed the consents of 80% of the owners of property in the district was invalid as violative of the due process clauses of the federal and state Constitutions. Quoting from *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 448, 72 L.Ed. 842, it was held that "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." In *State ex rel. Synod of Ohio, etc. v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515, it was held that a zoning ordinance excluding churches from a residential district was not justified for the protection of public health and safety by preventing increased noise, confusion, traffic congestion and parking difficulties, or because of the adverse effect on values of adjacent lands, nor for the protection of the public morals and welfare. It was held not a proper governmental function to exclude churches from a residential district of a municipality in the name of the public for the purpose of securing benefits of exclusive residential restrictions to adjacent landown-

ers. In *State ex rel. Roman Catholic Bishop of Reno v. Hill*, 59 Nev. 231, 90 P.2d 217, it was held that a zoning ordinance requiring the written permission of 75% of the property owners before a church could be erected in a residential district was void as violative of the due process clauses of the state and federal Constitutions.

Respondents contend that the cases from other jurisdictions are distinguishable from the one under consideration, and that in many of the sister states the Supreme Courts are as "anti-zoning as the record of this Court is pro-zoning." While on the facts, many of the cases may be distinguishable, the reasoning which leads to the conclusion that an ordinance is invalid which excludes private schools from an area in which public schools are found is persuasive. It is difficult to make an argument that private schools are inimical to the public welfare while public schools are not.

Respondents argue that Piedmont can neither "allow nor refuse to allow" public schools in Zone A in that only the Board of Education, an agency of the state, has that power. It is conceded that the wording of the ordinance purports to permit public schools in the area but that the reality of the situation is that Piedmont would have no power to exclude such schools. The question is not here involved whether the city could enact reasonable legislation concerning public schools. In *Butterworth v. Boyd*, 12 Cal.2d 140, 152, 82 P.2d 434, 440, 126 A.L.R. 838, it was held that "The school system has been held to be a matter of general concern, rather than a municipal affair, and consequently is not committed to the exclusive control of local governments. But the cities may make local regulations beneficial to and in furtherance of the school system, provided that these provisions do not conflict with the general law. *Whitmore v. Brown*, 207 Cal. 473, 279 P. 447; *Esberg v. Badaracco*, 202 Cal. 110, 259 P. 730; *Anderson v. Board of Education*, 126 Cal.App. 514, 15 P.2d 744, 16 P. 2d 272." A comprehensive zoning ordinance of the city of Los Angeles was held proper where it involved to some extent a part of the public school system. *Ransom v. Los Angeles City High School Dist.*, 129 Cal.

App.2d 500, 277 P.2d 455. Whether a city could zone to exclude public schools is not before us now, nor has it been before a court of this state so far as can be ascertained. The only question before us is whether a city may, constitutionally, by legislation exclude all private schools from 98.7% of its total area—which, when the character of the remaining area is taken into consideration, constitutes an effective exclusion of private schools from the entire city.

Respondents argue that a private school will be free from any control as distinguished from the control exercised over public schools. This argument is without merit. The Education Code provides in part, § 16624, that "Such school [private] shall be taught in the English language and shall offer instruction in the several branches of study required to be taught in the public schools of the state. The attendance of the pupils shall be kept by private school authorities in a register, and the record of attendance shall indicate clearly every absence of the pupil from school for a half day or more during each day that school is maintained during the year." Insofar as other regulations in the interest of the public welfare are concerned, no doubt the city, acting under its police power, could insure the preservation of the public peace and the preservation of private property.

It is also argued by respondents that the owner of a private school may, if the ordinance is struck down, locate the school as dictated by its own welfare and interests without any control on the part of the city. This question is not before us. Each case must be decided on its facts, and before us we have only the question of a private school to be located adjacent to a Catholic church in the area where public schools are found. Respondents' argument that a private school located in the precise location involved here would be inimical to the public welfare is not convincing. Respondents point to no exceptional circumstances concerning the particular location of this particular school. The state's basic zoning statute provides that a city "may by ordinance regulate, restrict and segregate the location of * * * the sev-

eral classes of public and semi-public buildings, and the location of buildings or property designed for specified uses * * *." Deering's Gen.Laws, 1943, Act 994, § 2. See West's Ann.Gov.Code, § 38695 note. Article XI, section 11, California Constitution, also provides that "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

[2, 3] Respondents place reliance upon the case of *Corporation of Presiding Bishop, etc. v. City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823, in which it was held that by ordinance the city could prohibit all churches in a residential area. That case is distinguishable from the one under consideration. Here, only private schools are excluded—not *all* schools as were all churches in the Porterville case. It is well settled that no law within the broad areas of state interest may be unreasonably discriminatory or arbitrary. The state's interest in public education, for example, does not empower the Legislature to compel school children to receive instruction from public teachers only, for it would thereby take away the right of parents to direct the upbringing and education of children under their control. *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 535, 45 S.Ct. 571.

[4] Careful examination of the arguments in support of the legislation in question reveals that there is absent the compelling justification which would be needed to sustain discrimination of the nature here involved.

For the reasons above stated it would appear that the ordinance here involved is unconstitutional and void because of its arbitrary and unreasonable discrimination against private schools.

Let the peremptory writ of mandate issue as prayed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

SCHAUER, Justice (dissenting).

Regardless of how beneficial and desirable we personally may think this par-

ticular school would be, it is our duty to uniformly apply the law and not, in order to obtain a result here, set a precedent which will have the effect of generally opening residential areas in all cities to private schools. It is particularly important that we carefully consider and apply the law here because this case appears to be designed as a test case to set the pattern for other communities. The attack is directly upon the classification as between public schools and private schools, and the impact of the ordinance upon petitioner's "business and property." The petition for the writ is completely silent upon whether the ordinance does or does not provide for variances or non-conforming uses or exceptions, or for administrative procedures in respect thereto, or whether any effort has been made to secure an amendment or exception or other relief.¹

The only real issues in this case are two: (1) The ordinance classifies schools, for purposes of zoning, as those which are "under the jurisdiction of the Board of Education of the City of Piedmont," and those which are not so governed. Is this classification unconstitutional?

(2) The petitioner attacks the application of the ordinance to its "business and property," with the charge that "Unless respondents are compelled * * * to issue to petitioner the permit which it has requested, and thus authorize the petitioner to construct, erect and establish its proposed school, petitioner's business and property will suffer irreparable injury." Does petitioner sustain this attack?

Classification

Classifying as between public and private ownership or management of a service or business is not new. It is elementary that the conduct of a public school is a public service while the operation of a private school is a private business. The Con-

stitution of California provides in article IX for public schools (see also art. XIII, § 15), and in section 15 of article XVI declares among other things that the public school system is "a matter of general concern inasmuch as the education of the children of the State is an obligation and function of the State."

General principles applicable to the classification inherent in zoning ordinances are that: "[A] zoning ordinance enacted pursuant to a comprehensive plan of community development, 'when reasonable in object and not arbitrary in operation,' will be sustained as a proper exercise of the police power; every intendment is in favor of its validity, and a court will not, 'except in a clear case of oppressive and arbitrary limitation,' interfere with the legislative discretion; it is presumed to be adapted to promotion of the public health, safety, morals and general welfare; and though the court may differ with the zoning authorities as to the 'necessity or propriety' of the regulation, so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy." (*McCarthy v. City of Manhattan Beach* (1953), 41 Cal.2d 879, 885-886, 264 P.2d 932; *Clemons v. City of Los Angeles* (1950), 36 Cal.2d 95, 98-99, 222 P.2d 439; see also "zoning," 12 Cal. Jur. Ten Year Supp. pp. 166-168, § 25, and cases there cited.) "[T]he establishment, as part of a comprehensive and systematic [zoning] plan, of districts devoted to strictly private residences or single family dwellings, from which are excluded business or multiple dwelling structures, is a legitimate exercise of the police power. [Citations.]" (*Wilkins v. City of San Bernardino* (1946), 29 Cal.2d 332, 337-338, 175 P.2d 542; see also *Miller v. Board of Public Works* (1925), 195 Cal. 477, 490-491, 234 P. 381, 38 A.L.R. 1479; *Corporation*

1. The general rule is that "A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief. [Citations.]" (*Metcalf v. County of Los Angeles* (1944), 24 Cal. 2d 267, 269, 148 P.2d 645; see also *Es-*

sick v. City of Los Angeles (1950), 34 Cal.2d 614, 622-623, 213 P.2d 492; *Lockard v. City of Los Angeles* (1949), 33 Cal.2d 453, 457, 202 P.2d 38, 7 A.L.R. 2d 990; *Bernstein v. Smutz* (1947), 83 Cal.App.2d 108, 114-115, 188 P.2d 48; *City of San Mateo v. Hardy* (1944), 64 Cal.App.2d 794, 797, 149 P.2d 307.)

Presiding Bishop, etc. v. City of Porterville (1949), 90 Cal.App.2d 656, 659, 203 P.2d 823.)

It appears clear that the classification—as between private and public schools—attacked by petitioner in the ordinance here involved has not been shown to be such that reasonable minds may not differ concerning it. The City of Piedmont, a small city with a total area of approximately 1152 acres and a population of less than 12,000, is an “island” entirely surrounded by the City of Oakland. In 1929 a comprehensive zoning ordinance was adopted, dividing the city into four zones designated as Zones A, B, C, and D, respectively. As amended in 1936, but prior to the time petitioner acquired its property here involved, section 3 of the ordinance provides that “No building * * * shall be erected * * * in Zone ‘A’, which is * * * intended to be occupied or used for any purpose other than a single family dwelling, church, or public school under the jurisdiction of the Board of Education of the City of Piedmont * * *.” The zoning provision which thus bans private schools from the single family residential Zone A, was approved by a vote (3,408 to 1,285) of the electors of the city. Zone A embraces approximately 1137.14 acres, including the land here involved upon which petitioner desires to construct and operate a private school. Such schools are permitted in the other three zones.

As establishing petitioner’s failure to show invalidity of the ordinance, it may be pointed out in the first place that although the majority opinion declares that the only

question involved in this controversy is “Whether the city of Piedmont may, by [a comprehensive zoning] ordinance, constitutionally prevent the construction of a building to be used for private school purposes in an area [a single family residential zone] where public schools are located,” it appears to be conceded by petitioner for the writ that the city does not have power or the legal right to exclude *public* schools, which are under the jurisdiction of the Board of Education, from its single family residential Zone A, which is here involved. (See Cal.Const., art. IX; see also *Butterworth v. Boyd* (1938), 12 Cal.2d 140, 152, 82 P.2d 434, 126 A.L.R. 838; *Gerth v. Dominguez* (1934), 1 Cal.2d 239, 242, 34 P.2d 135; *Ward v. San Diego School Dist.* (1928), 203 Cal. 712, 715–717, 265 P. 821; *Esberg v. Badaracco* (1927), 202 Cal. 110, 115–119, 259 P. 730.) A public school district has the power of eminent domain and may be allowed, by condemnation, in a proper case, to acquire property for a school site. (See e. g., *Long Beach City H. S. Dist. v. Stewart* (1947), 30 Cal.2d 763, 185 P.2d 585, 173 A.L.R. 249; *State ex rel. Britton v. Mulloy* (1933), 332 Mo. 1107, 61 S.W.2d 741.) It follows that, as contended by the city, if it is without power to exclude public schools from Zone A, then its zoning ordinance which excludes private but not public schools from that zone cannot fairly be held to invalidly discriminate against private and in favor of public schools. The general classification as between public schools and private schools is set up by the Constitution itself.²

2. See Constitution of California, article IX: “Sec. 5. The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

“Sec. 6. * * * The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them. No school or college or any

other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System. * * *

“Sec. 8. No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.”

Thus it seems indisputable that the classification here involved is not, as such, vulnerable to petitioner's attack.

Turning now to the application of the ordinance under the circumstances of the case and as affecting petitioner's "business and property," the following defects in its case appear: It has not been established as a fact that there are no adequate areas in which private schools may be built which would be reasonably accessible to residents (either children or adults) of the City of Piedmont. As already stated, Piedmont, a small city, is entirely surrounded by the City of Oakland, and, further, petitioner's property is actually bounded on one side by a boulevard which is entirely within Oakland. Thus, not only has it been here shown that there are approximately 15 acres of land within Piedmont which are outside residential Zone A and upon which private schools are permitted under the zoning ordinance, but it has *not* been shown that there is no available and reasonably accessible land within the surrounding City of Oakland upon which private schools are permitted. It seems obvious, therefore, that petitioner has failed to establish either that it is being oppressively and arbitrarily prevented from operating a private school catering to residents of Piedmont, or that Piedmont residents are being prevented from attending private schools; those wishing to attend, or to send their children to, private schools may, so far as appears, utilize such schools in Oakland or elsewhere in the San Francisco Bay area as it may be presumed they have done in the past. Furthermore, there is a complete absence of showing of an attempt by the City of Piedmont or by any other governmental unit to compel attendance at public schools only, or to take away the right of any parents to direct the upbringing or education of children under their control. Whether or not any particular property owner is or is not permitted to carry out his desires for future development of his particular property into a private school obviously has no bearing upon the rights of either adults or children to attend private schools. (See Corporation Presiding Bish-

op, etc. v. City of Porterville (1949), *supra*, 90 Cal.App.2d 656, 660, 203 P.2d 823.)

In the next place, Piedmont, under the terms of its freeholders' charter, is "primarily a residential city," and has been recognized as such by this court. (Reynolds v. Barrett (1938), 12 Cal.2d 244, 246, 249, 83 P.2d 29.) It is stipulated that petitioner's projected school would *not* be under the jurisdiction of the Board of Education of the City of Piedmont, but would be "owned and operated by petitioner" and would be constructed and operated next door to land on which "are a Roman Catholic Church, and a rectory occupied by priests of said Church who serve Corpus Christi Parish in the Archdiocese of San Francisco of such Church." Thus it is indicated the proposed private school would draw pupils not only from Piedmont but from surrounding San Francisco Bay area communities, whereas, presumptively, only Piedmont children attend public schools located in that city. If the city is compelled to permit petitioner's contemplated private school, then it would seem that it will be equally compelled to permit other private schools in its single family residential zone. That is, it must permit all private schools to enter equally unless this court is prepared to examine and censor or itself prescribe the projected curriculum, or other basis of classification, of each private school which proposes to construct a building and playground and commence business in Piedmont's Zone A. It is elementary that "The power of the legislature to impose restrictions on a lawful calling must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. * * * Hence, if a statute allows one class of persons to engage in what is presumptively a legitimate business while denying such right to others, it must be based upon some principle which may reasonably promote the public health, safety, or welfare." (11 Am.Jur. 1046-1047, § 285.) This court cannot in good conscience create a classification which it could not sustain if created by the Legislature.

A list, provided by property owners opposing petitioner in this proceeding, of the various private schools taken from the classified section of the San Francisco Bay area telephone directories shows at least 176 private schools, including among others, schools affiliated with various religious groups,³ driving schools, language schools, astrology schools, bartending schools, real estate schools, divinity schools, nursery schools, furniture finishing schools, radio schools, labor schools, beauty culture schools, mechanical arts schools, Swedish massage schools, secretarial schools, television schools, success schools, engineering schools, fencing schools, dancing schools, sewing schools, charm schools, dramatic schools, and finishing schools—to name but a few. Presumptively each of such private schools operates lawfully and furnishes instruction which to substantial segments of the population has some special value and desirability over and above instruction furnished in public schools. Some or all of the subjects taught in public schools could, of course, be included in the curriculums of the private schools, if the court deems that important as a basis for classification.

If the City of Piedmont is obliged by this court to permit petitioner to devote its property to private school purposes, in violation of the city's zoning ordinance, then the conclusion appears indubitably to follow that the city's doors must likewise be opened, upon demand of any other interested property owner, to any or all other private schools which in the manner of their operation are no more obnoxious to the public peace or quiet, or inherently unlawful, than the school herein authorized, all to the substantial, if not utter, subversion

of the planned residential character of Zone A. Zoning ordinances permitting parochial or church schools but prohibiting other private schools in residential districts have been held arbitrary, capricious, and invalid in *State v. Northwestern Preparatory School* (1949), 228 Minn. 363, 37 N.W.2d 370, 371, and *Lumpkin v. Township Committee of Bernards Tp.* (1946), 134 N.J.L. 428, 48 A.2d 798. Certainly this court cannot discriminate either in favor of, or against, a private school because of a religious affiliation or sponsorship, nor can this court properly undertake to censor or prescribe the curriculum of any lawfully conducted school, whether public or private. Freedom in the field of education is one of the basically protected rights. (*Pierce v. Society of Sisters* (1925), 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070; *Meyer v. State of Nebraska* (1923), 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042) but this does not mean that a private school is, as to location, immune from the application of comprehensive zoning ordinances.

The majority opinion states, but does not attempt to answer, the cogent factors which may have moved the city council and the electors to approve the exclusion of private schools from the residential zone. The very statement of such factors—the character of the district, the relativity of its surroundings, its school age population, the availability of other property, the conservation of property values, matters affecting traffic control, size of streets, parking, noise, fire protection, overburdening of water mains and sewers, and the peace, comfort and quiet of the district for residential purposes—demonstrates that reasonable minds might differ as to the necessity or propriety of the regulation, and that

3. Among the names listed are: Baptist Divinity School, Holy Names School, Our Lady of Perpetual Help School, Mt. St. Joseph's School, Redeemer Lutheran School, Seventh Day Adventist School, West Portal Lutheran School, Zion Lutheran Church and School, St. Anne's School, St. Anthony's School, St. Augustine's School, St. Boniface School, St. Brigid School, St. Charles School, St. Dominic's School, St. Elizabeth's School, St. Emydius School, St. Gabriel

School, St. Ignatius High School, St. James Boys School, St. John Lutheran School, St. Mary's Chinese Day School, St. Mary's Chinese Language School, St. Paul's Grammar School, St. Paul's High School, St. Philip's School, St. Stephens School, St. Vincent de Paul School, St. Vincent's High School, St. Columba School, St. John's School, St. Joseph High School, St. Joseph's Grammar School, St. Lawrence O'Toole School, and St. Mary's School.

therefore there should be no judicial interference with the municipality's determination. That such factors are legitimate considerations in the establishment and maintenance of residential districts is not open to dispute, under the zoning principles established in this state. (See Gov.Code, § 38695, formerly Deering's Gen.Laws, Act 994, § 2; *Miller v. Board of Public Works* (1925), *supra*, 195 Cal. 477, 492-494, 234 P. 381, 38 A.L.R. 1479; *Corporation Presiding Bishop, etc. v. City of Poterville* (1949), *supra*, 90 Cal.App.2d 656, 659-661, 203 P.2d 823.)

Surely the inherent differences between public schools on the one hand and those privately operated on the other furnishes clear support for the application by the municipality of the factors enumerated above. For one thing, there are many more private than public schools; many are operated under religious and many under secular domination and the manner of their operation may be as varied as the subjects they teach. In *State ex rel. Wisconsin Lutheran High School Conference v. Sinar* (1954), 267 Wis. 91, 65 N.W.2d 42, 47, the court in upholding an ordinance which permitted public schools and private elementary schools in a residential zone but excluded private high schools, pointed out that although public and private schools may perform like functions in some respects, nevertheless the public school serves the surrounding area without discrimination, whereas the private school, whether or not sectarian, does not. "The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same manner or to the same extent. If the private school does not make the same contribution to public welfare this difference may be taken into consideration by the legislative body in framing its ordinance." (At page 47 of 65 N.W.2d.) Further, it appears that the elected Board of Education of the City of Piedmont, which is directly responsive to the people, is required to consult and advise with "the planning

commission having jurisdiction of" property proposed to be acquired for new public school sites. (See Ed.Code, § 18403.) Standards for such sites are established by the State Department of Education. (Id., § 18402.) No such control can be exercised by the city over the location of private schools, if it is compelled to grant petitioner the building permit here sought. Thus, another ground is shown for the reasonable exercise by the municipality of its right to determine zoning policy, and certainly one upon which a reasonable mind could say the regulation here in controversy is at least fairly debatable—and therefore not to be judicially overthrown.

Irreparable Injury to Petitioner's Business and Property

The record shows that petitioner acquired the land concerned in July, 1954—some 18 years after⁴ the amendment of the zoning ordinance to ban private schools from Zone A; the last prior owner of the land was The Roman Catholic Archbishop of San Francisco, a California corporation sole. The same corporation sole owns additional, adjoining, land on which "are a Roman Catholic Church, and a rectory occupied by priests of said Church who serve Corpus Christi Parish in the Archdiocese of San Francisco of such Church." The school building which petitioner seeks to construct would have dimensions of 204 feet by 65 feet and an area of 13,260 square feet; in addition petitioner's land has an area of some 16,240 square feet "which is available for incidental and/or school playground uses."

Petitioner's land along its east boundary fronts upon the west side of Park Boulevard, all of which boulevard in that area lies within the corporate limits of the City of Oakland and *not* within the City of Piedmont. Adjacent to petitioner's land is a "residential area known as 'St. James Wood', which comprises approximately 227 building sites, all of which are restricted, by restrictions of record, to single family residences; the owners of said property

4. See *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365 [47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016]; *Jones v.*

City of Los Angeles (1930), 211 Cal. 304, 318-321, 295 P. 14.

have formed and are members of an association known as 'St. James Wood Homes Association'. If a witness were called for City of Piedmont he would testify that at a meeting of the members of said Association, held June 15, 1954, said members voted (170 to 2) objection to the granting of a permit for the building of petitioner's proposed school."

It thus is shown that petitioner's land was acquired by it with advance knowledge that such land lies in a single family residential zone, and, further, that the adjacent land within the City of Piedmont is used for single family residential, rather than for private business, purposes. Under such circumstances no support is found for petitioner's assertion of "irreparable injury" to its business and property if it does not secure the private school building permit it seeks.

In *Wilkins v. City of San Bernardino* (1946), supra, 29 Cal.2d 332, 340, 175 P.2d 542, this court said that "An examination of the California decisions discloses that the cases in which zoning ordinances have been held invalid and unreasonable as applied to particular property fall roughly into four categories: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances. [Citations.] 2. Where the restrictions create a monopoly. [Citations.] 3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance. [Citation.] 4. Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses. [Citations.]"

Petitioner has alleged no facts showing, and makes no effort to support a claim, that the present case falls into any of the categories above listed, but merely alleges generally that "Unless respondents are compelled * * * to issue to petitioner the permit which it has requested and, thus authorize the petitioner to construct, erect

and establish its proposed school, petitioner's business and property will suffer irreparable injury." The law is settled, however, that "The mere fact that some hardship may be experienced is not material, for '[e]very exercise of the police power is apt to affect adversely the property interest of somebody.'" (*Clemons v. City of Los Angeles* (1950), supra, 36 Cal.2d 95, 99, 222 P.2d 439; *Zahn v. Board of Public Works* (1925), 195 Cal. 497, 503, 234 P. 388.) "Where it is claimed that the ordinance is unreasonable as applied to plaintiff's property, or that a change in conditions has rendered application of the ordinance unreasonable, it is incumbent on plaintiff to produce sufficient evidence from which the court can make such findings as to the physical facts involved as will justify it in concluding, as a matter of law, that the ordinance is unreasonable and invalid. It is not sufficient for him to show that it will be more profitable to him to make other use of his property, or that such other use will not cause injury to the public, but he must show an abuse of discretion on the part of the zoning authorities and that there has been an unreasonable and unwarranted exercise of the police power. [Citation.]" (*Wilkins v. City of San Bernardino* (1946), supra, 29 Cal.2d 332, 338, 175 P.2d 542.) "[I]t must be shown that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power before a zoning ordinance can be held invalid [citations]. * * * The burden rests upon the plaintiff to establish the invalidity of the ordinance in its application to the property involved. The plaintiff's failure to sustain this burden raises a presumption of the existence of such facts as are sufficient to sustain the ordinance. [Citation.]" (*Beverly Oil Co. v. City of Los Angeles* (1953), 40 Cal.2d 552, 559, 254 P. 2d 865.)

If we conform to the principles above stated the writ sought should be denied.

EDMONDS and SPENCE, JJ., concur.

Rehearing denied: EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

45 Cal.2d 345

Dorothea COLE and Joyce Elaine Cole and Kenneth Foye Cole, minors, by their Guardian ad Litem, Dorothea Cole, Plaintiffs and Appellants,

v.

Paul RUSH, Frank Van Stone, and Curt Lonergan, individually and doing business as Tropic Isle, a co-partnership, Tropic Isle, a co-partnership, Defendants;

Frank Van Stone, individually and doing business as Tropic Isle Cafe,
Respondent.

L. A. 22864.

Supreme Court of California.

In Bank.

Oct. 28, 1955.

Wrongful death action against saloon keepers by widow and minor children of saloon patron who allegedly was fatally injured in fall while engaging in fisticuffs in saloon when he became belligerent after he had become intoxicated in the saloon. The Superior Court, Los Angeles County, Philbrick McCoy, J., sustained demurrer without leave to amend and rendered judgment for defendants, and plaintiffs appealed. The Supreme Court, Schauer, J., held that patron's surviving widow and minor children could not recover for alleged negligent furnishing of intoxicating liquor to patron on ground that such negligent furnishing proximately caused patron's death.

Judgment affirmed.

Carter, J., dissented.

Opinion, 271 P.2d 47, vacated.

1. Courts ⚡91(2)

Judgment of District Court of Appeal stands as decision of court of last resort in California until and unless disapproved by the Supreme Court or until change of law by legislative action.

2. Courts ⚡488(1)

Supreme Court's denial of hearing is not equivalent of express approval of judgment of District Court of Appeal, but a denial may be understood to mean no more than ground which the Supreme Court

would deem adequate or impellent for ordering hearing had not been brought to attention of the Supreme Court. Rules on Appeal, rule 29.

3. Intoxicating Liquors ⚡295

If man who is injured by reason of his intoxicated state may not recover from one who provided the liquor, then it follows that, under established law governing wrongful death actions, his survivors may not recover.

4. Constitutional Law ⚡70(1)

For the Supreme Court to hold that plaintiffs had stated cause of action by averring facts which establish that no cause of action arose either by statute or common law at time of events relied upon would, at least, constitute a departure from constitutional function of such court and an encroachment on constitutional function of the Legislature.

5. Statutes ⚡212.1, 220

Generally, in adopting legislation, Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in light of decisions which have direct bearing upon them, and Legislature's failure to change law in particular respect when the subject is generally before it and changes in other respects are made is indicative of intent to leave the law as it stands in the aspects not amended.

6. Common Law ⚡11

Where code is silent, the common law governs.

7. Common Law ⚡11

Where no positive state or national law controls, the common law is rule of decision.

8. Intoxicating Liquors ⚡291

Voluntary consumption, not sale or gift, of intoxicating liquor by competent person is proximate cause of injury resulting from its use.

9. Intoxicating Liquors ⚡295

Competent person, who voluntarily consumes intoxicating liquor, contributes directly to any injury caused thereby.

10. Death ☞23

Decedent's contributory negligence bars recovery by his heirs and next of kin in wrongful death action.

11. Intoxicating Liquors ☞295

Where saloon patron was fatally injured in fall while engaging in fisticuffs in saloon when he became belligerent after he had become intoxicated in the saloon, patron's surviving widow and minor children could not recover for alleged negligent furnishing of intoxicating liquor to patron on ground that such negligent furnishing proximately caused patron's death. West's Ann.Civ.Code, §§ 22.2, 43, 43.5(a), 45a to 48.5, 171c, 956, 1714.5, 1714.6, 3341, 3342; West's Ann.Code Civ.Proc. § 377; St.1945, pp. 1023, 2295, 2615; St.1947, pp. 2003, 2051, 2490, 2791, 2936, 3019, 3025; St.1949, pp. 492, 1546, 1582, 1884, 2060, 2349, 2735; St.1951, pp. 1897, 2814, 3051; St.1953, pp. 646, 918, 954, 1947, 2084, 3345.

John C. Stevenson, Los Angeles, and Lionel Richman, San Bernardino, for appellants.

Parker, Stanbury, Reese & McGee, J. H. Peckham and White McGee, Los Angeles, MacFarlane, Schaefer & Haun, E. J. Caldecott, Trippet, for respondent.

Newcomer, Yoakum & Thomas and Lyle C. Newcomer, Los Angeles, as amici curiae on behalf of respondent.

SCHAUER, Justice.

In this wrongful death action plaintiffs, who are the surviving widow and minor children of James Bernard Cole, deceased, seek to recover damages for the allegedly negligent furnishing of intoxicating liquor to the deceased, which plaintiffs claim proximately caused his death. They appeal from an adverse judgment entered upon the sustaining of a demurrer to their amended complaint, without leave to amend. We have concluded that the trial court correctly held that the complaint does not state facts sufficient to constitute a cause of ac-

tion, and that the judgment should be affirmed.

The material allegations of the amended complaint are that defendants own and operate an establishment known as the Tropic Isle in which "intoxicating liquors are sold and furnished to the public for consumption on the premises"; on October 13, 1950, James Bernard Cole was a patron of the Tropic Isle and defendants "did sell, furnish, give, and cause to be sold, furnished and given" to him alcoholic beverages which he drank; immediately before he came "to the premises of the defendants * * * Cole was not intoxicated by reason of the use of alcoholic beverages," but he "did drink said alcoholic beverages so sold, furnished and given until and after * * * [he] became intoxicated." Cole had patronized the Tropic Isle on numerous occasions and was well known to defendants, who also knew that he was "normally of quiet demeanor but that when * * * intoxicated he became belligerent, pugnacious and quarrelsome"; on numerous prior occasions plaintiff widow had requested defendants "not to sell or furnish intoxicating beverages to said James Bernard Cole sufficient¹ to allow him to become intoxicated thereon" (italics added), but defendants refused to comply with such requests; "by reason of said intoxication, and by reason of said alcoholic beverages so unlawfully sold, furnished or given * * * and as a proximate result thereof, * * * Cole became belligerent, pugnacious and quarrelsome; * * * Cole did thereafter on said date quarrel with one Franklin Leonard; * * * Cole and * * * Leonard did engage in fisticuffs; * * * Cole was struck by * * * Leonard and did fall to the pavement, striking his head against the concrete, by reason of which * * * Cole suffered a subarachnoid hemorrhage, traumatic, and died immediately from the effects of said blow"; at the time of his death Cole "was an able-bodied man of the age of 39 years," earning approximately \$4,000 a year.

1. By what standards or tests the defendants on any occasion might determine

the amount which properly could be furnished is not disclosed.

Defendant Frank Van Stone, alleged to be one of the owners of the Tropic Isle, demurred to the amended complaint on the ground that it fails to state facts sufficient to constitute a cause of action. By way of particularizing its insufficiency he specifies, among other things, that the complaint shows on its face that decedent's injuries were caused or contributed to by fault and negligence on decedent's part and that it cannot be determined in what manner any acts of the defendant were the proximate cause of the alleged injuries. Following the hearing upon the demurrer and the statement of counsel for plaintiffs that "he cannot further amend," the court sustained the demurrer without leave to amend, and judgment was entered accordingly.

The general rule of the common law as to tort liability arising out of the sale of intoxicating beverages is stated in 30 American Jurisprudence 573, section 607: "The common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a legal liability on the seller for damages resulting from the intoxication." (For examples of cases following the rule see: *Hitson v. Dwyer* (1943), 61 Cal.App.2d 803, 808, 143 P.2d 952; *Fleckner v. Dionne* (1949), 94 Cal.App.2d 246, 210 P.2d 530; *Lammers v. Pacific Electric Ry. Co.* (1921), 186 Cal. 379, 384, 199 P. 523; *Howlett v. Doglio* (1949), 402 Ill. 311, 83 N.E.2d 708, 712, 6 A.L.R.2d 790; *Tarwater v. Atlanta Co., Inc.* (1940), 176 Tenn. 510, 144 S.W.2d 746; 48 C.J.S., *Intoxicating Liquors*, § 430, 432, pp. 716-718; see also Annotations 44 L.R.A.(NS) 299; 130 A.L.R. 357-369.) A number of jurisdictions have adopted statutes creating a right of action, under specified conditions, against persons furnishing intoxicants.² California, however,

has enacted no such statute notwithstanding the fact that, as hereinafter shown, its Legislature has repeatedly dealt with problems concerning alcoholic beverages and concerning tort liability.

Plaintiffs with commendable frankness state in their opening brief (p. 3) that they "recognize that it is the general rule of law that it is the consumption of the intoxicating liquor which is the proximate cause of any subsequent injury by reason of such intoxication rather than the sale of intoxicating liquor" (citing *Hitson v. Dwyer* (1943), supra, and *Fleckner v. Dionne* (1949), supra; see also *Collier v. Stamatis*, (Ariz.1945), 162 P.2d 125, 127: "The principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking", but urge that "knowledge on the part of the defendants of the propensities of Cole to seek a quarrel when intoxicated, and * * * their wilful refusal to heed the pleas of the wife, and their wilful insistence in selling intoxicating liquor to Cole and allowing him to be intoxicated" are distinguishing factors which support the charge of negligence here and establish the sale of the liquor as the proximate cause of the injury. Such a view, we conclude in the light of the common law, cannot be sustained in this state in the absence of legislative action.

In the first place, it appears that in *Lammers v. Pacific Electric Ry. Co.* (1921), supra, 186 Cal. 379, 384, 199 P. 523, this court stated and relied on the general rule that "the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication." In that case the plaintiff, while intoxicated, was ejected from defendant's passenger train; he left the place of immediate peril where he was ejected but later returned to the tracks at a point about three-quarters of a mile away

2. It appears that such a statute has been adopted in Arkansas, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Da-

kota, Utah, Vermont, Washington, West Virginia, Wisconsin. (See 48 C.J.S., *Intoxicating Liquors*, § 431, pages 717-718; 30 Am.Jur. 576, § 612; Ann.Cas.1917B, p. 534; Black on *Intoxicating Liquors*, § 277, pp. 326-331; see also 6 A.L.R.2d 798-807.)

and was seriously injured. The court said: "The only connection between the ejection and the injury would be the fact that if there had been no ejection there would have been no injury. The sale of the whiskey to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. The peril arising from the ejection ceased the moment the passenger left the position where he could be struck by defendant's trains, while the peril arising from the use of the intoxicating liquor continued in operation up to the time of the injury and contributed thereto, and yet it has been uniformly held in the absence of statute to the contrary that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. (Joyce on Intoxicating Liquors, sec. 421; Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 3 L.R.A. 327.) * * * That the injury was not the proximate result of the ejection is demonstrated by the fact that the plaintiff was able to, and did in fact, leave the place of danger and subsequently of his own volition returned to a position of danger on defendant's tracks, and that but for plaintiff's action in so returning to a position of danger the accident would not have occurred."

[1,2] In the second place it is to be observed that in *Fleckner v. Dionne* (1949), supra, 94 Cal.App.2d 246, 210 P.2d 530, knowledge on the part of the tavernkeeper was, as here, expressly averred. The allegations of the complaint there were that on the evening in question defendant Dionne, a minor, was a patron of the tavern and was sold and given intoxicating liquors and allowed to consume them in the tavern; that the defendant tavernkeeper *knew* that Dionne was a minor and sold the

liquors to him while he was already under the "severe influence of intoxicating liquors"; that he knew also that Dionne had upon or near the premises an automobile and would thereafter drive it; that defendant *knew* and should have known and foreseen that the driving of the automobile by him in his then intoxicated condition could and would result in harm and damage to others upon the highway; that Dionne while so intoxicated negligently drove his automobile into an automobile in which plaintiffs were riding and injured them; that the sale and serving of the liquor to Dionne by defendant constituted a "negligent disregard of the rights of plaintiffs" which joined with Dionne's negligence in proximately injuring plaintiffs. Defendant's general demurrer was sustained with leave to amend and on plaintiffs' failure to amend judgment was entered in defendant's favor. The District Court of Appeal affirmed the judgment, relying upon the *Hitson* and *Lammers* cases, supra, as well as upon various out-of-state decisions, and this court denied a hearing.³ Its judgment stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by this court or until change of the law by legislative action. It is to be noted that the knowledge alleged in the *Fleckner* case was more specific and extensive than that in the instant case. Here it is only alleged that defendant knew of the belligerent disposition of the deceased when he was intoxicated.

[3] In the next place, it is to be observed that in *Hitson v. Dwyer* (1943), supra, 61 Cal.App.2d 803, 143 P.2d 952, it was held that one who suffers injuries by reason of his own intoxication may not recover from the tavernkeeper by reason of the sale of the liquor to the plaintiff. In

3. Denial of a hearing is not the equivalent of express approval by this court but it has been said that "The order of this court denying a petition for a transfer * * * after * * * decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." (*Eisenberg v. Superior Court* (1924), 193 Cal. 575, 578, 226 P. 617; see also

People v. Rowland (1937), 19 Cal.App.2d 540, 542, 65 P.2d 1333. The significance of a denial in any particular case is also to be understood as further qualified by the fact that under the Rules on Appeal a denial may mean no more than that a ground which we deem adequate or impellent for ordering a hearing has not been brought to our attention. (See Rule 29, Rules on Appeal.)

that case plaintiff alleged that while obviously intoxicated and sitting on a movable stool at defendants' bar he wrongfully was served intoxicating liquor, and as a result he fell from the stool to the floor, and was thereafter dragged by defendants from his position on the floor; that as a result of the fall or the dragging or both, plaintiff was injured. It was held that so far as concerned the fall and any injuries suffered therefrom, the proximate cause was the drinking of the liquor rather than the wrongful (i. e., in violation of the alcoholic beverage control act) sale thereof to an obviously intoxicated person, and any wrong in the sale was non-actionable. This court denied a hearing. If the man who is injured by reason of his intoxicated state may not himself recover from the one who provided the liquor, then it follows that under the established law governing wrongful death actions, his survivors may not recover in this, which is such an action. (Buckley v. Chadwick (1955), 45 Cal.2d 183, at page 203, 288 P.2d 12, at page 24; see also Demge v. Feierstein (1936), 222 Wis. 199, 268 N.W. 210, 212 (liquor sale); Scott v. Greenville Pharmacy (1948), 212 S.C. 485, 48 S.E.2d 324, 326 (barbiturate sale); 30 Am.Jur. 575, § 610.)

Other cases, from other jurisdictions, relied upon by plaintiffs are clearly distinguishable on their facts, even if it be assumed that upon similar facts action would lie in California. For example, Cherbonnier v. Rafalovich (D.C.1950), 88 F.Supp. 900, was an action against saloonkeepers by one of their patrons who, while he was eating in the saloon and cafe, was attacked by another patron, one Hobson, who was drunk. Although dismissing the complaint for failure to state a cause of action in that it was not alleged that defendants knew Hobson was of a violent disposition or had threatened harm to plaintiff before he was served the last of the intoxicating drinks, the court did observe (88 F.Supp. at page 903) that "The present trend is apparently toward holding the defendant saloonkeeper liable for lawless acts occurring in the saloon," and quoted from 30 American Jurisprudence 574, section 609, the statement that "The better reason appears to

favor placing on the proprietor the duty of seeing to it that the patron is not injured either by those in his employ or by drunken or vicious men whom he may choose to harbor. Further, a guest or patron of such a place has a right to rely on the belief that he is in an orderly house and that its operator * * * is exercising reasonable care to the end that the doings in the house shall be orderly." Here, if Leonard had been injured by Cole (who was the attacker) and if the former or his next of kin were the plaintiffs, and if it were further alleged that Leonard had been within the defendants' premises and was there attacked by Cole, we would then have a case to which the Cherbonnier decision might be pertinent. Obviously it is not in point on the facts which are alleged.

Rommel v. Schambacher (1887), 120 Pa. 579, 11 A. 779, 6 Am.St.Rep. 732; Curran v. Olson (1903), 88 Minn. 307, 92 N.W. 1124, 60 L.R.A. 733; and Peck v. Gerber (1936), 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996, additionally relied upon by plaintiffs, also involve the liability of the saloonkeeper as a proprietor for not using reasonable care in maintaining order for the safety of his guests. However, as is indicated in the opinions in the cited cases as well as in the annotation in 106 A.L.R. 1003, following the report of Peck v. Gerber (1936), supra, and as recognized by the court in the Cherbonnier case, the liability of a saloonkeeper in this line of cases appears to be related to that of innkeepers and restaurateurs for injuries to guests or patrons by other guests or persons not connected with the management, and is an exception to the general common law rule of non-liability of the vendor of intoxicating liquor, and furnishes no precedent for imposing liability on the saloonkeeper under the circumstances alleged in the complaint in this case.

In Pratt v. Daly (1940), 55 Ariz. 535, 104 P.2d 147, 130 A.L.R. 341, plaintiff wife was permitted to recover damages resulting from defendants' sale of intoxicating liquor to her husband with knowledge of the fact that the husband was an *habitual drunkard*. Arizona had no civil damage statute. The court there, after discussing the rule as

stated in Restatement of the Law of Torts, volume 3, section 696, that "One who, without a physician's direction, sells or otherwise supplies to a married woman a habit-forming drug with knowledge that it will be used in a way which will cause harm to any of the legally protected marital interests of the husband is liable for harm caused by such drug to those interests unless the husband consents to the wife's acquisition or use of the drug" and that the same rule applies to a sale to the husband in an action by the wife under similar circumstances (see also 130 A.L.R. 352-365), then goes on to observe (p. 347 of 130 A.L.R.): "Of course, since there is not the same presumption that the use of liquor will eventually cause the loss of volition that there is with a habit-forming drug, it is incumbent upon plaintiff to prove that to the knowledge of defendant such a stage has been reached by the consumer, but if this fact is once established, in all reason and logic the right of action should be the same in one case as in the other * * * [130 A.L.R. at page 348.] The allegation of the complaint is that the husband of plaintiff was an 'habitual drunkard,' and that the fact was well known to defendants. The term 'habitual drunkard' has been defined repeatedly, and in almost all of the definitions the principal element emphasized is that such a person has lost the will power to resist the temptation when the liquor is offered him." In *Collier v. Stamatis* (Ariz.1945), supra, 162 P.2d 125, 126-127, the Arizona court held that no cause of action for loss of services lies against a tavernkeeper who unlawfully sold intoxicating liquor to a child of the age of fifteen, upon which she became intoxicated, because "It cannot be said as a matter of law that a child of fifteen has neither will nor choice nor discretion whatever"; the court further confirmed that its opinion in the *Pratt v. Daly* case rested upon the showing by plaintiff wife that her husband was "incapable of voluntary action." (See also *Cavin v. Smith* (1949), 228 Minn. 322, 37 N.W.2d 368, 369.) By contrast, the plaintiffs in the case now before us allege no such lack of volition on the part of the decedent, but, rather, that he was an

"able-bodied man" who was not intoxicated immediately before he entered defendant's establishment on the day in question. Other cases indicating the court's awareness of the materiality of the element of volition or of competency, and, hence, of at least contributing responsibility of the voluntary drinker or user, are *Seibel v. Leach* (1939), 233 Wis. 66, 288 N.W. 774, in which the court remarked that "Under the common law it is not an actionable wrong to sell or to give intoxicating liquors to an able-bodied man," and affirmed a judgment dismissing the complaint; and *Scott v. Greenville Pharmacy* (1948), 212 S.C. 485, 48 S.E.2d 324, 327, supra, in which it was pointed out that the complaint failed to describe plaintiff's deceased husband "as being without mind or lacking in volition," in buying and consuming barbiturate capsules during a period of about a year, at the end of which time he committed suicide by hanging himself, and judgment for defendant, who sold the barbiturates, following the sustaining of his demurrer was affirmed. (See also 30 Am.Jur. 575-576, § 611.)

[4] For this court to hold that plaintiffs have here stated a cause of action by averring facts which establish that no cause of action arose either by statute or by common law as the same existed at the time of the events relied upon would at the least constitute a departure from its constitutional function and an encroachment upon that of the Legislature. As declared by the court in *State for use of Joyce v. Hatfield* (1951), 197 Md. 249, 78 A.2d 754, 757, in affirming the judgment on demurrer in defendants' favor in a wrongful death action in which plaintiff widow whose husband was killed by an intoxicated driver sought damages from tavern owners who had sold the liquor, "It would be worse than futile for us to attempt to convince plaintiff by reason, where all other courts have failed and the accumulated mass of authority carries no weight at all. In the circumstances of this case * * * we should virtually usurp legislative power if we should declare plaintiff's contentions to be the law of Maryland. In the course of the last hundred years there probably has

seldom, if ever (except during prohibition), been a regular session of the General Assembly at which no liquor laws were passed. On few subjects are legislators kept better informed of legislation in other states. In the face of the flood of civil damage laws enacted, amended and repealed in other states and the Volstead Act—and of the total absence of authority for such liability, apart from statute—the fact that there is now no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would.” (See also *Henry Grady Hotel Co. v. Sturgis* (1943), 70 Ga.App. 379, 28 S.E.2d 329, 333.)

[5] The significance of legislative action in the light of established law and of pertinent judicial decisions has been repeatedly recognized in this state. As we have so recently said in *Buckley v. Chadwick* (1955), supra, 45 Cal.2d 183, 288 P.2d 12, “It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them.” The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended. In this connection it should be noted that section 22.2 of the Civil Code of this state specifically declares that “The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” (See also *Philpott v. Superior Court* (1934), 1 Cal.2d 512, 515, 36 P.2d 635, 95 A.L.R. 990; *Gin S. Chow v. City of Santa Barbara* (1933), 217 Cal. 673, 695, 22 P.2d 5; *Munchiando v. Bach* (1928), 203 Cal. 457, 264 P. 762; *Peters v. Peters* (1909), 156 Cal. 32, 34, 103 P. 219, 23 L.R.A., N.S., 699; 10 Cal.Jur.2d 651–652, § 2, and cases there cited; 23 Cal.Jur. 603.)

[6,7] Accordingly, it is to be noted that notwithstanding the holding of this

court in *Lammers v. Pacific Electric Ry. Co.* (1921), supra, 186 Cal. 379, 384, 199 P. 523; and of the District Court of Appeal in *Hitson v. Dwyer* (1943), supra, 61 Cal. App.2d 803, 808, 143 P.2d 952, and in *Fleckner v. Dionne* (1949), supra, 94 Cal. App.2d 246, 210 P.2d 530, the Legislature of California has at no time seen fit to adopt a statute inconsistent with the common law so far as concerns a remedy for injury or death following the furnishing of liquor to the ordinary man. Demonstrating awareness by the Legislature of problems relating to the furnishing and consumption of intoxicating liquors, and a similar awareness in respect to problems of tort liability, it is pointed out (without attempting to go back as far as the *Lammers* case, in 1921) that in the ten years immediately following the decision in the *Hitson* case (1943) the Legislature made numerous changes in statutes governing the sale, use, and furnishing of intoxicating liquors (see e. g., Stats.1945, pp. 1023, 2295, 2615; Stats.1947, pp. 2003, 2051, 2490, 2791, 2936, 3019, 3025; Stats.1949, pp. 492, 1546, 1582, 1884, 2060, 2349, 2735; Stats.1951, pp. 1897, 2814, 3051; Stats.1953, pp. 646, 918, 954, 1949, 2084, 3345) and also in statutes having to do with various aspects of tort liability (see e. g., Civil Code, §§ 43, 43.5(a), 45a, 46, 47, 48, 48a, 48.5, 171c, 956, 1714.5, 1714.6, 3341, 3342; Code of Civil Procedure, § 377), but there was no adoption of a statute imposing liability in such a case as is now before us. Under such circumstances not only does the legislative intent appear to be to maintain, rather than to depart from, the pertinent common law, but in the further light of the express enactment (Civ.Code, § 22.2) that “The common law * * * so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all courts of this State,” it becomes manifest that the common law is the controlling law in this case. (*Estate of Apple* (1885), 66 Cal. 432, 434, 6 P. 7, “where the code is silent, the common law governs”; *In re Estate of Wickes* (1900), 128 Cal. 270, 274, 60 P. 867, 49 L.R.A. 138, “The common law is the rule of decision in this state, where no positive law, state

or national, controls"; *Peters v. Peters* (1909), *supra*, 156 Cal. 32, 34, 103 P. 219, 23 L.R.A.,N.S., 699, "The common law of England is declared to be the rule of decision in all courts of this state, so far as it is not repugnant to or inconsistent with our constitution and statutes"; see also *Gray v. Sutherland* (1954), 124 Cal.App.2d 280, 290, 268 P.2d 754; 10 Cal.Jur.2d 652, § 2.)

[8-11] Since it is established both by the common law and by the decisional law in this state (1) that as to a competent person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use; (2) that the competent person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby; and (3) that contributory negligence of the decedent bars recovery by his heirs or next of kin in a wrongful death action, the judgment must be, and it is, affirmed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concur.

SPENCE, Justice.

I concur.

Further consideration of this case upon rehearing convinces me that the governing law, as heretofore enunciated by the courts of this state as well as by the courts of practically all other jurisdictions, precludes plaintiff's recovery. I am further in agreement with the view expressed in the main opinion that the established rules should be followed until such time as these rules may be changed by legislative action. I therefore conclude that the trial court properly sustained the demurrer, and that the judgment should be affirmed.

CARTER, Justice.

I dissent.

I do not agree with the statement of the majority opinion that the common law so clearly forbids recovery in a case such as the one under consideration, or that under the circumstances here presented the consumption of the liquor, rather than its sale, should be considered the proximate cause

of the death. For the reasons stated by me in my dissenting opinion in the case of *Buckley v. Chadwick*, 45 Cal.2d 183, 288 P.2d 12, I also disagree with the holding that any contributory negligence on the part of a decedent is, or should be, a bar to recovery by his heirs or next of kin. It further appears to me that the holding that plaintiffs' decedent was a "competent" person because of plaintiffs' use of the phrase "able bodied" in describing him is outside any of the issues here presented. Plaintiffs alleged that defendants knew of the decedent's propensities when intoxicated—that he was dangerous to himself and to others—and that they, with such full knowledge, sold alcoholic beverages to him.

Under the holding of the majority here, a tavern owner may escape liability for the death or serious injury of innocent third persons by an intoxicated patron when he has furnished intoxicating liquor to such patron after warning by both relatives and police that such person should not be furnished any intoxicating liquor whatsoever because of his vicious propensities when intoxicated. I cannot subscribe to such a holding.

It is true that California has no civil damage, or Dramshop Act. *Fleckner v. Dionne*, 94 Cal.App.2d 246, 249, 210 P.2d 530. The question is, therefore, whether, at common law, the surviving spouse and children of a decedent had a cause of action against one who, with notice, sold intoxicating beverages to a patron, and whether the selling, or the drinking, of the liquor was the proximate cause of the subsequent injuries.

I am of the opinion that the California cases dealing with this problem are distinguishable from the case at bar.

In the case of *Hitson v. Dwyer*, 61 Cal. App.2d 803, 143 P.2d 952, plaintiff alleged that while a patron of the bar, and in an obviously intoxicated condition, he was served intoxicating liquor as a result of which he fell from the movable stool on which he was sitting; that he was dragged from his position on the floor by the defendants, and as a result of which, he suffered a fracture and other injuries of the

shoulder and body. He contended that the defendants, knowing his condition, negligently failed to take precautions to protect him. Plaintiff relied in part upon the Alcoholic Beverage Act, Deering's Gen. Laws, 1937, Act 3796, § 62, Stats. 1935, p. 1123, which makes it a misdemeanor to sell alcoholic beverages to an "obviously intoxicated person." The court held that it could not be said that the purpose of the act was to protect an obviously intoxicated person, as the act itself declared, section 1, that the purpose was to promote "* * * in the highest degree the economic, social and moral well-being and the safety of the State and of all its people." It was also held that "The principle that a violation of a statute or ordinance is negligence *per se* is subject to the limitation that the act or omission must proximately cause or contribute to the injury. *Burt v. Bank of California National Association*, 211 Cal. 548, 296 P. 68; *Lawrence v. Southern Pac. Co.*, 189 Cal. 434, 208 P. 966. Unless the alleged violation of the Beverage Act by defendants constituted the proximate cause of plaintiff's injuries such violation is wholly immaterial to a disposition of this appeal." The court continued to state the "general rule" as follows: "Rather we find the general rule to be as stated in the case of *Hyba v. C. A. Horneman, Inc.*, 302 Ill.App. 143, 23 N.E.2d 564, 565: 'The common law gave no remedy for the sale of liquor, either on the theory that it was a direct wrong or on the ground that it was negligence, which would impose a legal liability on the seller for damages resulting from intoxication', and that the rule found support in the case of *Lammers v. Pacific Electric Ry. Co.*, 186 Cal. 379, 199 P. 523, wherein the court held that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. 'Therefore, in the absence of a showing to the contrary, the proximate cause is not the wrongful sale of the liquor but the drinking of the liquor so purchased.'

The case of *Fleckner v. Dionne*, 94 Cal. App.2d 246, 210 P.2d 530, 532, was an action brought, in part, against the owners of a tavern. It was alleged that these de-

fendants had sold intoxicating liquors to one Dionne, a minor, knowing that he was already intoxicated and knowing that he would drive his car in an intoxicated condition which could, and would, result in harm to others using the highway; that Dionne, in an intoxicated condition, did drive his car so negligently and recklessly that he caused it to collide with the car in which plaintiffs were riding to their injury and damage; that all of said injury and damage was the direct and proximate result of the "unlawfulness, negligence, recklessness of the defendants" in selling the intoxicating liquor to the obviously intoxicated minor, Dionne.

The court cited both the *Lammers* and *Hitson* cases and held that in both of them the language in re proximate cause was not necessary to the decision since in the *Lammers* case the statement "it has been uniformly held, *in the absence of statute to the contrary* that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication" was qualified by the words "in the absence of statute to the contrary" and in the *Hitson* case the actionable wrong was the dragging of plaintiff across the floor. (Emphasis added.)

The court cited *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774, where the action was for property damage and personal injuries brought by a third person against the defendant tavern owner for selling intoxicants to one Leach who drove his car in such a manner as to cause plaintiff's injuries and damage. In the *Wisconsin* case, the court relied upon *Demge v. Feierstein*, 222 Wis. 199, 268 N.W. 210, which was an action brought by a widow whose husband had been sold intoxicants by tavern owners after she had given them notice not to let her husband have any more liquor. After leaving the tavern, her husband lost control of his car and was fatally injured. The court there held that there was no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee. *Black, Law of Intoxicating Liquors*, ch. 13, sec. 281; *Buntin v. Hutton*, 206 Ill.App. 194; *Healey v. Cady*, 104 Vt. 463, 161 A. 151;

Coy v. Cutting, 138 Kan. 109, 23 P.2d 458; State v. Johnson, 23 S.D. 293, 121 N.W. 785, 22 L.R.A.,N.S., 1007; Kraus v. Schroeder, 105 Neb. 809, 182 N.W. 364, 365. The California court concluded that in the absence of civil damage legislation in this state, and with such views as have been expressed by our courts on the subject (Lammers and Hitson cases) coinciding with the holdings in other jurisdictions where the questions have been passed upon, "we are satisfied that the sustaining of the demurrer of respondent Pangracs was correct."

Mr. Justice Dooling dissented. He admitted frankly that cases from some other jurisdictions were to the effect that in the absence of statute no remedy existed against the dispenser of liquor for injuries resulting to third persons from the acts of intoxicated persons. "However, considered as questions of the law of negligence and proximate cause, I cannot bow to the reasoning of those decisions when carried to the full extreme of holding that under no circumstances can one who dispenses liquor to another knowing that he is becoming intoxicated be liable to a third person later injured by the intoxicated person's conduct; and I can see no reason for perpetuating in the law of this state the error of the courts of other jurisdictions.

"Negligence is measured by what a person of ordinary prudence would or would not do under the same or similar circumstances and *it is thoroughly settled that negligence may be the proximate cause of an injury to another even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct.* McEvoy v. American Pool Corp., 32 Cal.2d 295, 299 et seq., 195 P.2d 783; Mosley v. Arden Farms Co., 26 Cal.2d 213, 218 et seq., 157 P.2d 372, 158 A.L.R. 872; Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001." (Emphasis added.)

Both the Fleckner and Hitson cases alleged no more than negligence in serving liquors; in the present case, plaintiff wife alleges that "on occasions too numerous to name (she) requested defendants and each

of them not to give, sell or furnish intoxicating beverages to James Bernard Cole sufficient to allow him to become intoxicated" but that defendants refused to desist from selling Cole intoxicating beverages; and that defendants had *specific knowledge* that when Cole became intoxicated he was invariably belligerent and quarrelsome. In the Hitson case, the plaintiff was suing for his own injuries received while *he* was intoxicated; in the Fleckner case, a third person was suing for injuries received by reason of the driving of an automobile by an intoxicated person. In neither case were the surviving spouse and dependent children suing for loss of consortium and support; and in neither case did the defendant tavern owner have prior specific notice and knowledge of the effect of liquor on the patron to whom the intoxicants were sold.

In Woollen and Thornton "Law of Intoxicating Liquors" (Vol. II, sec. 1029, p. 1837) it is said: "The right of persons injuriously affected by the sale of intoxicating liquors to recover damages *is not entirely restricted to the right given them by statute.* In several jurisdictions it has been held that when, by the continued sale of intoxicating liquors, a person has been unable to perform the duties owing by him to another, under the common law, the seller was liable in damages to persons to whom the duty was owing for any loss that he thereby sustained, Holleman v. Harward, 119 N.C. 150, 25 S.E. 972, 974, 34 L.R.A. 803: "It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealer's complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully sells or gives laudanum or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action." However, *it may be stated as a general rule, that unless the rights of persons having peculiar interests in the buyers of intoxicating liquors, such as a wife in her husband, or parent in the child, are invaded by the sales of in-*

toxicating liquors and the seller of such liquors has notice of the injurious effects of the liquors so sold upon the buyer, Holleman v. Harward, *supra*; Hoard v. Peck, 56 Barb., N.Y., 202 [opium]; Struble v. Nodwift, 11 Ind. 64, the right to recover damages for injuries resulting from the sales of intoxicating liquors is purely statutory, and the action is governed entirely by the provisions of the statute." (Emphasis added.)

In *Peck v. Gerber*, 1936, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996, in which it appears that the plaintiff was assaulted in the saloon by another customer, the latter being a regular customer who was *known* to the saloonkeeper to be a trouble-maker, the court held the saloonkeeper liable, because he was negligent, and expressed the view that he did not use the care required of the ordinarily prudent man in maintaining order for the safety of his guests. The court stated that the standard of care does not vary, but that the ordinarily prudent man exercises care commensurate with the dangers to be avoided and the likelihood of danger to others. There is, apparently, no statute in Oregon on which recovery could have been predicated. Other cases in which the saloonkeeper was held liable under somewhat similar circumstances are *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803, and *Molloy v. Coletti*, 114 Misc. 177, 186 N.Y.S. 730. In *Curran v. Olson*, 88 Minn. 307, 92 N.W. 1124, 60 L.R.A. 733, where the factual situation was different, the court said: "* * * the bartender knew, or might have known by the exercise of the slightest care, what the alcohol was to be used for, and could have prevented the injury to the plaintiff."

In *Cherbonnier v. Rafalovich*, D.C.Alaska, 88 F.Supp. 900, the court granted leave to plaintiff to plead over to allege, if he could, that the saloonkeeper had knowledge of the patron's violent disposition while under the influence of intoxicating beverages. Here, the court pointed out, 88 F.Supp. at page 903, that: "The present trend is apparently toward holding the defendant saloonkeeper liable for lawless acts occurring in the saloon. It is said in 30 Am.

Jur. 574 that: 'The better reason appears to favor placing on the proprietor the duty of seeing to it that the patron is not injured either by those in his employ or by drunken or vicious men whom he may choose to harbor. Further, a guest or patron of such a place has a right to rely on the belief that he is in an orderly house and that the operator, personally or by his delegated representative, is exercising reasonable care to the end that the doings of the house shall be orderly.'"

It would seem from the foregoing that the rule of the common law with respect to intoxicating beverages is not quite so clearly defined in favor of non-liability as would appear from statements found in other cases, and textbooks, as well as in the majority opinion.

Plaintiffs next contend that the rule of the common law with respect to habit forming drugs should be controlling here. At common law, it was held that a wife could bring an action against one who sold habit forming drugs to a husband with knowledge that the drug was intended to satisfy a craving induced by habitual use. *Hoard v. Peck*, 56 Barb., N.Y., 202; *Holleman v. Harward*, 119 N.C. 150, 25 S.E. 972, 34 L. R.A. 803; *Flandermeyer v. Cooper*, 85 Ohio 327, 98 N.E. 102, 40 L.R.A., N.S., 360 [morphine]; *Moberg v. Scott*, 38 S.D. 422, 161 N.W. 998, L.R.A.1917D, 732 [opium]; *Tidd v. Skinner*, 225 N.Y. 422, 122 N.E. 247, 3 A.L.R. 1145 [morphine].

In *Pratt v. Daly*, 55 Ariz. 535, 104 P. 2d 147, 130 A.L.R. 341 (in Arizona there is no civil damage act), it was held that defendant vendor of intoxicating liquors was liable to the plaintiff wife after selling such liquors over her protest and with knowledge that the plaintiff's husband was an habitual drunkard and had reached such a state that his power to drink or not as he chose had been destroyed. The court concluded that the defendants had breached a duty owing to the plaintiff for which the plaintiff should be compensated in damages.

A note in *Southern California Law Review* (14:91) points out that at common law, a vendor was liable to one spouse for a sale to the other spouse, or to a parent

for a sale to a minor child of habit forming drugs to the extent of the damages suffered by the loss of consortium or the services of the victim of the drugs if the vendor knew or had reason to know that the drugs were to be used for a purpose harmful to the purchaser. The doctrine stems from the husband's common law cause of action against one who injures the husband's wife and thereby causes the husband expense and loss of consortium, *Golden v. Greene Paper Co.*, 44 R.I. 231, 116 A. 579, 21 A.L.R. 1517, and from the wife's similar cause of action, *Emerson v. Taylor*, 133 Md. 192, 104 A. 538, 5 A.L.R. 1049; *Nash v. Mobile & O. R. Co.*, 149 Miss. 823, 116 So. 100, 59 A.L.R. 680, recognized subsequent to her right to sue in her own name as created by the various Married Women's Acts (see California Code of Civ.Proc. § 370). The doctrine would now seem to have acquired the dignity of a status distinct from its parent action (Restatement, Torts, §§ 696, 697, 705; 17 Am.Jur., Drugs & Druggists, 864, § 34), especially in view of its application to parent and child.

The author of the article points out that there should be no reason to distinguish between habit-forming drugs and intoxicating liquors since both have two important characteristics in common: (1) Their use in substantial quantities causes injury to the mind and body; and (2) after reaching a certain point in their use, a person can no longer control his appetite for them. (As to the general pharmacological problem, see *The Action of Alcohol on Man* [1923], Ernest H. Starling; *The Opium Problem* [1928], Charles E. Terry and Mildred Pellens; U. S. Treasury Department, Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs* [1938].)

In the Pratt case, *supra* [55 Ariz. 535, 104 P.2d 151], the court said: "A careful study of the cases following the principle laid down in *Hoard v. Peck*, *supra*, will show that the reasoning upon which they were based is that there are certain substances which, if used habitually, destroy the volition of the user to such an extent that he has no power to do aught but consume them when they are placed before

him; that the consumption and the sale of such substances are, therefore, merged and become the act of the vendor; the sale is, therefore, the proximate cause of the loss of consortium, and the consumer cannot, having lost his volition to act, be guilty of contributory negligence. The best known of these substances is opium and its various derivatives, but it is a well-known scientific fact that many other things, under certain circumstances, will produce the same result. Cocaine is an instance among the drugs, and it is equally well established that the excessive use of intoxicating liquor may, and frequently does, have the same effect. We think it would be a narrow and illogical limitation of the rule to hold that because one habit-forming substance is a 'drug' in the technical sense of the term, and another is a 'liquor', different rules should be applied to the sale and use thereof. In fact, there is no specific holding applying such limitation in any of the recorded cases, and in *Holleman v. Harward*, *supra*, the court intimated strongly that under certain circumstances intoxicating liquor might fall within the same rule as laudanum as a habit-forming substance. Of course, since there is not the same presumption that the use of liquor will eventually cause the loss of volition that there is with a habit-forming drug, it is incumbent upon plaintiff to prove that to the knowledge of defendant such a stage has been reached by the consumer, but if this fact is once established, in all reason and logic the right of action should be the same in one case as in the other. We are satisfied from our examination of the cases that the language of the Restatement, *supra* (Torts, vol. 3, p. 696) 'c. The expression "habit-forming drugs" as used in this section does not include intoxicating liquor', was not meant as a declaration that the decided cases *exclude* liquors from the rule, for no such cases have been cited to us, but rather is merely a recognition of the fact that the precise issue had not yet been presented to and determined by any court." The court frankly admitted that: "Every requested application of the principles of the common law to a new set of circumstances is originally without precedent, and some court

must be the first one to make the proper application.

"In answer to the second contention (judicial legislation), we are not asked to make a law. We are asked to declare what the common law is and always has been, and a declaration by us that it has always *permitted* such an action, even though none has ever actually been brought, is no more legislation than would be a declaration that it does not.

"So far as the bringing of unwarranted actions is concerned, if the facts do not show the action is justified, we must assume that the trial court and jury will properly apply the law, and we may not refuse to declare it correctly merely because there are some who may attempt to apply it to cases where the facts do not sustain it.

"On a careful review of all the authorities and a consideration of well-known scientific facts, we think that under the rationale of the rule laid down in *Hoard v. Peck*, *supra*, and the cases following it, the sale of intoxicating liquors under the circumstances indicated above is subject to the same rule as the sale of what is, in the strict sense of the word, a habit-forming 'drug', and that under such circumstances an action for the sale of the former should be upheld as allowed by the common law as well as the latter."

In *Swanson v. Ball*, 67 S.D. 161, 290 N. W. 482, 483, there was no dramshop act involved. The court there was concerned with facts substantially the same as the ones here under consideration. Plaintiff's husband was alleged to have died after drinking liquor sold to him by defendants who admitted receiving both oral and written notice from plaintiff to refrain from doing so. Defendants appealed from an order overruling their demurrer to plaintiff's complaint. The court, in affirming, said: "We are not impressed with the argument presented in which the appellant has attempted to differentiate between the opium drug in the case of *Moberg v. Scott*, *supra*, 161 N.W. 998, and the intoxicating liquor

in the instant case. This court through its former decisions, which we have just referred to, has quite conclusively established that a complaint such as we are considering states a cause of action. The right of the wife to the consortium of the husband is one of her personal rights and we believe that the allegations of the complaint are sufficient in both statements, as to facts and form, to permit a trial upon its merits." The court also held that the wife had a cause of action "independent of any specific statute."

So far as the rationale of the decided cases is concerned—that the consumption and not the sale of the liquor is the proximate cause of the injury received by the third person—it appears clear that under the circumstances of this case, the sale and consumption were so merged as to become one act and under the rule that individuals must be held to have contemplated the natural and probable result of their own acts purposely and intentionally committed it is unrealistic to say that the act of the deceased in drinking the liquor and thereafter becoming belligerent and pugilistic was not a foreseeable consequence of the sale by defendant. (See 23 So. Cal. L. Rev. 420, 421.) This court has held many times that negligence may be the proximate cause of an injury even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct. *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269; *Austin v. Riverside Portland Cement Co.*, 44 Cal.2d 225, 282 P.2d 69; *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 299, 195 P.2d 783; *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 218, 157 P.2d 372, 158 A.L.R. 872; *Katz v. Helbing*, 215 Cal. 449, 10 P.2d 1001, and others.

It appears to me that under the facts alleged by plaintiffs it was an abuse of discretion for the trial court to sustain the defendants' demurrer without leave to amend.

I would, therefore, reverse the judgment.

45 Cal.2d 462

Morton FREEDLAND and Charles L. Drake,
Plaintiffs and Respondents,

v.

Domenick R. GRECO, Defendant and
Appellant.

L. A. 23323.

Supreme Court of California.

In Bank.

Nov. 4, 1955.

Action to foreclose chattel mortgage and for deficiency judgment. The Superior Court, Los Angeles County, Allen W. Ashburn, J., rendered judgment for plaintiff, and defendant appealed. The Supreme Court, Carter, J., held that where two notes were executed for the same liability, one secured by a trust deed and the other by a chattel mortgage, and creditor, after foreclosing trust deed under power of sale, foreclosed chattel mortgage, creditor could not, in view of statute providing that no deficiency judgment may be rendered where trust deed is foreclosed under power of sale, obtain a deficiency judgment in the chattel mortgage foreclosure action.

Judgment affirmed in part and reversed in part.

Opinion, 281 P.2d 633, vacated.

1. Mortgages ⇐375

Statute providing that no deficiency judgment may be rendered on a note secured by a deed of trust when property has been sold under power of sale applies where a note is secured by a trust deed even though note may also be secured by other security. West's Ann.Code Civ.Proc. § 580d.

2. Mortgages ⇐375

Where a note is secured both by a trust deed and by additional security, and property is sold under power of sale, creditor may not obtain a deficiency judgment, but may pursue the additional security. West's Ann.Code Civ.Proc. § 580d.

3. Chattel Mortgages ⇐287

Where two notes were executed for the same liability, one secured by a trust

deed and the other by a chattel mortgage, and creditor, after foreclosing trust deed under power of sale, foreclosed chattel mortgage, creditor could not, in view of statute providing that no deficiency judgment may be rendered where trust deed is foreclosed under power of sale, obtain a deficiency judgment in the chattel mortgage foreclosure action. West's Ann.Code Civ. Proc. §§ 580a-580d, 726; West's Ann.Civ. Code, § 1642.

4. Statutes ⇐184

Purpose to be achieved and evils to be eliminated has important place in ascertaining legislative intent, and statute should be interpreted to promote rather than defeat legislative purpose and policy.

5. Statutes ⇐181(2)

In interpretation of a statute, when two constructions appear possible, that will be chosen which leads to the more reasonable result.

6. Statutes ⇐181(2)

That construction of a statute should be avoided which affords an opportunity to evade act, and that construction is favored which would defeat subterfuges, expediences, or evasions employed to continue mischief sought to be remedied by statute, or to defeat compliance with its terms, or any attempt to accomplish by indirection what statute forbids.

7. Contracts ⇐164

Several papers relating to the same subject-matter, and executed as parts of substantially one transaction, are to be construed together as one contract. West's Ann.Civ.Code, § 1642.

Edmund F. Barker, Montebello, for appellant.

John M. Dvorin, Los Angeles, for respondents.

CARTER, Justice.

Defendant appeals from a judgment for \$6,671.96 (plus \$360, attorney's fees), foreclosing a chattel mortgage on described personal property, ordering the sale of the property, and for a deficiency judgment if

the sale price was not sufficient to satisfy the amount secured by the mortgage. Four hundred and forty-four dollars and fifty-five cents was realized from the sale, hence the deficiency judgment was substantial. Defendant's appeal is on the judgment roll and a settled statement of the proceedings.

Plaintiffs were the owners of an off-sale liquor business which included the license, stock in trade and equipment; they also held a lease of the premises on which the business was conducted. They sold all items to defendant who paid part of the purchase price in cash. The unpaid balance of the purchase price was \$7,000 (later adjusted to \$6,449.53). Defendant gave plaintiffs two promissory notes dated August 14, 1951, each for \$7,000, representing the balance of the purchase price. There is no question but that these two notes represented a single obligation in the amount of \$7,000, the unpaid balance of the purchase price. Both of the notes and the security therefor hereafter mentioned were a part of the same transaction.

As security for the payment of one of the notes (hereafter called the first note) defendant gave plaintiffs a chattel mortgage on the equipment sold. That note recited that it was given in "addition to the deed of trust in like amount as additional security to the mortgagees and trustees [plaintiffs]."

A second trust deed on real property owned by defendant was given as security for the second note.

Defendant defaulted in the payment of the installments under the notes, and plaintiffs had the trustee under the trust deed sell the real property on October 14, 1952, under the power of sale contained therein. Plaintiffs bought the property and, as a re-

sult thereof, a net of \$740.35 was credited as payment on the trust deed note. In the meantime, on October 9th, plaintiffs commenced the instant action to foreclose the chattel mortgage and note and for a deficiency judgment. The judgment appealed from followed.

It was stipulated that the "chattel mortgage represented the balance of the purchase price of the personal property sold to the defendant, but that the trust deed did not stand in that category, but merely constituted additional security for the debt."

Defendant contends that under section 580d of the Code of Civil Procedure¹ no deficiency judgment may be given where there has been a sale under a power of sale in a trust deed as distinguished from a foreclosure sale following court action. It is argued that while there were two notes here, one of which was secured by the trust deed, and section 580d refers to a deficiency on a "note" secured by a trust deed, there was in fact only one obligation or debt which was secured by the trust deed under which a sale had taken place; that a deficiency judgment may not be permitted by the device here used of having two notes, one of which was secured by the chattel mortgage. Defendant does not question that both the real and personal property security may be exhausted and the chattel mortgage foreclosed. Nor is there any contention that either the mortgage or trust deed was a purchase money security and thus controlled by section 580b of the Code of Civil Procedure² considered by this court in the recent case of *Brown v. Jensen*, 41 Cal.2d 193, 259 P.2d 425.

[1,2] If, in the instant case, there had been only one note, secured by a chattel mortgage as well as a trust deed, which

1. "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such a mortgage or deed of trust." Code Civ.Proc. § 580d.
2. "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete

his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property.

"Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof." Code Civ.Proc. § 580b.

represented the debt of defendant to plaintiffs, it is clear that plaintiffs would not be entitled to a deficiency judgment under the plain wording of section 580d, *supra*. It would be a note "secured by a deed of trust or mortgage upon real property" upon which there could not be a judgment for "any" deficiency. There is no limitation in that section that a note must be secured solely by a trust deed. Thus, if the note is secured by a trust deed on real property the section applies even though it may also be secured by other security. Also, in accordance with the section the real property given as security for the note has been sold under the power of sale contained in the deed of trust. It has been held in such a situation (one note secured by both trust deed and other security) that after a sale under the power of sale in the trust deed, the creditor may exhaust the additional security and need not follow the procedure following a sale under a trust deed prescribed by section 580a of the Code of Civil Procedure,³ *Hatch v. Security-First Nat. Bank*, 19 Cal.2d 254, 120 P.2d 869, nor is he prevented from exhausting the other security where the trust deed is a purchase money one on which no deficiency judgment may be given under section 580b of the Code of Civil Procedure as it read prior to its amendment in 1949, Stats.1949, Ch. 1599. *Mortgage Guarantee Co. v. Sampsell*, 51 Cal.App.2d 180, 124 P.2d 353. By analogy the same rule would apply to section 580d, *supra*, here involved, and defendant does not contend that the chattel mortgage may not be foreclosed. The *Hatch* and *Mortgage Guarantee* cases, however, in arriving at that conclusion stress, and are based on, the proposition that the pursuit of additional security is not a deficiency judgment, the implication being that if it were the creditor could not prevail. We take it, therefore, that a deficiency judgment may not be obtained under the circumstances now being discussed. The dictum apparently to the contrary in *Peterson v. Wilson*, 88 Cal.App.2d 617, 632, 199 P.2d

757, 6 A.L.R.2d 258, fails to consider the reasoning in those cases or the wording of the code sections and is, therefore, disapproved.

[3] Since the giving of additional security for the note gives the right to exhaust such security but no right to a deficiency judgment, the chattel mortgage in the instant case adds nothing to the rights of plaintiffs with regard to a deficiency judgment. The question is, therefore, whether the fact that a separate note, secured by a chattel mortgage, changes the picture legally. We think it does not where, as here, both notes represented only a single sum owing from defendant to plaintiffs. The case is no different than if defendant had given two notes each for the same total indebtedness and only one of them was secured by a trust deed. It should be clear that in such a case the plaintiffs could not recover a deficiency judgment on the unsecured note after selling the property under the trust deed covered by the other note. It is unreasonable to say the Legislature intended that section 580d could be circumvented by such a manifestly evasive device. In such a situation the legislative intent must have been that the two notes are, in legal contemplation and under section 580d, one, secured by a trust deed. This construction is compelled by several persuasive factors.

In *Brown v. Jensen*, *supra*, 41 Cal.2d 193, 197, 259 P.2d 425, 426, we held: "These provisions [Code Civ.Proc. §§ 580-580d, 726] indicate a considered course on the part of the Legislature to limit strictly the right to recover deficiency judgments, that is, to recover on the debt more than the value of the security." Moreover, those provisions may not be waived in advance by the debtor as the courts have held with respect to section 726 of the Code of Civil Procedure, *Winklemen v. Sides*, 31 Cal.App.2d 387, 88 P.2d 147, and section 580a, *California Bank v. Stimson*, 89 Cal.App.2d 552, 201 P.2d 39 and, see generally, *Salter v.*

3. When a deficiency judgment is sought after sale under a trust deed there must be a determination of the fair market value of the property and the judgment may

not be for more than the difference between the indebtedness due at the time of the sale and the market value.

Ulrich, 22 Cal.2d 263, 138 P.2d 7, 146 A.L.R. 1344 and *Morello v. Metzenbaum*, 25 Cal.2d 494, 154 P.2d 670. Because of the strong reasons of policy expressed in the *Winklemen* and *California Bank* cases the same rules should apply to section 580d. The section would have little effect if the prospective creditor could compel the prospective debtor to waive it in advance.

[4-7] Taking into consideration the policies and purposes of the act, the applicable rule of statutory construction is that the purpose sought to be achieved and evils to be eliminated has an important place in ascertaining the legislative intent. *Wotton v. Bush*, 41 Cal.2d 460, 261 P.2d 256. Statutes should be interpreted to promote rather than defeat the legislative purpose and policy. *People v. Centr-O-Mart*, 34 Cal.2d 702, 214 P.2d 378. "[I]n the interpretation of statutes, when two constructions appear possible, this court follows the rule of favoring that which leads to the more reasonable result." *Metropolitan Water Dist. of Southern California v. Adams*, 32 Cal.2d 620, 630, 197 P.2d 543, 549. And, "That construction of a statute should be avoided which affords an opportunity to evade the act, and that construction is favored which would defeat subterfuges, expedencies, or evasions employed to continue the mischief sought to be remedied by the statute, or to defeat compliance with its terms, or any attempt to accomplish by indirection what the statute forbids." 50 Am.Jur., Statutes, § 361; see *In re Reineger*, 184 Cal. 97, 193 P. 81. Moreover, it should be noted that "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Civ.Code, § 1642. And, "It is a general rule that several papers relating to the same subject-matter, and executed as parts of substantially one transaction, are to be construed together as one contract. * * *" *Symonds v. Sherman*, 219 Cal. 249, 253, 26 P.2d 293, 295.

While other sections of the Code of Civil Procedure which deal with deficiency judgments, Code Civ.Proc. §§ 726, 580a, 580b, refer to "debts," "obligations," or "contracts" secured by a trust deed may be broader than the word "note" used in sec-

tion 580d, the fact remains that here we have a note and in order to avoid thwarting the purpose of section 580d by a subterfuge, we must construe that section as embracing a situation such as we have here. If we do not so construe the section the debtor would, in legal effect, waive in advance the protection afforded by being required to give two notes for the same debt, even though the instruments contained no such waiver.

That portion of the judgment for a deficiency payment after sale of the property covered by the chattel mortgage is reversed. Otherwise the judgment is affirmed, defendant to recover costs.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



45 Cal.2d 448

The GAGNON COMPANY, Inc., a corporation, Ernest E. Gagnon, Ethel D. Glines, Bernard Martin, and Adelaide M. Martin, his wife, individually and on behalf of Themselves and All Other Stockholders of Nevada Desert Inn, Inc., a corporation, Plaintiffs and Appellants,

v.

NEVADA DESERT INN, Inc., a corporation, Stanley Burke, Lillian Nelson, John R. Barkley, E. N. Crosby, L. Clay Johnson, Harry Lillis Crosby sometimes known as Bing Crosby, Lela M. Anderson, Harold M. Morse, Frank Sinatra, Charles H. Tanner, Roy F. Wilcox, Larry Crosby, Barney H. Van Der Steen, George Guthrie, and The New Horizon, a corporation, Defendants.

Stanley Burke, Respondent.

L. A. 23254.

Supreme Court of California.

In Bank.

Nov. 4, 1955.

Action by stockholders of a corporation against the corporation and a director and

officer thereof for his alleged fraudulent breach of contract to hold property in trust for corporation and supply funds to assist in financing its construction of a hotel building and fraudulent taking of corporation funds. From a judgment of the Superior Court, Los Angeles County, Clarence M. Hanson, J., dismissing the action on ground that a Nevada court's judgment, dismissing with prejudice an action by corporation against such officer, was res judicata, plaintiffs appealed. The Supreme Court, Carter, J., held that evidence justified trial court's conclusions that attempt to remove corporation's secretary, who signed verification of complaint in Nevada action, was abortive, and that attorney who signed such complaint had authority to commence action and dismiss it with prejudice, so that judgment therein was res judicata.

Judgment affirmed.

Opinion, Cal.App., 280 P.2d 112, vacated.

1. Corporations ⇨206(1)

A stockholder's representative suit is a "derivative action" because wrong to be redressed is against corporation, which normally would bring suit, but where it fails or refuses to act after proper demand, stockholder's ultimate interest in corporation is sufficient to justify propulsive action by him to set in motion judicial machinery for redress of such wrong.

See publication Words and Phrases, for other judicial constructions and definitions of "Derivative Action".

2. Corporations ⇨202

Generally, a stockholder may not maintain action in his own behalf for wrong done to corporation by third person on theory that such wrong devalued stock, as such an action would authorize multitudinous litigation and ignore corporate entity, but under proper circumstances, stockholder may bring representative action or derivative action on corporation's behalf.

3. Corporations ⇨207½

A stockholder's action is "derivative," that is, in corporate right, if gravamen of

complaint is injury to corporation or to whole body of its stock or property, without any severance or distribution among individual holders thereof, or complaint seeks to recover assets for corporation or prevent dissipation of its assets.

4. Judgment ⇨701

In stockholders' derivative action, judgment on merits against corporation on wrong alleged to have been done it is ordinarily res judicata in stockholders' subsequent action on corporation's behalf for same wrong, which is to corporation as such, not to stockholders individually, so that bar to action by corporation bars stockholders' action for corporation.

5. Judgment ⇨821

Whether a Nevada court's judgment dismissing action with prejudice on plaintiff's motion is a bar to or res judicata in another action on same cause in California is controlled by Nevada law. West's Ann. Code Civ.Proc. § 1913.

6. Judgment ⇨822(1)

The effect of valid judgment on rights or other interests of parties thereto and persons in privity with them or as conclusive adjudication between them of facts which were or might have been put in issue in proceedings leading to judgment is determined by law of state wherein judgment was rendered.

7. Evidence ⇨80(1)

In absence of Nevada statute or case law covering question whether Nevada court's judgment dismissing action with prejudice on plaintiff's motion is res judicata in another action on same cause in California, Supreme Court will assume that Nevada law is not out of harmony with California law and look to such law for solution of problem.

8. Dismissal and Nonsuit ⇨29, 42

A voluntary dismissal of action by clerk's entry is presumed to be without prejudice to bringing of another action while dismissal in open court pursuant to stipulation is ordinarily effective as a retraxit, and in absence of such stipulation or motion addressed to court, there is no retraxit.

9. Judgment $\S$ 570(1)

A dismissal of action with prejudice by plaintiff bars subsequent action by him on same cause.

10. Dismissal and Nonsuit $\S$ 42

A dismissal of action with prejudice terminates action, affects rights of parties thereto, and is final judgment for defendants, who are entitled to recover their costs.

11. Judgment $\S$ 570(5)

A mere statement by court that judgment dismissing action is with prejudice is not conclusive that judgment is *res judicata*, but such question is determined by nature of action and character of judgment, and if it is clearly not on merits, court's intention to make determination on merits is immaterial.

12. Judgment $\S$ 565

A dismissal of action without prejudice does not bar another action by plaintiff on same cause, but in other respects has effect of final judgment for defendant, as it terminates action and concludes rights of parties therein.

13. Judgment $\S$ 570(5)

An order dismissing action without stating that it is made without prejudice does not bar subsequent action, unless record shows actual determination on merits.

14. Judgment $\S$ 822(1)

Any attack on Nevada court's judgment, dismissing corporation's action against a director and officer thereof by such defendant as defense in stockholders' subsequent derivative action in California against him and corporation, is collateral.

15. Judgment $\S$ 504(1)

A domestic judgment may not be impeached collaterally on ground that a regularly licensed attorney, appearing as such for a party to action wherein judgment was rendered, had no authority to act on such party's behalf.

16. Judgment $\S$ 495(1)

Generally, every presumption is in favor of validity of judgment or order of court of general jurisdiction on collateral attack thereon, and any condition of facts

consistent with its validity and not affirmatively contradicted by judgment roll will be presumed to have existed.

17. Judgment $\S$ 495(1)

On collateral attack on judgment, parties thereto will be presumed to have consented to court's action or waived objection thereto, when necessary to sustain judgment.

18. Judgment $\S$ 490(1), 492

Generally, a domestic judgment, valid on its face, is not subject to collateral attack on ground that defendant in action wherein judgment was rendered was not served with process or that attorney entering appearance for defendant had no authority to do so.

19. Judgment $\S$ 818(1)

The clause of federal Constitution, requiring that full faith and credit be given in each state to records and judicial proceedings of every other state, applies to records and proceedings of courts, only so far as they have jurisdiction, and courts of one state are not required to give full faith and credit to, or regard as valid or conclusive, any judgment of another state's court which had no jurisdiction of subject-matter or parties to action wherein judgment was rendered or of *res* in proceedings in rem. U.S.C.A.Const. art. 4, $\S$ 1.

20. Judgment $\S$ 818(2)

The jurisdiction of court rendering judgment is open to inquiry under proper averments, when questioned in court of another state, and such rule applies to foreign judgment entered on attorney's unauthorized appearance for a party.

21. Judgment $\S$ 951(4)

In stockholders' derivative action against corporation and a director and officer thereof, who raised defense of *res judicata* by reason of Nevada court's judgment dismissing corporation's action against him, evidence was sufficient to support trial court's conclusion that one signing verification of complaint in Nevada action was a director and secretary of corporation and that attempt to remove her as secretary at stockholders' meeting was abortive because

no notice of meeting was given, so that she had authority to commence Nevada action.

22. Attorney and Client ⚖️70

An attorney signing complaint in corporation's action in foreign state against a director and officer of corporation is presumed to have had authority to commence action.

23. Attorney and Client ⚖️70

An attorney's act in entering a defendant's appearance carries with it presumption of attorney's due authority to do so, and such presumption may be weighed against evidence to contrary by trier of facts.

24. Appeal and Error ⚖️991

Whether attorney, signing complaint in corporation's Nevada action against a director and officer of corporation had authority to commence action, so as to render judgment dismissing it with prejudice res judicata in stockholders' subsequent derivative action against corporation and such officer in California, should be decided by trial court.

25. Attorney and Client ⚖️89

An attorney has authority to dismiss his client's action without prejudice.

26. Attorney and Client ⚖️77

An attorney's implied general authority does not include power to dispose of his client's substantive rights.

27. Attorney and Client ⚖️88

In civil litigation, attorney, as his client's agent, has authority to bind client in all matters pertaining to regular conduct of case, in absence of fraud.

28. Attorney and Client ⚖️88

The conduct and management of action is entrusted to judgment of plaintiff's attorney, who decides what should be contested and what points should be taken or abandoned, in absence of special instructions by client, but does not ordinarily have implied authority to do an act which will effect surrender or loss of client's substantial rights, as client determines objectives to be attained.

29. Attorney and Client ⚖️70

Plaintiff's attorney is presumed to have authority to compromise action.

30. Attorney and Client ⚖️72

In stockholders' derivative action against corporation and a director and officer thereof, who raised defense of res judicata because of Nevada court's judgment dismissing with prejudice corporation's action against him, evidence justified trial court's conclusion that attorney signing complaint in Nevada action had authority to commence it and to dismiss it with prejudice.

31. Appeal and Error ⚖️991

In stockholders' derivative action against corporation and a director and officer thereof, who raised defense of res judicata because of Nevada court's judgment in corporation's action against him, whether attorney signing complaint in Nevada action, one signing verification thereof as corporation's secretary, and such officer and his counsel, acted collusively and fraudulently, was question for trial court.

32. Judgment ⚖️822(1)

Testimony of attorney, signing complaint in corporation's Nevada action against a director and officer of corporation, that he did not think dismissal of action with prejudice on his motion would affect stockholders' pending California derivative action against corporation and such officer, did not alter res judicata effect of Nevada judgment of dismissal on collateral attack, but was only attorney's opinion of legal effect of dismissal.

33. Appeal and Error ⚖️991

In stockholders' derivative action against corporation and a director and officer thereof, whether individual defendant waived, and was estopped to assert, defense of res judicata because of Nevada court's judgment in corporation's action against him, was question for trial court.

34. Judgment ⚖️958(1)

In stockholders' derivative action against corporation and a director and officer thereof, trial court's confinement of issue to question raised by individual defendant as to whether Nevada court's judgment, dismissing with prejudice corporation's action against him, was res judicata, did not foreclose plaintiffs from showing that he waived or was estopped from rais-

ing such defense, as such question was part of res judicata issue.

35. Judgment $\hookrightarrow$ 822(1)

Stockholders' derivative action against corporation and a director and officer thereof for fraud was not such an unusual case that doctrine of res judicata because of Nevada court's judgment, dismissing with prejudice corporation's action against such officer for same wrongs after commencement of such derivative action, should not be applied.

J. George Bragin, Hollywood, and H. Ward Dawson, Jr., San Francisco, for appellants.

Pearlson & Pearlson and Herbert Pearlson, Beverly Hills, for respondent.

CARTER, Justice.

Plaintiffs, alleging that they were stockholders of Nevada Desert Inn, a Nevada corporation, commenced the instant action asserting it to be on their behalf and as representatives of the other stockholders. Among the defendants are the Desert Inn and Burke, a director and officer of Desert Inn, other directors of the Inn and also Lela M. Anderson and Harold M. Morse. Burke was the only defendant who answered the complaint. Presumably the others had not been served.

Plaintiffs alleged that defendant Burke had fraudulently breached a contract with the Inn under which he was to hold property in trust for it and supply funds to assist in the financing of the construction of a hotel in Las Vegas, Nevada, and he was to take stock in the Inn. They charged that he fraudulently took Inn funds; that the other directors knew of Burke's actions and yet they did not stop him; that the directors mismanaged the affairs of the Inn and misappropriated the funds thereof. They also alleged fraud on the part of defendant Barkley in the sale of the stock to them, and that Morse, attorney for some of the stockholders in an action commenced in Nevada against the directors, negligently permitted the action to be lost on nonsuit.

Burke answered and raised the defense of res judicata by reason of a judgment by a Nevada court of the eighth judicial district. The judgment which the trial court herein found to be res judicata came about as follows:

In 1947 the Inn commenced an action in the proper Nevada court. The complaint filed therein was verified by Lela Anderson who stated therein that she was the secretary of the Inn. This action is hereafter called second Nevada action. The complaint was signed by Morse and Graves, a firm of Nevada attorneys, by Harold M. Morse, as attorneys for plaintiff therein. The action made substantially the same charges against Burke as are made in the instant action. Burke answered raising the general issue. A "Dismissal with Prejudice" signed by Morse and Graves, by Harold M. Morse, as attorneys for the Inn was filed in that action on November 16, 1950 (the instant action was commenced on April 11, 1949), and based thereon the Nevada court on the same day made its order that it appearing that plaintiff (the Inn) having filed its written dismissal of the action with prejudice and on motion of Morse and Graves, attorneys for plaintiff, the action is "dismissed with prejudice." Prior to the above mentioned Nevada action a similar action by the Inn, with Morse as counsel, had been commenced and tried and resulted in a nonsuit, hereafter referred to as first Nevada action.

[1-4] Plaintiffs here describe their action as "derivative" and insofar as they, as stockholders of the Inn, are seeking redress for wrongs done the Inn, it is such an action. "A stockholder's representative suit has been called a 'derivative action' for the reason that the wrong to be redressed is one against the corporation, and normally the corporation would bring the suit. Where, however, the corporation fails or refuses to act after proper demand, the stockholder's ultimate interest in the corporation is sufficient to justify the bringing of a 'propulsive' action designed to set in motion the judicial machinery for the redress of the wrong to the corporation." *Klopstock v. Superior Court*, 17 Cal.2d 13, 16, 108 P.2d

906, 908, 135 A.L.R. 318. And, "Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. [Citations.] * * * The action is derivative, i. e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.'" *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525, 530, 170 P.2d 898, 900, 167 A.L.R. 271. Being a derivative action, a judgment on the merits against the corporation on the wrong alleged to have been done to it would ordinarily be res judicata in an action by the stockholders on behalf of the corporation for the same wrong. This follows because the wrong was to the corporation as such and not the stockholders individually, hence a bar to an action by the corporation would be a bar to an action by the stockholders for the corporation. *Scarborough v. Briggs*, 81 Cal.App.2d 161, 183 P.2d 683; see *Beyersbach v. Juno Oil Co.*, 42 Cal.2d 11, 28, 265 P.2d 1; *Fletcher Cyc. Corps.* (perm.ed.) § 5859; 50 C.J.S., Judgments, § 794.

[5-11] Here we have a judgment (the Nevada judgment) of dismissal with prejudice, rendered by the court on a motion therefor by plaintiff. Whether such a judgment is a bar—res judicata—as to another action on the same cause in this state is controlled by Nevada law. See Code Civ. Proc. § 1913; *Rall v. Lovell*, 105 Cal.App.2d 507, 233 P.2d 681; *Smith v. Smith*, 115 Cal. App.2d 92, 251 P.2d 720; *In re Kimler*, 37 Cal.2d 568, 233 P.2d 902; *Goodrich on Conflict of Laws*, pp. 630-634; Rest.Conflicts, § 450. The rule is stated: "(1) The effect of a valid judgment upon the rights or other interests of the parties and persons in

privity with them is determined by the law of the state where the judgment was rendered.

"(2) The effect of a valid judgment as a conclusive adjudication between the parties and persons in privity with them of facts which were or might have been put in issue in the proceedings is determined by the law of the state where the judgment was rendered." (Rest.Conflicts, § 450.) Our courts take judicial notice of "the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states". Code Civ.Proc. § 1875. In Nevada the statute with reference to dismissal, at the time the dismissal here was made, provided that an action may be dismissed by plaintiff at any time before trial if no affirmative relief is sought by defendant; by either party with the consent of the other; by the court when plaintiff fails to appear at the trial; by the court when upon trial plaintiff "abandons" it; on nonsuit; and in "every other case the judgment shall be rendered on the merits." Nevada Compiled Laws 1929, § 8793, as amended in 1939, Nev. Stats.1939, p. 33.* It has been held by the Supreme Court of Nevada that where there is a dismissal of the action at plaintiff's behest but nothing is said about prejudice that the judgment is not on the merits and hence not a bar to a subsequent action by plaintiff on the same cause, *Van Vliet v. Olin*, 1 Nev. 495; *James v. Leport*, 19 Nev. 174, 8 P. 47; *Christensen v. Duborg*, 38 Nev. 404, 150 P. 306, but where it is dismissed on the stipulation of the parties it is on the merits and a bar. *Phillpotts v. Blasdel*, 10 Nev. 19. We find no Nevada statute or case law covering the case we have here where the plaintiff moved the court for judgment of dismissal with prejudice and the judgment of dismissal was with prejudice. Under those circumstances we will assume the Nevada law is not out of harmony with ours and thus we look to our law for a solution of the problem. See *Strout v. Burgess*, 144 Me. 263, 68 A.2d 241, 12 A.L.R.2d 939; *Knox v. Pryor*, 10 Cal. App.2d 76, 51 P.2d 106; *McDonald v. Hart-*

* Compare Code of Civil Procedure, sections 581, 581b, 582, which are similar.

ford Trust Co., 104 Conn. 169, 132 A. 902; *Dimon v. Dimon*, 40 Cal.2d 516, 542, 254 P.2d 528, concurring and dissenting opinions. In *Lewis v. Johnson*, 12 Cal.2d 558, 563, 86 P.2d 99, 102, we said: "There is a well-recognized distinction between a dismissal voluntarily made by the clerk's entry, which is presumed to be without prejudice to the bringing of another action, and a dismissal entered in open court pursuant to stipulation, which is ordinarily effective as a *retraxit*. In the absence of such stipulation or motion addressed to the court, there is no *retraxit*." Here, according to the recital in the Nevada judgment, the dismissal with prejudice was made with prejudice on the motion of the Inn's attorneys. It would seem clear that a dismissal with prejudice by plaintiff of its action is a bar to a subsequent action on the same cause; otherwise there would be no meaning to the "with prejudice" feature. "A dismissal with prejudice terminates the action and the rights of the parties are affected by it. It is a final judgment in favor of defendants and they are entitled to recover their costs. But a mere statement that a judgment of dismissal is 'with prejudice' is not conclusive. It is the nature of the action and the character of the judgment that determines whether it is *res judicata*. The intention of the court to make a determination on the merits may be important, but if the judgment is clearly not on the merits, the court's intention is immaterial.

[12] "A dismissal without prejudice, on the other hand, is not a bar to another action by the plaintiff on the same cause. In other respects, however, it has the effect of a final judgment in favor of the defendant, for it terminates the action and concludes the rights of the parties in that particular action. * * *

[13, 14] "An order of dismissal containing no statement whatever that it is made without prejudice is not a bar to a subsequent action, unless the record shows that there was an actual determination on the merits." (16 Cal.Jur.2d, Dismissal, Etc., § 5.) Finally, it is clear that any attack on the Nevada judgment raised by Burke as a defense in the instant action is collateral.

Kaufmann v. California Mining etc. Syn., 16 Cal.2d 90, 104 P.2d 1038; Rest.Judgments, § 11, com. a.) And, of course, a judgment of a court of a sister state having jurisdiction must be given full faith and credit. U.S.Const. art. IV, § 1.

Plaintiffs contend, however, that the Nevada court lacked jurisdiction, and its judgment is not a bar because attorney Morse had no authority to dismiss the Inn's action with prejudice, Anderson had no authority to commence or prosecute the action for the Inn, and the dismissal was the result of collusion and fraud by the mismanaging directors of the Inn and Morse.

[15, 16] Aside from the question of the scope of the authority of an attorney with general power to represent a client in an action, to dismiss his client's action (here the dismissal by Morse of the Inn's action), being raised by a direct attack on the judgment, there is the problem of whether such question can be raised on a collateral attack on the judgment. It has been stated both in this state and Nevada that a domestic judgment may not be impeached collaterally on the ground that a regularly licensed attorney appearing as such for a party to an action had no authority to act on his behalf. See *Deegan v. Deegan*, 22 Nev. 185, 37 P. 360; *Barber v. Barber*, 47 Nev. 377, 222 P. 284, 39 A.L.R. 706, dictum; *Carpentier v. City of Oakland*, 30 Cal. 439; *Nielsen v. Emerson*, 119 Cal.App. 214, 6 P.2d 281; *Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 161 P. 975, approving the *Deegan* and *Carpentier* cases; *Suydam v. Pitcher*, 4 Cal. 280; *Holmes v. Rogers*, 13 Cal. 191; *May v. Rosen*, 91 Cal.App.2d 794, 205 P.2d 1118. In *Hill v. City Cab etc. Co.*, 79 Cal. 188, 21 P. 728, the same rule was stated but a collateral attack was permitted because it was admitted that the attorney had no authority. This is in line with the general rule that: "On collateral attack every presumption is in favor of the validity of the judgment or order of a court of general jurisdiction, and any condition of facts consistent with its validity and not affirmatively contradicted by the judgment roll will be presumed to have existed. * * *

[17, 18] "Under this general rule it will be presumed, when necessary, that the parties consented to the court's action or waived objection thereto." *Phelan v. Superior Court*, 35 Cal.2d 363, 373, 217 P.2d 951, 958. It is said in 88 A.L.R. 12, 36: "There is a lack of agreement among the courts on the question whether or not a judgment can be attacked in a collateral proceeding on the grounds that the defendant was not served with process and that the attorney entering his appearance had no authority to do so. The weight of authority supports the view that a domestic judgment, valid on its face, is not subject to collateral attack on this ground." (Citing cases from the federal courts and Arkansas, Indiana, Iowa, Louisiana, Maine, Michigan, Missouri, Nevada, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Texas and West Virginia; contra, Illinois, Kansas, Nebraska, Oregon and Virginia. [See, also, 5 Am.Jur., Judgments, § 83.])

[19, 20] On the other hand with respect to foreign judgments (judgments of a sister state) it has been said: "Indeed, the clause of the Federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction, and the courts of one state are not required to give full faith and credit to, or regard as valid or conclusive, any judgment of a court of another state, which had no jurisdiction of the subject matter, or of the parties, or, in proceedings in rem, of the res. Accordingly, the jurisdiction of a court rendering a judgment is open to inquiry under proper averments, when questioned in the court of another state. The party against whom the judgment is rendered is not forced to go to the state of the rendition of the judgment for relief. *These rules have been applied in the case of a foreign judgment entered upon an attorney's unauthorized appearance for a party.*" (Emphasis added; 31 Am. Jur., Judgments, § 549.) See *Rest. Judgments*, § 12, com. c.; *Carlton v. Miller*, 114 Cal.App. 272, 299 P. 738; 50 C.J.S., Judgments, § 893, c. (6).

The question of the res judicata effect of the Nevada judgment of dismissal was raised by Burke's motion to dismiss the instant action and that was the sole issue presented to the court. The court in its order of dismissal recited that the Nevada judgment was res judicata. No other findings were made but the court in its remarks from the bench stated that as late as April, 1946, directors for Desert Inn had been elected, including Lela Anderson; that a purported meeting of stockholders in Los Angeles in September, 1946, in which Anderson was removed, was a nullity as notice thereof was not given; that there is no showing that the action leading to the Nevada judgment of dismissal was not authorized by Desert Inn, inasmuch as Morse and Anderson were directors of it. Implicit in the dismissal of the California action, on the ground of res judicata of the judgment in the Nevada action, is the finding that Anderson had authority to commence the Nevada action for the Inn and Morse had authority to act as its attorney and dismiss the Nevada action with prejudice, and that there was no fraud or collusion in the commencement or dismissal of the Nevada action.

At the hearing on the res judicata question the transcript of the trial in the first Nevada action which resulted in a nonsuit was introduced as was a transcript of the record in the second Nevada action. Morse's deposition was also received. Therein he testified that he was a regularly licensed attorney practicing in Nevada; that he was one of the attorneys for the Inn in the first Nevada action, being employed by Barkley and Anderson; that after the nonsuit was granted and in September, 1946, he wrote to Barkley stating he desired to withdraw as attorney in the first action and that he should obtain new counsel to file a new action; that after he wrote the letter any and all association with Barkley or plaintiff Gagnon was terminated; that he filed the second action at the request of Lela Anderson and her husband; that at the time of dismissal of that action he knew the California action was pending as did counsel for Burke. He filed an affi-

davit in the second action in reply to Burke's motion to dismiss for failure to bring it to trial stating that there should not be a dismissal because the California action involving the same issues had been commenced and if it were not tried the second action should be dismissed. He stated that his dismissal of the second Nevada action was to have no relation "whatsoever" to the California action, no bearing on the issues in the California action, the one now before us.

Burke was called as a witness. It was stipulated he signed the verified answer in the second Nevada action in which it was alleged that Anderson had no authority to bring it for the Inn, but Burke said he did not know whether or not she had such authority. He testified that he and his counsel, Mr. Pearlsen, went to Morse's office in November, 1950, to have Morse dismiss the second Nevada action. He testified that he and his counsel knew the California action had been commenced; that they talked with Morse about settling the second Nevada action and paid him some money (\$1,500 or \$1,700) in settlement thereof and Morse had the action dismissed with prejudice as above mentioned. What Morse did with the money does not appear.

Mrs. Anderson testified that she signed the verification of the complaint in the second Nevada action in which she stated she was secretary of the Inn, although she thought she was not at the time because of the purported stockholders' meeting which purported to remove her but Morse told her she was still secretary and she took his advice; that she protested that purported stockholders' meeting.

Plaintiff Gagnon testified concerning the stockholders' meeting in Los Angeles and that he was there elected president of the Inn; that neither he nor any of the other stockholders of the Inn ever authorized or knew about the commencement or dismissal of the second Nevada action and it was stipulated they did not know Morse filed that action.

[21] Insofar as Anderson's authority is concerned, it would appear that the court was justified in concluding she was a direc-

tor and secretary of the Inn and the attempt to remove her was abortive. There may be a conflict in the evidence on this issue but there is sufficient to support the conclusion of the trial court. Hence she would not lack authority to commence the second Nevada action by reason of her holding no official position with the corporation.

[22-24] As to Morse's authority to commence the second Nevada action there is a presumption that he had such authority. "The act of the attorney in entering the appearance of a defendant, carries with it a presumption of due authority upon his part to do so." *Voinich v. Roller*, 203 Cal. 379, 382, 264 P. 240, 241, quoting from *Garrison v. McGowan*, 48 Cal. 592, 600; see, also, *Dale v. City Court of City of Merced*, 105 Cal.App.2d 602, 234 P.2d 110; *People v. Western Meat Co.*, 13 Cal.App. 539, 110 P. 338; *In re Estate of Pailhe*, 114 Cal.App.2d 658, 251 P.2d 76; *Wilson v. Barry*, 102 Cal.App.2d 778, 228 P.2d 331; *Sullivan v. Dunne*, 198 Cal. 183, 244 P. 343; 6 Cal.Jur.2d, Attorneys at Law, §§ 154-5. And that presumption may be weighed against evidence to the contrary by the trier of fact. *Dale v. City Court of Merced*, supra, 105 Cal.App.2d 602, 234 P.2d 110. The question should be decided by the trial court. *Sullivan v. Dunne*, supra, 198 Cal. 183, 244 P. 343.

[25-29] With reference to an attorney's authority to dismiss his client's action with prejudice it is said: "An important problem is related to the distinction between voluntary dismissals or nonsuits which are without prejudice to the cause of action, and dismissals or nonsuits with prejudice, the last mentioned type being referred to in the cases by the common-law term 'retraxit.' It is clearly within the attorney's authority to dismiss the client's action without prejudice. However, a series of early cases held the general authority of an attorney even sufficient to empower him to effect a retraxit, amounting to a renunciation of the client's substantive right or cause of action. It is hardly possible to reconcile this rule with the established principle that the implied general authority of an attorney does not include any power or authority to dis-

pose of the client's substantive rights, and it would therefore seem doubtful whether, or to what extent, the early cases would now be followed." (6 Cal.Jur.2d, Attorneys at Law, § 164.) And further in that connection: "In civil litigation, the attorney, as the client's agent, and in the absence of fraud, has authority to bind his client in all matters pertaining to the regular conduct of a case. * * * In the absence of such special instructions, the conduct and management of the action is entrusted to the attorney's judgment; he decides what should be contested, what points should be taken, and what should be abandoned. This authority is, however, subject to the qualification that an attorney ordinarily does not have implied authority to do an act which will effect the surrender or loss of a client's substantial rights, for the client determines 'the objectives to be attended.'" (6 Cal. Jur.2d, Attorneys at Law, § 156.) There is, however, a presumption that he has authority to compromise his client's action which he is prosecuting. *Church v. Church*, 40 Cal.App.2d 701, 105 P.2d 643; *Burns v. McCain*, 107 Cal.App. 291, 290 P. 623; 66 A.L.R. 107, 126; 30 A.L.R.2d 944, 953; *State v. California M. Co.*, 15 Nev. 234; *Deegan v. Deegan*, 22 Nev. 185, 37 P. 360. Defendant Burke points out that there are authorities in California and Nevada which hold that on collateral attack the presumption of the attorney's authority is conclusive, *Westwood Temple v. Emanuel Center*, 98 Cal. App.2d 755, 221 P.2d 146; *Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 139 P. 805; *May v. Rosen*, 91 Cal.App.2d 794, 205 P.2d 1118; *Deegan v. Deegan*, supra, 22 Nev. 185, 37 P. 360, and it has been held that an attorney has authority to dismiss an action with prejudice, the modern name for retraxit, *Ghiringhelli v. Riboni*, 95 Cal.App.2d 503, 213 P.2d 17; *Robinson v. Hiles*, 119 Cal.App.2d 666, 260 P.2d 194, contrary to the rule at common law. *Lamb v. Herndon*, 97 Cal.App. 193, 275 P. 503; *Bogardus v. O'Dea*, 105 Cal.App. 189, 287 P. 149; *Chase v. Van Camp Sea Food Co., Inc.*, 109 Cal. App. 38, 292 P. 179; but see 6 Cal.Jur.2d, Attorneys at Law, § 164, supra. While the above cited cases may appear to conflict with the rule that ordinarily an attorney has

no authority to surrender his client's rights (see quotation, supra, from 6 Cal.Jur.2d, Attorneys at Law, §§ 156, 164), they may be reconciled on the theory that there is a rebuttable presumption that he had such authority.

[30] It would seem, therefore, that the trial court was justified in concluding that Morse had authority to commence the second Nevada action and to dismiss it with prejudice.

[31, 32] While there may be evidence from which it could be inferred that Morse and Anderson and Burke's counsel and Burke acted collusively and fraudulently the question was for the trial court. Plaintiffs rely in part on the allegations in their complaint in the instant action that Morse, Burke, Anderson and other directors acted collusively and fraudulently, but allegations are not proof. It would seem that Morse's testimony that he did not think the dismissal of the second Nevada action would affect the California action, should not be allowed to alter the res judicata effect on collateral attack. In effect it was only his opinion of the legal effect of the dismissal.

[33, 34] Plaintiffs argue that Burke waived the defense of res judicata and is estopped to assert it, and in that connection, that they were prevented from giving evidence on that issue because the court confined the issue to res judicata. It is doubtful that there was any conduct on which a plea of estoppel or waiver could be based as there was no change in position on plaintiffs' part in reliance on Burke's claim in the second Nevada action that Anderson had no authority to act for the corporation. In any event the question would appear to be one for the trial court. Confining the issue to res judicata, as was done by the trial court, did not foreclose plaintiffs from making a showing that the defense had been waived or that Burke was estopped from raising it, as that would be part of the res judicata issue.

[35] Plaintiffs claim that the case is an unusual one in which the doctrine of res judicata should not be applied. See *Greenfield v. Mather*, 32 Cal.2d 23, 194 P.2d 1; *In re Guardianship of Di Carlo's Estate*,

3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990. This case does not present the factors present in those cases unless we hold that a dismissal with prejudice of an action by a corporation to recover for a wrong alleged to have been committed as to it cannot be res judicata where the dismissal occurs after stockholders have commenced a derivative action for the same wrong. No authority so holding has been cited and we find none.

Plaintiffs contend that the trial court was "motivated" in making its order of dismissal by its finding that the prayer of the complaint was not sufficient. Even if we delve into the reasoning of the trial court it is clear it based its order on the premise of res judicata.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



45 Cal.2d 501

GRIFFITH COMPANY, a corporation,
Plaintiff and Appellant,

v.

SAN DIEGO COLLEGE FOR WOMEN,
a corporation, Defendant and
Respondent.

L. A. 23725.

Supreme Court of California.
In Bank.

Nov. 10, 1953.

Rehearing Denied Dec. 8, 1955.

Proceeding upon motion to vacate an arbitrators' award and motion to confirm award. The Superior Court, Los Angeles County, William R. McKay, J., denied the motion to vacate and granted the motion to confirm. An appeal was taken. The Supreme Court, Carter, J., held, inter alia, that it was not improper for one of the arbitrators to talk the matter over with a distinter-

ested attorney to check the arbitrator's legal conclusions, and it was not necessary that all arbitrators act as a body in seeking such independent advice.

Affirmed.

Edmonds, J., dissented.

Opinion, 286 P.2d 3, vacated.

1. Arbitration and Award ⚡89

Though an arbitrator cannot impeach the award by testifying to his fraud and misconduct, his testimony is admissible to show what matters were submitted for decision and were considered by the arbitrators.

2. Arbitration and Award ⚡31

It was not improper for one of arbitrators to talk matter over with a distinterested attorney to check arbitrator's legal conclusions, and it was not necessary that all arbitrators act as a body in seeking such independent advice.

3. Arbitration and Award ⚡76

Conclusion of trial court in refusing to vacate award was an implied finding that he believed affidavit of arbitrator wherein it was stated that arbitrator's opinion was reached through his own independent thought and was not that of any other person, and evidence sustained such implied finding of trial court.

4. Appeal and Error ⚡996, 1011(2)

When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring contention of prevailing party established not only the facts stated therein but also all the facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.

5. Arbitration and Award ⚡53

Under rule of Standard Form of Arbitration providing that award is to be made in writing and signed by a majority of the arbitrators and that it shall be acknowledged when prevailing law so requires, it was unnecessary that dissenting arbitrator be present when the other two arbitrators signed award. West's Ann.Code Civ.Proc. § 1287.

6. Arbitration and Award ⇨53

Manner of signing whereby one arbitrator prepared and signed award and delivered it by messenger to office of another who then signed same, the award having been previously acknowledged by the notary in the office of the first arbitrator, is not approved practice, but was not prejudicial. West's Ann.Code Civ.Proc. § 1287.

7. Arbitration and Award ⇨76

Evidence on motion to vacate arbitrators' award established that each party was notified at earliest possible opportunity and as nearly simultaneously as could be expected, and rule of Standard Form of Arbitration providing that award shall be delivered simultaneously to each party was substantially complied with.

8. Arbitration and Award ⇨70

Record on appeal from denial of motion to vacate award failed to establish misconduct or abuse of discretion on part of majority in refusing dissenting arbitrator's motion to reopen for purpose of producing additional evidence.

9. Arbitration and Award ⇨82(1)

After arbitration and award, merits of controversy between parties are not subject to judicial review.

10. Arbitration and Award ⇨48

Record on appeal from denial of motion to vacate award, including text of chairman's opinion, disclosed that decision of issue arising out of building construction contract was not "arbitrary, harsh and inequitable" any more than any other decision is such to the losing party. West's Ann.Civ.Code, §§ 3300, 3301.

11. Arbitration and Award ⇨31

Where issues arising out of building construction contract were submitted to arbitration, arbitrators were not specifically required to act in conformity with other than "prevailing arbitration law".

12. Arbitration and Award ⇨57

Record on appeal from denial of motion to vacate arbitrators' award failed to support contention that award was not co-extensive with issues submitted.

13. Arbitration and Award ⇨35

Where one arbitrator who was an attorney prepared formal award but award merely followed opinion prepared by another arbitrator in which the first concurred, award was that of a majority of the three-man board of arbitration. West's Ann.Code Civ.Proc. § 1287.

Gibson, Dunn & Crutcher, Ira C. Powers and Richard L. Wells, Los Angeles, for appellant.

Bodkin, Breslin & Luddy, Los Angeles, Martin & Mahedy and O'Neill P. Martin, San Diego, for respondent.

Joseph Scott, Los Angeles, as amicus curiae on behalf of respondent.

CARTER, Justice.

A rehearing was granted in this case so that plaintiff's supplemental reply brief might be considered by this court. We have examined said brief and find nothing therein which compels any change in our decision as heretofore filed.

Plaintiff Griffith Company appeals from an order denying its motion to vacate an arbitrators' award and from a judgment entered on an order confirming the award in favor of defendant college.

A construction contract entered into between the parties provided for the erection of certain college buildings for defendant by plaintiff on a cost plus and maximum price basis. The contract provided that all disputes subject to arbitration should be settled by arbitration under the "Standard Form of Arbitration Procedure of the American Institute of Architects." The work was delayed beyond the date set for substantial completion and a dispute arose. Plaintiff demanded arbitration and eventually an arbitration panel was agreed upon: Mr. McKittrick, a contractor, was named by the plaintiff; Mr. J. Howard Ziemann, an attorney, was named by the defendant; and the two nominees selected the third, Paul B. Young, as chairman. After several hearings at which evidence and briefs were considered,

Mr. Young, as chairman, with Mr. Ziemann concurring, agreed on an award in defendant's favor. Mr. McKittrick dissented in a written opinion in which he (among other things) accused Mr. Young of not having arrived at his decision by his own independent thought but through the work of an "outside attorney," or, in other words, of misconduct sufficient to justify setting aside the award. Mr. McKittrick's affidavit, as well as those of Mr. Young and Mr. Ziemann are on file.

[1] We said in *Sapp v. Barenfeld*, 34 Cal.2d 515, 523, 212 P.2d 233, 239, that "Although an arbitrator cannot impeach the award by testifying to his fraud or misconduct, his testimony is admissible to show what matters were submitted for decision and were considered by the arbitrators." This is, apparently, the general rule. In *Commercial Arbitrations and Awards*, by Sturges, it is said: "While ordinarily an arbitrator may not testify to his own acts of mistake or misconduct any more than he may to those of the members of the arbitral board generally, to establish a cause sufficient to defeat or vacate an award, it has been held that the complaining party may take such testimony of an arbitrator when it implicates the other party in the alleged misconduct, partiality, bias or corrupt action.

"Again, in the case of a dissenting arbitrator, the award not being his, it is uniformly held that he may testify as to the bias, partiality or other misconduct of the arbitrators who rendered the award in question the same as any other witness." (§ 365, p. 787.)

McKittrick, the dissenting arbitrator, by affidavit, stated that Mr. Young, prior to full discussion by the panel members, had submitted the matter to an unnamed attorney who had drafted an opinion; that Mr. Young, at a meeting, signed the original and gave it and a copy thereof to McKittrick; that Mr. Young and Mr. Ziemann desired then and there to make an award but because of Mr. McKittrick's opposition, agreed to a further meeting. At the next meeting, McKittrick moved, on

behalf of plaintiff, to reopen the proceedings to permit further testimony on the "items of damage"; that the motion was denied. It is also claimed that Mr. Young and Mr. Ziemann did not sign the award in each other's presence; that the acknowledgment of Mr. Young's signature was made prior to the time he signed it; that the award was not delivered simultaneously to all arbitrators; that the award went outside the issues of the arbitration proceeding. It is also contended that Mr. Young was guilty of prejudicial misconduct in refusing to reopen the proceedings to permit additional testimony on the part of Mr. McKittrick.

Mr. Young's affidavit shows that he took his tentative written opinion to the meeting with him; that it was in a sealed envelope which was not opened until after four and one-half hours of discussion between the three of them. It was also averred that hearings had been held on May 20th, June 15th, June 22nd, June 23rd, June 24th, and July 13th, July 14th, July 15th, July 16th; that briefs were filed on the law and the facts. It is further stated that after hearing the evidence and considering the briefs, Mr. Young formed a tentative opinion of his own and that he then consulted an attorney with whom he had previously discussed the matter so that his opinion could be checked to determine that "it was not grossly erroneous so far as the law was concerned"; that upon being advised by the attorney that his opinion was not erroneous, he dictated the tentative opinion to his secretary from his own notes; that the language thereof was his own except for the citations of legal authority which he had obtained from the attorney; and that "said opinion and the award of the arbitrators were the result of affiant's own judgment and that of said J. Howard Ziemann.

"That during the course of the hearings affiant had informed both his fellow arbitrators that he intended to seek legal confirmation of whatever opinion he might arrive at, and no objection was made by either."

Article 40 of the agreement between the parties provides that any dispute subject to arbitration shall be submitted to arbitration in accordance with the provisions of the Standard Form of Arbitration Procedure of The American Institute of Architects and the "prevailing arbitration law."

It is argued by plaintiff that Mr. Young's conduct in privately consulting an attorney constituted misconduct such as would justify vacating the award. In *Sapp v. Barenfeld*, supra, 34 Cal.2d 515, 521, 212 P.2d 233, 238, substantially the same point was raised. We said there: "[T]he arbitrators, to determine the amount of the award, consulted ex parte with C. L. Weeks, a skilled cost appraiser, for an estimate of the labor and material cost of remedying the defects. They checked his estimate with several building supply firms and adopted it in making their award after this independent investigation. The award was the result of the arbitrators' own judgment, based, however, on information acquired in this manner.

"There is no error in such procedure. Although a hearing is required on disputed questions of fact, arbitrators may inform themselves further by privately consulting price lists, examining materials and receiving cost estimates. *Sturges, Commercial Arbitrations and Awards*, § 217, p. 495. This procedure may be ex parte, without notice or hearing to the parties, for 'it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.' 1 *Mechem, Agency*, § 310, p. 229; *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 198, 30 S.Ct. 615, 54 L.Ed. 991; *California Annual Conf. of M. E. Church v. Seitz*, 74 Cal. 287, 295, 15 P. 839; *Dore v. Southern Pac. Co.*, 163 Cal. 182, 189, 124 P. 817; *Simons v. Mills*, 80 Cal. 118, 120, 22 P. 25; *Foster v. Carr*, 135 Cal. 83, 86, 67 P. 43; *Rives-Strong Bldg., Inc., v. Bank of America*, 50

Cal.App.2d 810, 814-817, 123 P.2d 942; *Gord v. F. S. Harmon & Co.*, 188 Wash. 134, 140, 61 P.2d 1294; *Liggett v. Toppington Bldg. Co.*, 114 Conn. 425, 432, 158 A. 917; *Koepke v. E. Liethen Grain Co.*, 205 Wis. 75, 77, 236 N.W. 544; *Twin Lakes Reservoir & Canal Co. v. Platt Rogers, Inc.*, 112 Colo. 155, 147 P.2d 828; *City of Bangor Savings Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 76-77, 26 A.991, 20 L. R.A. 650, 35 Am.St.Rep. 341. It is immaterial whether the subject of the appraisal is the only matter in dispute or is part of a broader submission. *Gord v. F. S. Harmon & Co.*, supra; *Hegeburg v. New England Fish Co.*, 7 Wash.2d 509, 110 P.2d 182; *Bangor Savings Bank v. Niagara Fire Ins. Co.*, supra; *Sturges*, supra, § 217, pp. 495-498." See, also, *Sampson Motors, Inc., v. Roland*, 121 Cal.App.2d 491, 494, 263 P.2d 445.

[2-4] In view of the foregoing, there appears to be no good reason why Mr. Young should not have talked the matter over with an attorney to check his legal conclusions. There was no showing made by plaintiff that the attorney was not a disinterested person. We made no requirement in the *Sapp* case that all arbitrators must act as a body when seeking independent advice and it would appear that such a requirement would be unnecessarily burdensome and could lead to absurd results. the conclusion of the trial court in refusing to vacate the award is an implied finding that he believed the affidavit of Mr. Young wherein it was stated that his opinion was reached through his own independent thought and was not that of any other person. "An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documenta-

ry. In the consideration of an order made on affidavits involving the decision of a question of fact, the appellate court is bound by the same rule as where oral testimony is presented for review." 4 Cal.Jur.2d § 614, p. 495; *People v. Western Meat Co.*, 13 Cal. App. 539, 544, 110 P. 338; *Maselli v. E. H. Appleby & Co., Inc.*, 117 Cal.App.2d 634, 638, 256 P.2d 618; *Jones v. Lindsey*, 114 Cal. App.2d 237, 239, 250 P.2d 153; *Schreiber v. Hooker*, 114 Cal.App.2d 634, 640, 251 P.2d 55; *Paulekas v. Paulekas*, 117 Cal.App.2d 73, 77, 254 P.2d 941. When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party established not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed. *Hayutin v. Rudnick*, 115 Cal. App.2d 138, 140, 251 P.2d 707.

[5,6] Paragraph 14 of the Standard Form of Arbitration provides that the award is to be made in writing and signed by a majority of the arbitrators and that it shall be acknowledged when the prevailing law so requires. It is contended by plaintiff that Mr. McKittrick was not permitted to participate in the making of the award, or to see a copy thereof, and that the arbitration panel did not meet when the award was made. Mr. Young's affidavit shows that at the close of the meeting when he opened his written opinion, he gave copies thereof to each of the other arbitrators; that no award was made that day, but a meeting was arranged for the following day; and he and Mr. Ziemann signed the opinion that day; that the next day a meeting was had with Mr. Young and Mr. Ziemann adhering to the conclusion previously reached and Mr. McKittrick dissenting therefrom; that Mr. Young asked Mr. Ziemann to prepare the formal award since he was an attorney; that Mr. McKittrick said he would not sign the award. It was further stated that a tentative meeting was arranged for the following day to sign the award but that Mr. Young was unable to be there because of another business engagement; that Mr. Ziemann prepared and

signed the award and delivered it by messenger to Mr. Young's office where it was signed, having been previously acknowledged by the notary in Mr. Ziemann's office. Plaintiff's contention is, apparently, that Rule 14 (heretofore set forth) required all the arbitrators to have been together at the time the award was signed. Rule 14 does not specifically so require. Mr. McKittrick had announced his refusal to sign the award and that he would dissent therefrom. There appears to be no reason why it was necessary that he be present when the other two arbitrators signed. It has been held that the arbitrators, having met in consultation at the time of their final decision of the case upon the merits, were not required to meet again for the mere purpose of signing the award. *Campbell v. Inhabitants of Upton*, 113 Mass. 67, 71; *Robinson v. Bickley*, 30 Pa. 384; *Sturges*, supra, § 219, p. 509.

Section 1287 of the Code of Civil Procedure provides that the award must be in writing and acknowledged or proved in "like manner as a deed for the conveyance of real estate." While the manner in which Mr. Young signed the award is not approved practice, plaintiff has not shown that it was prejudiced thereby.

In *Williston v. City of Yuba City*, 1 Cal. App.2d 166, 169, 170, 36 P.2d 445, 447, an acknowledgment was taken by an officer out of the presence of the grantor. The court held: "The deed of conveyance was not invalid between the parties thereto merely because it was not acknowledged by the grantors. The purpose of an acknowledgment to a deed is evidentiary in character and is required so as to entitle the instrument to be recorded or to render it competent evidence without further proof. 9 Cal.Jur. 113, § 18; *Gordon v. City of San Diego*, 108 Cal. 264, 41 P. 301; *Knaugh v. Baender*, 84 Cal.App. 142, 257 P. 606; section 1161, Civ.Code. The fact that the deed in this case was irregularly acknowledged out of the presence of the grantors is immaterial except for the purpose of determining whether the grantors intended to presently convey their title to the land therein described when the deed was handed to Mr. Weis for the purpose of delivering

it to the grantee. There is sufficient evidence in the record to support the finding of the court to the effect that the deed was delivered by the grantors for the purpose of conveying title to the property without any condition or contingency attached thereto, and that the delivery of the deed was absolute." (See, also, 1 Cal.Jur.2d § 28, p. 500.)

[7] Rule 14 of the Standard Form of Arbitration provides that the award shall be delivered simultaneously to each party. Mr. Young's affidavit shows that shortly before 4 p. m. on October 2nd, he received the award which had been signed and acknowledged by Mr. Ziemann; that shortly thereafter he received a phone call from plaintiff's attorneys and that he had his secretary dictate the award to the attorneys' secretary; that thereafter he called defendant's attorney and announced that the award had been signed by him and Mr. Ziemann; that thereafter a copy of the award was delivered to Mr. McKittrick and the original mailed to defendant's attorney. It appears, therefore, that each party was notified at the earliest possible opportunity and as nearly simultaneously as could be expected. Rule 14 was substantially complied with.

[8] It is next contended that Mr. Young was guilty of misconduct in refusing Mr. McKittrick's motion to reopen for the purpose of producing additional evidence. Rule 11 of the Standard Form provides that "The hearing may be reopened at any time before the award is required to be made at the discretion of the arbitrators or upon the request of a party for good cause shown." After Mr. Young had disclosed his tentative opinion, Mr. McKittrick asked for a continuance until the next day to give him an opportunity to consult with "his people." At the time set for the continuance, he moved to reopen. He made no offer of proof by affidavit. Rule 11 leaves the matter of reopening to the discretion of the arbitrators, or a majority thereof, and plaintiff has not shown what competent and material evidence was excluded by reason of the denial of its motion, *Moore v. Griffith*, 51 Cal.App.2d 386-389, 124 P.2d 900, or that

Mr. Young and Mr. Ziemann were guilty of an abuse of discretion.

[9,10] Plaintiff contends that the decision is arbitrary, harsh and inequitable; that it is contrary to law; and that it is not co-extensive with the issues submitted. The merits of the controversy between the parties are not subject to judicial review. *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal.2d 228, 233, 174 P.2d 441; *Kerr v. Nelson*, 7 Cal.2d 85, 59 P.2d 821; *Loving & Evans v. Blick*, 33 Cal.2d 603, 204 P.2d 23; 5 Cal.Jur.2d § 52, p. 120.

It was held in *Crofoot v. Blair Holdings Corp.*, 119 Cal.App.2d 156, 165, 260 P.2d 156, 160, that "The opinion and award of the arbitrator are the sole guide to the evidentiary facts upon these appeals. The court is not called upon to review the evidence produced before the arbitrator, and such is not included in the record on appeal. The record consists of the opinion and award of the arbitrator, of the pleadings in the various court actions, and the proceedings upon confirmation of the award."

The "*Opinion of the Chairman, Board of Arbitration*" sets forth the issues and result as follows: "Griffith Company, a corporation, hereinafter referred to as the Contractor, entered into an agreement with San Diego College for Women, a corporation, hereinafter referred to as the Owner, on July , 1950, whereby the Contractor agreed to furnish labor and materials for the purpose of constructing a College for Women in the City of San Diego. Under the agreement work was to begin on August 1, 1950, and the construction was to be substantially completed by September 1, 1951. The Contractor agreed to perform its services for the cost of the work and materials furnished, plus a 3 per cent fee, the total price not to exceed \$2,995,000. The project was actually not completed until October of 1952, about 14 months beyond the contractual termination date, and the Contractor's records indicate that the cost for labor and materials exceeded the contract price, plus authorized extras, in the sum of \$152,239.58. In this proceeding the Contractor alleges that the Owner's delay in furnishing de-

tailed drawings was the sole cause for the over-all delay in completing the job, and resulted in damage to the Contractor in the amount expended in excess of the contract price, plus profit, in the sum of \$108,190.37, or total damages in the sum of \$260,429.95.

"The evidence discloses that the owner requested several contractors to bid on the job and that Griffith Company submitted the lowest bid. However, the total amount of the Griffith bid exceeded the Owner's budget, and the Owner through its Architect, conferred with Griffith Company for the purpose of eliminating certain items in order to reduce the total cost of the job. After a figure had been reached, which was agreeable to the Owner, the Architect prepared an addendum to the specifications setting forth the changes that were to be made. On page 1 of addendum 3, it is provided that:

"Original plans will be revised to incorporate the above changes.' Both the Owner and the Contractor were fearful that certain materials might not be available unless the job was begun immediately because of the Korean war which had just begun. Consequently, the Contractor agreed to go ahead and start the work without waiting for final working drawings incorporating the changes that were made with the understanding that the drawings would be provided during the progress of the work. The Owner offered evidence to prove that the Architect had informed the Contractor that the working drawings would not be completed for six months. This, the Contractor denies. Article 3 of the contract provides that:

"The Architect shall furnish with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work.'

"Actual construction on the job site began on August 8, 1950. A carpenters' strike prevented the Contractor from obtaining skilled carpenters until September 7, 1950. The Contractor introduced evidence to prove that because of delays in obtaining plans the work progressed very slowly during the first four months of the building operation. Consequently, on December 12,

1950, the Contractor wrote to the Architect complaining of these delays and, among other things, stated:

"Lack of plans and information will require us to take more than three months to do work which normally should require three weeks.

"* * * This type of operation is expensive and accomplishes little. * * *

"At the present time lack of plans and information prevents us from starting any other units. * * *

"In this letter the Contractor requested a conference with the Owner, and such a conference was subsequently held. The subject matter of that conference is in dispute but, thereafter, and on December 18, 1950, the Architect wrote to the Contractor and stated that he believed that the conference had answered the problems raised in the letter of December 12. On December 19, 1950, the Owner granted the Contractor a three months' extension of time within which to complete the project. It should be noted no increase in contract price was demanded or received by the contractors at the time this Change Order was formalized.

"The Contractor's evidence indicates that the job was delayed throughout its entire life because of the Owner's failure to promptly furnish plans and information necessary to the Contractor. Some 52 Change Orders were executed, but these are not included in the Contractor's claim since prices were adjusted at the time each Change Order was executed. No evidence was introduced indicating the Contractors requested time extensions by reason of the changes, with the exception of Change Order No. 3 extending the contract time to December 1, 1951. No evidence was introduced indicating the Contractors were not satisfied with the various Change Order monetary increases. No evidence was introduced indicating the Contractors requested a Change Order for the delays caused by the late delivery of plans and details during the construction period of the contract.

"The Owner has introduced evidence to prove that many other factors, such as labor

disputes, material shortages, contractor delays, etc., contributed to the over-all delay of the job. The Chairman of the Board is of the opinion that all of these factors contributed in some degree to delay the job.

"It is the Chairman of the Boards conclusion that the Contractor may not recover because, First, it did not comply with the provisions in the contract pertaining to the filing of claims, and, Second, he is unable to ascertain what proportion of the costs, over and above the contract price, is attributable to the Owner's neglect, and what proportion is attributable to other factors.

"First, he decides that Article 16 of the contract has no application to these proceedings. That article is limited to claims for extra costs caused by positive instructions, not by the failure to give instructions. Article 31 of the contract does apply. It provides that either party shall be reimbursed for damages caused by the

"'wrongful act or neglect of the other party, or of anyone employed by him,

"'Claims under this clause shall be made in writing to the party liable within a reasonable time at the first observance of such damage, and not later than the time of final payment.

* * *

"The letter of December 12, 1950, does indicate dissatisfaction with the manner in which plans were furnished. The letter also indicates that 'this type of operation is expensive and accomplishes little.' But the letter does not specifically register a claim. It requests a conference. Immediately after the conference a three month extension of time was granted, with no increase in contract price, and at least to some degree, this extension of time was predicated upon the carpenters' strike over which the Owner, of course, had no control. Thereafter, no further written notice was given by the Contractor either to the Architect or to the Owner directly. There is evidence to indicate that many oral complaints were made, but it is not unusual in a large construction operation for both the Architect and the Contractor to orally complain to one another about the progress of some of the

work. In the opinion of the Chairman of the Board such oral complaints would not put the Owner on notice of the fact that his actions were causing excessive costs which would result in the assessment of damages against him. The purpose of Article 31 is to give the Owner notice so that he may change his course of conduct if, in fact, that course of conduct will result in additional costs. I believe that the Owner never had this opportunity in this case.

"Moreover, the Contractor agreed to start the operation without the customary working drawings usually available at the outset of a job. There was bound to be some delay because of this and, hence, the mere fact that the job was being delayed would not in itself give the Owner notice that his activities might be contributing to that delay.

"But irrespective of the question of liability, *we could not award damages in this case because the Contractor has not established what proportion of the total damages were due to the failure of the Owner to promptly furnish plans.* As I understand the law, this Board is not empowered to arbitrarily assess damages. Article 1(g) of the contract provides that:

"The law of the place of the building shall govern the construction of this contract."

"Section 3300 of the California Civil Code provides that:

"The measure of damages for the breach of an obligation arising from contract * * * is the amount which will compensate the party aggrieved for all the detriment *proximately caused thereby*, or which in the ordinary course of things, would be likely to result therefrom." (Emphasis supplied).

"Section 3301 provides:

"No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and *origin*." (Emphasis supplied).

"In the case of *Austin v. Roberts*, 130 Cal.App. 328, 333, 20 P.2d 97, 99, the Court stated:

"Conceding that plaintiff suffered a loss of profits, there is no evidence showing what part of that loss was caused by the wrongful acts of any of the defendants and what part was caused by the sale of [his property]

* * *. The burden of making the proof rested on the plaintiff.' See also, J. J. Kelly Co. v. United States, 1947, 69 F.Supp. 117, 118, 107 Ct.Cl. 594.

"As a matter of fact Chairman of the Board concludes that the execution of 52 Change Orders caused some delay. We also conclude that certain labor disputes, material shortages, difficulties with suppliers, and contractor delays contributed to some extent in the over-all delay in completing the job. Since I was unable to ascertain what portion of the over-all delay is attributable to these various factors I am unable to determine the Contractor's damages, if any.

"The Chairman of the Board, therefore, recommends this Board decide in favor of the defendant, San Diego College For Women, and against the plaintiff, Griffith Company. Both parties shall pay their costs and Attorneys' fees." (Emphasis added.)

This opinion was signed by Mr. Young and concurred in by Mr. Ziemann. The award followed the recommendation of the opinion.

It is at once obvious from a reading of the chairman's opinion that it is not "arbitrary, harsh and inequitable" any more than any other decision is so to the losing party. The decision is argued to be contrary to law in that Mr. Young's opinion sets forth that he was unable to ascertain what proportion of the damages was attributable to defendant's fault and that he was therefore unable to determine the damages proximately caused thereby to plaintiff.

[11] In Sapp v. Barenfeld, supra, 34 Cal.2d 515, 523, 212 P.2d 233, 239, we held: "Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in

a judicial action. Gerdetz v. Central Oregon Irr. Co., 83 Or. 576, 580, 163 P. 980; Everett v. Brown, 120 Misc. 349, 198 N.Y.S. 462, 465; Koepke v. E. Liethen Grain Co., 205 Wis. 75, 80, 236 N.W. 544. The claim must be expressly raised at some time before the award." The arbitrators in the instant case were not specifically required to act in conformity with other than the "prevailing arbitration law." In Crofoot v. Blair Holdings Corp., supra, 119 Cal. App.2d 156, 189, 260 P.2d 156, 174, it was held: "Even if the arbitrator decided this point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts." It appears, however, from Allen v. Gardner, 126 Cal.App.2d 335, 340, 272 P.2d 99, 102, that the chairman did not commit an error of law. It was there said: "Uncertainty as to the fact of damage, that is, *as to the nature, existence or cause of the damage, is fatal.*" (Emphasis added.) The chairman's opinion specifically sets forth the finding that plaintiff had not established what proportion of the total damages were due to the fault of the defendant. It appears therefore that the nature, existence or cause of the damage was uncertain.

[12] Plaintiff's contention that the award was not co-extensive with the issues submitted is also without merit. It appears from the record (Mr. Young's affidavit of November 6, 1953) "That said board of arbitrators heard and determined (adversely to defendant) objections to the statement of issues presented by plaintiff on May 20, 1953, and heard and considered plaintiff's evidence in said matter on June 15th, June 22nd, June 23rd and June 24th, and defendant's evidence on July 13th, July 14th, July 15th and July 16th. * * *" Plaintiff's contention appears to be an attempt to re-argue the issues and the evidence. As we have heretofore stated, the merits of the controversy between the parties are not subject to judicial review. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., supra, 29 Cal.2d 228, 233, 174 P.2d 441. "It must be presumed 'That all matters within * * * a submission to arbitration were laid be-

fore the arbitrators and passed upon by them". § 1963, subd. 18, Code Civ.Proc." Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d 156, 192, 260 P.2d 156, 175. Further, "Under the 1927 statute, it is well settled that both before the superior and appellate courts every intendment of validity must be given the award and that the burden is upon the one claiming error to support his contention. Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 207 P.2d 647." Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d at page 185, 260 P.2d at page 171.

[13] There is no merit to plaintiff's contention that the award was not that of the arbitration panel but of Mr. Ziemann. It is true that Mr. Ziemann, being an attorney, prepared the formal award but that award merely followed the opinion prepared by Mr. Young in which Mr. Ziemann concurred. It follows, therefore, that the award was that of a majority of the board of arbitration.

Other contentions made by plaintiff do not merit discussion.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

EDMONDS, Justice (dissenting).

To me, the record in this case compels the conclusion that the arbitration proceeding was not the full and fair and unbiased hearing to which the parties were entitled under the fundamental principles of fair trial. To hold that one arbitrator, unknown to his associates, may seek the advice of an attorney and then use the opinion prepared by that attorney as the award of the arbitrators violates every principle of fair trial. If arbitration is to have the place in the administration of justice to which it is entitled, it must be conducted in accordance with the same rules of law which apply to judicial proceedings, insofar as the integrity of decision is concerned.

The identity of the consulting attorney has never been disclosed. For all that ap-

pears, he may have been a partisan who acted with entirely improper motives. Secret consultation by a judge with a lawyer who prepared his opinion for him would meet with the unqualified disapproval of bench and bar. I see no difference between that situation and the one shown in this case.

For these reasons and those stated by Mr. Justice Ashburn in the opinion upon which the District Court of Appeal set aside the award, 280 P.2d 203, I would make the same order.

Rehearing denied; EDMONDS, J., dissenting.



45 Cal.2d 524

Harriet Jane BERTCH, Kathryn L. Brooke, Alfred A. Cheney, Andy T. Cope, Frankie May Cope, Robert Vern Crooks, Carrie N. Crooks, Myrtle Everett, William Guy, Sophia A. Hall, Maude D. Harrel, Edward Loftus, Louise Mackay, Cornella G. Mattox, Laura Petersen, David L. Robinson, Lillian G. Robinson, Minnie E. Schroder, Eda Strever, Annie Laurie Stewart, Theresa F. Tembreull, and Lillian Wells, Petitioners and Appellants,

v.

SOCIAL WELFARE DEPARTMENT of the State OF CALIFORNIA, Respondent.
S. F. 19232.

Supreme Court of California.
In Bank.

Nov. 15, 1955.

Rehearing Denied Dec. 14, 1955.

Proceeding upon petitions for benefits under the Old Age Security Act. The Social Welfare Board denied benefits, and petitioners sought writ of mandamus to review Board's administrative order. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., denied petition, and petitioners appealed. The Supreme Court, Carter, J., held that petitioners, who possessed the age and residence requirements for benefits under the Old Age Security Act, who, as members of a religious society, gave all their worldly pos-

sessions to the society to promote its objective, and who received \$16 to \$18 per month in food, clothing, and medicine from society which was not obligated to so provide for them, were "needy persons" under the Act.

Judgment reversed.

Schauer and Shenk, JJ., dissented.

Opinion, 276 P.2d 891, vacated.

1. Administrative Law and Procedure Ⓒ5

Statute pertaining to application of administrative adjudication provision of the Government Code is applicable only when made applicable by statutes relating to particular agency involved. West's Ann.Gov. Code, § 11501.

2. Social Security and Public Welfare Ⓒ68

In determining whether petitioners were "needy" persons within provisions of the Old Age Security Act, procedure set forth in the Welfare and Institutions Code, rather than that in Government Code, was properly followed. Welfare and Institutions Code, §§ 104.1 to 104.3, 104.5, 104.5(c), 1624, 1625, 2160, 2181.1, 2304, 2305, 2355, 2356; West's Ann.Gov.Code, §§ 11501, 11517(b, c).

3. Constitutional Law Ⓒ318

Where, in proceeding upon applications for old age security benefits, petitioners were given full opportunity to be heard before the hearing officer whose report was then reviewed by State Social Welfare Board, there was not a denial of procedural due process of law, even though decision was not made by those who had heard the evidence. West's Ann.Gov.Code, § 11517(b, c).

4. Social Security and Public Welfare Ⓒ83

Petitioners, who sought old age security benefits, were not possessed of a vested right, but of right to make application for such benefits provided they were able to comply with statutory prerequisites therefor, and, therefore, were not entitled to trial de novo in superior court following denial of their petitions by the Social Welfare Board. Welfare and Institutions Code, § 2160 et seq.

5. Social Security and Public Welfare Ⓒ51

Petitioners, who possessed the age and residence requirements for benefits under the Old Age Security Act, who, as members of a religious society, gave all their worldly possessions to the society to promote its objective, and who received \$16 to \$18 per month in food, clothing, and medicine from society which was not obligated to so provide for them, were "needy persons" under the Act. Welfare and Institutions Code, §§ 2010, 2020, 2160(a-c, e-g), 2160.5, 2163 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Needy Persons".

6. States Ⓒ119

Grant of old age benefits to petitioners who would turn over part of grant to religious society of which they were members would not constitute unconstitutional gift of public money to a religious sect. Welfare and Institutions Code, §§ 2010, 2020, 2160(a-c, e-g), 2160.5, 2163 et seq.

7. Social Security and Public Welfare Ⓒ84

Determination of question of need in proceeding upon application for benefits under the Old Age Security Act is one of fact for Social Welfare Board, but Board must act in accordance with statutory definitions set by Legislature for the standard of need. Welfare and Institutions Code, §§ 2010, 2020, 2160(a-c, e-g), 2160.5, 2163 et seq.

Howard B. Crittenden, Jr., San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

CARTER, Justice.

This is an appeal from a judgment of the superior court denying a petition for a writ of mandate to review an administrative order of the State Social Welfare Board.

Appellants, at all times here pertinent, have been and are members of a religious

society named Christ's Church of the Golden Rule. The members of the church live together in a seminary or home owned by the church, located in the City and County of San Francisco, and share with each other everything they possess. In the petition it is alleged that they receive the necessities of life to the extent of an average of \$17 per month from the religious society although the society is not obligated to so provide such necessities. Appellants were in residence at the seminary at the time they applied for Old Age Security benefits which were denied. (One of the original petitioners left the church and is now receiving benefits under the Old Age Security Act.) Petitioners then applied for aid to the boards of supervisors of the various counties from which they came, under the procedure set forth in the Welfare and Institutions Code, and from the denials thereof, each petitioner filed an appeal with the Social Welfare Board, Welf. & Inst. Code, § 2181.1. The board appointed a referee to hear the appeals. A hearing was had at which petitioners were represented by counsel. The referee submitted his findings to the board; the board denied the appeals. Petitioners then filed a petition for a writ of mandate in the Superior Court of the City and County of San Francisco, seeking a review of the matter both as to the law and the facts.

The basic question involved on this appeal is whether or not petitioners are "needy" persons within the provisions of the Old Age Security Act. It is conceded that they all possess the age and residence qualifications set forth in section 2160 of the Welfare and Institutions Code. Before discussing the question of the need of petitioners, however, several preliminary matters must be first disposed of.

[1,2] Petitioners argue that certain findings of the hearing officer were changed by the board without notice to them or an opportunity for them to be heard. They point to no specific finding which was changed. Petitioners contend the procedure outlined in section 11517(b, c) of the Government Code should have been followed;

the board contends that the procedure set forth in sections 104.1, 104.2, 104.3, and 104.5 was the proper method. Preliminarily, it should be noted that section 11501 of the Government Code provides: "*Extent to which procedure conducted pursuant to chapter: Agencies included.* (a) The procedure of any agency shall be conducted pursuant to the provisions of this chapter only as to those functions to which this chapter is made applicable by the statutes relating to the particular agency." (Emphasis in body of statute added.) As "included agencies" are set forth the Department of Social Welfare and the Social Welfare Board. It is our opinion that the board's contention that the section means it is to apply only when made applicable by the statutes relating to the particular agency involved is meritorious. In different sections of the Welfare and Institutions Code, the provisions of the Government Code are made directly applicable (see sections 1624, 1625, 2304, 2305, 2355, 2356, all of which relate to permits or licenses or revocation thereof, or supervision of life-care contracts). It appears then that the board is correct in its contention that sections 104.1 et seq. of the Welfare and Institutions Code contain the controlling procedure.

Section 104.1 provides in part that any applicant or recipient for aid who is dissatisfied with the action of the county board of supervisors "shall * * * upon filing a petition with the State Department of Social Welfare, have the right of appeal and shall be accorded an opportunity for a fair hearing. The department shall set such appeal for hearing before the State Social Welfare Board and shall give all parties concerned written notice of the time and place of such hearing." The applicant is to appear in person either with or without counsel of his choice; the board is to consider the appeal and either dismiss it or award aid in compliance with the terms of the code. Section 104.2 provides that if such an applicant feels aggrieved by any decision of the board, he may petition the superior court of the county of his residence for a "review of the entire proceed-

ings in the matter, *upon questions of law involved in the case*. Such review, if granted, is a distinct and cumulative remedy. The State Social Welfare Board shall be the sole respondent in such proceedings." (Emphasis added.) Section 104.5(c) provides: "[*Referee's report: Final decision.*] If an appeal, hearing, or rehearing is not heard by the board, a report of the proceedings shall be prepared by the referee conducting it and the report, together with any data the party appealing may desire, shall be presented to the board for final decision. Only the board may make such final decision."

Under section 11517(b) and (c) of the Government Code, if the proposed decision of the hearing officer is not adopted by the agency, "The agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. * * * The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself no agency member may vote unless he heard the additional oral evidence."

[3] Petitioners contend that "unless he who hears decides", *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, there has been a denial of due process of law. In *Leeds v. Gray*, 109 Cal.App.2d 874, 242 P.2d 48, the petitioner was a referee of the Unemployment Insurance Appeals Board; charges were preferred against him. He had a hearing before a hearing officer at which no board member was present. The hearing officer made no findings, no decision or recommendation. The Personnel Board reviewed the transcript of the proceedings and made certain findings, after which he was ordered demoted. The court there said in holding there had been no denial of due process: "Petitioner, of course, was entitled to a fair and full hearing. The fact that a fact finding tribunal does not see or hear the wit-

nesses does not in every instance constitute a denial of such hearing. For example, many court proceedings are determined upon affidavits. There the court neither sees nor hears the witnesses. A fair and full hearing is given where the fact finder fully reviews the record and an opportunity is given the parties to argue their contentions as to the credibility of the witnesses and the other matters involved in the proceeding. This was done in our case by briefs. It is true that no proposed findings or decision were submitted to the parties and no opportunity given to argue concerning them, but where the board itself is passing on the record, fully considers it and the arguments presented, on the merits, there is no requirement that the board permit further argument on its proposed findings and decision, and no logical reason therefor." 109 Cal.App.2d at pages 883, 884, 242 P.2d at page 54. See, *California Shipbuilding Corp. v. Industrial Acc. Comm.*, 27 Cal.2d 536, 165 P.2d 669; *Cooper v. State Board of Medical Examiners*, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593. It would appear that under the situation here present where petitioners were given a full opportunity to be heard before the hearing officer whose report was then reviewed by the board, there was no denial of procedural due process of law.

[4] Petitioners next argue that they should have been given a trial de novo in the superior court. In other words, it is contended that the trial court should have based its decision on the facts as well as the law. Petitioners rely upon *Laisne v. California State Bd. of Optometry*, 19 Cal.2d 831, 123 P.2d 457, and *Drummey v. State Board of Funeral Directors*, 13 Cal.2d 75, 87 P.2d 848, for the proposition that in reviewing an order of a statewide administrative agency, the superior court must exercise its independent judgment on the law and the facts where constitutional rights are involved. The *Drummey* and *Laisne* cases stand for the rule that an "existing valuable privilege" may not be taken away by an administrative order without giving the person so deprived the opportunity of having the finality of such action passed up-

by a court of law, 13 Cal.2d 75, 84, 87 P.2d 848, 853. Petitioners here were not possessed of a vested right, but the right to make application for old age benefits provided that they were able to comply with the statutory prerequisites therefor, Welf. & Inst. Code, § 2160 et seq. It would appear, therefore, that petitioners were not entitled to a trial de novo in the superior court.

Petitioners' major contention is that they are deprived of old age benefits by reason of their membership in Christ's Church of the Golden Rule and that such deprivation is a denial of freedom of religion and a denial of equal protection of the laws within the meaning of both the federal and state Constitutions.

The Social Welfare Board found that when petitioners joined the church they gave up all their worldly possessions to promote its objects; that they have performed duties imposed upon them as such members, and that petitioners received "full, complete, and adequate support from said" church; and "That to the extent that any of the appellants were in need within the meaning of the Old Age Security Law, they were so as a result of a continuing voluntary acceptance of lower standards of living in accordance with their adherence to the precepts of Christ's Church of the Golden Rule and their entrance into 'the religious apostolic society form of living.'" Finding VI is "That all or a major portion of any grant of Old Age Security made to the appellants would not be devoted to meeting their individual and personal needs as those needs are defined by the Welfare and Institutions Code and the Manual of Policies and Procedures of the State Department of Social Welfare, but would, on the contrary, be devoted systematically and continuously to the advancement of the objectives of Christ's Church of the Golden Rule." Finding VII is "That none of the appellants is or since January 20, 1948, has been under any so-called 'life care' contract whereby gifts or transfer of property were made to be used for the support, maintenance, or care of the donor thereof."

We said in *County of Los Angeles v. La Fuente*, 20 Cal.2d 870, 875, 129 P.2d 378, 381, that the "'need' of the applicant necessary to qualify for the benefits of the law is defined by the Legislature to be the absence of actual receipt of support by the applicant from responsible relatives and by the property limitations of the law." Let us then look to see how the law defines "need."

Section 2160, subdivisions (a), (b), (c), sets forth the age and citizenship and residence requirements which are not here involved or questioned. Section 2160(e) provides in part: "Persons who are inmates of a boarding home or other institution not supported in whole or in part by public funds shall be granted aid but no such aid shall be granted if such persons are cared for under a contract for a period of time exceeding one month; * * *." Subsection (f) provides that aid shall be granted to such an aged person "Who is not receiving adequate support from a husband or wife, or child able and responsible under the laws of this State to furnish such support; free board and lodging supplied to an applicant, because of his necessity, by a friend or relative who is not responsible for his support, shall not be grounds for refusing aid"; subsection (g) provides that aid shall be granted to such an aged person "Who has not made any voluntary assignment or transfer of property *for the purpose of qualifying for such aid.*" (Emphasis added.) Section 2160.5 provides: "Notwithstanding any provision of subdivision (e) of Section 2160 to the contrary, aid shall be granted to any person who is an inmate of a home or institution maintained by any fraternal, benevolent, or other nonprofit organization if the organization has not been paid for the life care and maintenance of the person through assessment of or dues of said inmate or otherwise, whether or not the person has agreed or promised to pay for his maintenance in the event that he receives any pension, bequest, devise, or other inheritance.

"The county from which such inmate came to such home shall, for the purposes of this section, be considered the residence of such inmate to grant such aid."

Sections 2163 et seq. set forth the amount of personal property which may be owned by persons otherwise eligible for aid and the valuation of real property which if owned would render such persons ineligible for aid. Section 2010 provides that "No question, inquiry, or recommendation under the authority of this chapter or the rules of the State Department of Social Welfare shall relate to the political or religious opinions or affiliations of any person, and no grant or denial of aid under this chapter shall be in any manner affected or influenced by such opinions or affiliations." A specific finding was made to the effect that this section had not been violated by county or state officials.

Section 2020 provides that "The amount of aid to which any applicant shall be entitled shall be, when added to the income (including the value of currently used resources, but excepting casual income and inconsequential resources) of the applicant from all other sources, seventy-five dollars (\$75) per month. If, however, in any case it is found the actual need of an applicant exceeds seventy-five dollars (\$75) per month, such applicant shall be entitled to receive aid in an amount, not to exceed seventy-five dollars (\$75) per month, which when added to his income (including the value of currently used resources, but excepting casual income and inconsequential resources) from all other sources, shall equal his actual need."

There is no finding that petitioners made any voluntary assignment or transfer of property for the purpose of qualifying for old age assistance, Welf. & Inst. Code, § 2160(g); there is no finding that petitioners are disqualified by reason of owning either personal or real property in excess of the statutory valuations. The finding that petitioners are receiving *full, complete and adequate support from their church (if material)* must be examined in the light of the record which shows that they each receive from \$16 to \$18 per month in food, clothing and medicine. This is not denied by the board. The finding that any grant of old age security benefits would not be devoted to the personal needs of the applicants

but to the work of the church (*if material*) does not appear to be supported by the record: many testified that they needed clothing, or medicine, or proper food, or special diets, or dentures, hearing aids, etc. which they were not receiving from the church. We find nothing in the record, nor does the board point to any provision in the Welfare and Institutions Code which places any limitation on the use for which, or to which, money received under the act must be put. As a matter of fact, the board's Manual of Policies and Procedures, section A 140, provides: "No provision of the O. A. S. Law requires or purports to require that income received by any person, whether a recipient of aid or one who has been a recipient of aid, shall be expended by that person for particular purposes or in particular amounts." If the applicants are otherwise qualified for benefits under the act, it would appear completely immaterial and irrelevant for what the money is spent. If they choose to turn it over to a religious institution in return for which they receive care at a lower level than if all the money were spent for food, clothing and the like, is the board to place a monetary value on the satisfaction such applicants may receive in having their spiritual needs fulfilled? If an applicant receives \$75 per month and gives \$50 of it each month to the Catholic or any protestant church, is the aid to cease because considered unnecessary? We would think not.

[5] Petitioners are under no contract for life care with the Church of the Golden Rule; they are free to leave the church whenever they desire. The seminary in which they live is not supported in whole or in part with public funds. It appears to us that as a matter of law, petitioners come directly within the provisions of section 2160.5 which provides that aid shall be granted to any person who is an inmate of a home or institution maintained by any benevolent "or other non-profit organization if the organization has not been paid for the life care and maintenance of the person through assessment of or dues of said inmate or otherwise, whether or not the person has agreed or promised to pay

for his maintenance in the event that he receives any pension, bequest, devise, or other inheritance." In addition, they are not receiving assistance from any legally responsible relative, Welf. & Inst. Code, § 2160(f).

The board makes much of the fact that when the church corporation was organized in 1944 as a nonprofit organization, all members turned over all their property to the corporation which purchased various business organizations therewith in which all members able to work were required to do so. This corporation went through bankruptcy in 1945. In 1946, some of the original members, including petitioners, organized a "nonincorporated association" and had released to themselves certain of the commercial projects which had been operated by the bankrupt corporation. It is apparently the board's position that the income from the various enterprises is sufficient to support, adequately, the petitioners. A complete answer to this contention is that whether or not \$16 or \$18 per month is adequate support, *the church is not obligated to provide it.* The code, Welf. & Inst. Code, § 2160, provides that "Aid shall be granted under this chapter to any person * * * (f) Who is not receiving adequate support from a husband or wife, or child able and responsible under the laws of this State to furnish such support; free board and lodging supplied to an applicant, because of his necessity, by a friend or relative who is not responsible for his support, shall not be ground for refusing aid." (Emphasis added.) As we said in the La Fuente case, 20 Cal.2d 870, 875, 129 P.2d 378, 381, " * * * the 'need' of the applicant necessary to qualify for the benefits of the law is defined by the Legislature to be the absence of actual receipt of support by the applicant from responsible relatives and by the property limitations of the law." We also said, 20 Cal.2d at page 876, 129 P.2d at page 381, "Both the letter and the spirit of the Old Age Security Law clearly show that only the receipt of support from responsible relatives should render the applicant ineligible for benefits under it."

[6] The board argues that if old age benefits are paid to these petitioners it would be, in fact, a grant of aid to a religious sect and unconstitutional as a gift of public funds. We held in *County of Los Angeles v. La Fuente*, supra, 20 Cal.2d 870, 876, 877, 129 P.2d 378, that the care and relief of aged persons who are in need is a special matter of state concern and that the enactment of the Old Age Security Law, based upon a broad social policy, did not constitute a gift of public money within the constitutional prohibition.

[7] The board argues that the question of "need" is one of fact for the board and cites *Newbold v. Social Welfare Board*, 76 Cal.App.2d 844, 174 P.2d 482, and *Kelley v. State Board of Social Welfare*, 82 Cal.App.2d 627, 186 P.2d 429, in support of the statement. With this statement there can be no argument. However, the Legislature has seen fit to set the standard of need and the board must act in accordance with the statutory definition. We have heretofore discussed the statutory requirements to be met by persons applying for old age assistance and it appears to us that petitioners, so far as can be ascertained, meet those requirements.

It is our opinion that the findings that petitioners are receiving adequate support from Christ's Church of the Golden Rule and that they are in need because of their "voluntary acceptance of the lower standards of living" prescribed by the church, as well as the finding that all, or a major portion, of any aid received would be devoted to the church are immaterial when considered in the light of the applicable statutes as heretofore set forth and discussed.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

The majority opinion concedes, as it must, that "the question of 'need' is one of fact for the board [Social Welfare]" but avoids the board's finding by holding that

"the Legislature has seen fit to set the standard of need" and that petitioners as a matter of law come within the prescribed standard. Certainly I agree that the Legislature has, within limits, set the standard, but in respect to the fact question as to whether the petitioners, upon the record, *as a matter of law* fall within that standard, I agree with the Social Welfare Board and with the superior court rather than with the majority. In my view the majority opinion unduly extends the concept of "need" which is basic to the philosophy and required by the letter of the statutes governing the granting of old age security. The opinion relies, among other things, upon isolated statements from County of Los Angeles v. La Fuente (1942), 20 Cal. 2d 870, 129 P.2d 378, a case which dealt with a situation materially different from that presented here, and which is herein-after discussed.

The law which provides for the payment of aid by the state to the aged has since its inception been based upon the concept of need. It was provided by Stats.1929, ch. 530, p. 914, § 1, as it is now provided by section 2001 of the Welfare and Institutions Code, that residents of the state are entitled to aid in old age "if in need." The petitioners here, according to the findings of the State Social Welfare Board, and of the superior court, are not in need. In accord with their beliefs they have transferred all their property to Christ's Church of the Golden Rule. They all perform tasks, according to their abilities, at the theological seminary. In accord with the canon law of the church, "As the material needs of the various persons and their families and dependents must of necessity be met to permit these persons to dedicate their work, services, and studies to carry out the religious purposes of the ecclesiastical society, the religious apostolic society form of living is selected as the means to accomplish these results * * *" and "The ecclesiastical Church Government shall determine how much is necessary for the common community treasury to carry out the religious purposes through the apostolic society form of living." The petitioners subscribe to these tenets.

The board has further found that petitioners "are now receiving, full, complete, and adequate support including incidental expenses from said Christ's Church of the Golden Rule, of which they are members, through the Elected Delegates Committee, a temporal agency of said Christ's Church of the Golden Rule in accordance with their needs as they and the said Christ's Church determined them to exist"; "That to the extent that any of the appellants were in need within the meaning of the Old Age Security Law, they were so as a result of a continuing voluntary acceptance of lower standards of living in accordance with their adherence to the precepts of Christ's Church of the Golden Rule and their entrance into 'the religious apostolic society form of living'"; and "That all or a major portion of any grant of Old Age Security made to the appellants would not be devoted to meeting their individual and personal needs as those needs are defined by the Welfare and Institutions Code and the Manual of Policies and Procedures of the State Department of Social Welfare, but would, on the contrary, be devoted systematically and continuously to the advancement of the objectives of Christ's Church of the Golden Rule."

It thus appears that although petitioners do not have enforceable, temporal contracts for receipt of their material needs, they do in fact, in accord with the canon law, which they continue to espouse, receive such needs.

In County of Los Angeles v. La Fuente (1942), supra, 20 Cal.2d 870, 129 P.2d 378, this court affirmed a judgment for plaintiff county for reimbursement for old age benefits furnished to the parents of defendant. It was shown that defendant was financially able to contribute to the support of her parents. The parents had refused the child's offer to support them in her home. It was held (at page 875 of 20 Cal.2d at page 381 of 129 P.2d) that this refusal of support in the home did not render the parents ineligible for old age assistance.

In the La Fuente case it is said (as stated, in 289 P.2d 491, the majority opinion) that "the 'need' of the applicant necessary to qualify for the benefits of the law is de-

fined by the Legislature to be the absence of actual receipt of support by the applicant from responsible relatives [those who, according to law, owe a duty of support] and by the property limitations of the law" (at page 875 of 20 Cal.2d, at page 381 of 129 P.2d). But this statement should be considered in the context in which it was made; i.e., in a case where this court was considering, in effect, whether aged parents should be deprived of old age assistance because they preferred to maintain their own home with such aid rather than to be forced to accept the offer of an inharmonious residence with their child. If the quoted statement from the La Fuente case is read literally out of context, then every aged person in the state who has no relatives liable for his support, and whose property is less than that stated in sections 2163 and 2164 of the Welfare and Institutions Code, is entitled to old age assistance regardless of his income. Such is not the law. (See Welf. & Inst. Code, § 2020: "The amount of aid to which any applicant shall be entitled shall be, when added to the income (including the value of currently used resources, but excepting casual income and inconsequential resources) of the applicant from all other sources, eighty-five dollars (\$85) per month. If, however, in any case it is found the actual need of an appellant exceeds eighty-five dollars (\$85) per month, such applicant shall be entitled to receive aid in an amount, not to exceed eighty-five dollars (\$85) per month, which when added to his income (including the value of currently used resources, but excepting casual income and inconsequential resources) from all other sources, shall equal his actual need.") Thus "actual need" and "income * * * from all other sources" are elements integral to the legislative plan; be-

ing integral to the plan, it seems essential that the agency charged with its administration shall have power within the scope of the plan to make the practical factual determinations incidental to its application.

Some argument has been advanced to the effect that petitioners are being deprived of a right to dispose of their state aid as they may see fit. There is such holding either by the administrative agency or the superior court. The argument begs the question by assuming that petitioners are entitled as a matter of law to receive the aid. Until and unless they become entitled to receive it, they should not be heard to argue a right to dispose of it. We therefore need not consider an opposing argument suggesting the profits which might be garnered by a smooth-talking promoter who under the guise of religious, political or social theme could sell old persons on a plan of contributing \$85 a month to the "Master," together with such personal services as they were able to render, all for a roof and keep on frugal scale.

These petitioners have elected to live modestly in their communal, religious fashion; they are enjoying the material, social and spiritual compensations which they find therein. In my view, the finding of the board, in substance, made on substantial evidence, that they have voluntarily accepted such a standard and circumstances of living as fulfilling their needs, and hence are not persons in need, is not, as held in the majority opinion 289 P.2d 491, immaterial, but is vital and determinative. I would affirm the judgment.

SHENK, J., concurs.

Rehearing denied; SHENK and SCHAUER, JJ., dissenting.

136 Cal.App.2d 759

C. O. BRAND, Plaintiff and Appellant,
v.

**MAGNOLIA MANOR, a partnership, and
Eugene M. Shidler and Frank M. Coppo, a
partnership, associated in business under
the common name and style of Magnolia
Manor, Defendants and Respondents.**

Civ. 5056.

District Court of Appeal, Fourth District,
California.

Nov. 7, 1955.

Action for breach of contract. The Superior Court, Riverside County, Russell S. Waite, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that where total cost for each item in contract and total price for entire work had been stricken, and no substitutions were made, although the unit prices of the various items were altered and new prices substituted, evidence supported findings that defendant had paid plaintiff in full for work done by him under contract, and that it had been terminated by mutual agreement.

Judgment affirmed.

1. Statutes $\S$ 223.2(24)

Provision of Civil Code that the execution of a contract in writing, supersedes all negotiations, must be considered in connection with provisions of the Civil Procedure Code that evidence of the terms of the agreement may be received where a mistake or imperfection of the writing is put in issue by the pleadings, or the validity of the agreement is in dispute, and that the circumstances under which it was made may be shown so that the trial judge may be placed in the position of those parties whose language he is to interpret. West's Ann.Civ.Code, $\S$ 1625; West's Ann.Code Civ.Proc. $\S$ 1856, 1860.

2. Evidence $\S$ 458, 461(1), 462

Where total cost for each item and the total price for the entire work had been stricken from written contract and no substitution had been made, although the unit

prices for the various items were altered, and new prices substituted, instrument contained sufficient uncertainty and ambiguity to justify the admission of oral evidence as to the circumstances under which the changes were made, and intent and purpose of the parties with respect to the meaning of the agreement as finally approved. West's Ann.Code Civ.Proc. $\S$ 1856, 1860.

3. Contracts $\S$ 322(3), 350(3)

In action for breach of contract where total cost for each item in contract and total price for entire work had been stricken, and no substitutions were made, although the unit prices of the various items were altered and new prices substituted, evidence supported findings that defendant had paid plaintiff in full for all work done by him under contract, and that it had been terminated by mutual agreement.

Willard H. Winder, Riverside, for appellant.

S. Thomas Bucciarelli, Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action for damages. The defendants owned 60 lots of a subdivision containing 160 lots, and planned to build certain houses and eventually to build houses on the remainder of the tract. They entered into some sort of a contract with the plaintiff and his partner for certain sewer work on part or all of this tract. They built houses on the 60 lots and the plaintiff and his partner did a certain amount of sewer work, for which they were paid in full. The plaintiff brought this action claiming that the defendants had prevented him from performing the remainder of the contract, and that he had been damaged in the sum of \$3000. The plaintiff's partner refused to join him in the action.

The complaint alleged that the parties entered into a written contract on April 6, 1950, by the terms of which it was agreed that the plaintiff was to make certain sewer improvements in Magnolia Manor con-

sisting of laying 6285 linear feet of 8" sewer pipe at \$1.85 per lineal foot; installing 16 manholes at \$150 each; and laying 7,200 linear feet of 4" pipe for house connections at \$1.30 per foot; with an additional \$15 for each sewer line which was obstructed by a curb and gutter. It was further alleged that the plaintiff performed one-half of this work, was ready, willing and able to perform the remainder, but was prevented by the defendants from so doing. The written contract attached to the complaint was in the form of a "bid" dated April 6, 1950, addressed to the defendants, signed by the plaintiff and approved by one of the defendants. So far as material here, this bid refers to "Magnolia Manor Sewer Improvements" and states "I submit for your approval the price, as quoted below for the above mentioned improvements." It then lists as Item 1, 6285 lin. ft. of 8" sewer pipe at \$2.25 per lin. ft., \$14,421.25; as Item 2, 16 manholes \$160 each, \$2560; as Item 3, 7200 lin. ft. of 4" house connections at \$1.45 per lin. ft., \$10,440: total price \$27,141.25. The figure \$2.25 in the first item is struck out and \$1.85 inserted. The figure \$160 in the second item is struck out and \$150 inserted. The figure \$1.45 in the third item is struck out and \$1.30 is inserted. All of these changes are initialed by the plaintiff. The three totals for each item and the total price of \$27,141.25 are all struck out, with nothing inserted in lieu thereof.

The answer admitted that the defendants entered into a contract with the plaintiff on or about April 6, 1950, but alleged that by the terms thereof it was agreed that the plaintiff was to do so much of the sewer work on this subdivision as the defendants should from time to time request him to do; that such work was to consist of installing not more than 6285 lineal feet of sewer lines at a price of \$1.85 per linear foot, not more than 7200 feet of 4" pipe for housing connections at a price of \$1.30 per linear foot, and not more than 16 manholes at a price of \$150; that it was further agreed that said agreement could be terminated at any time, with the plaintiff being paid at the agreed rates for all work done up to that

time; that the plaintiff installed 2950 lineal feet of 8" sewer line, 3854 lineal feet of house connections, and ten manholes, for which he had been fully paid at the rates provided in the agreement; that the defendants then notified the plaintiff that they did not desire him to do any more of said work; and that the contract was then terminated, to which termination the plaintiff agreed.

The court found that all of the allegations of the defendants' answer are true; that the defendants had paid the plaintiff in full for all work done by him under the contract; that the contract was terminated by mutual agreement; that all sums due the plaintiff under the contract have been paid to him; and that the plaintiff has suffered no damages whatever. The plaintiff has appealed from the judgment which followed.

The evidence received, if admissible, amply sustains all of the court's findings. The only claim to the contrary is with respect to the finding that the contract was terminated by mutual agreement. While there was no direct evidence that the appellant agreed to such a termination after his work was done, the oral evidence disclosed that this was a part of the original agreement as made by the parties. Moreover, that finding is immaterial in view of the other findings made.

The appellant contends that the intention of the parties must be gathered from the written contract itself; that the written contract sued on is clear and unambiguous, and provides on its face for the installation of certain amounts of material at named prices, the amount due being merely a matter of computation; that under section 1625 of the Civil Code oral testimony could not be received to change the written terms of that contract; that the oral testimony supporting the findings was inadmissible; and that it follows that there is no evidence to support the findings and judgment.

[1,2] Section 1625 of the Civil Code must be considered in connection with sections 1856 and 1860 of the Code of Civil Procedure. *Greathouse v. Daleno*, 57

Cal.App. 187, 206 P. 1019. Under the latter sections, oral evidence may be received in many cases in order to show the surrounding circumstances, to the end that the trial judge may be in a position to establish the intention of the parties where that intention does not fully and clearly appear on the face of the instrument. Not only did this bid fail to set out a number of the matters which would be required in a complete contract, but it showed on its face that it had been changed by striking out certain things, only a part of which were replaced. While it purported to be submitted as a bid for "the price" of certain improvements, and originally gave a total price, the alterations made disclosed a pattern which might well indicate a contrary intention. The total cost for each item and the total price for the entire work were stricken, and no substitutions therefor were made, although the unit prices of the various items were altered, and new prices substituted. Evidence as to the circumstances and understanding of the parties in connection with these changes, as to why they were made and as to what was intended thereby, was essential in order that the intention of the parties and the meaning of the bid, as approved, could be determined. On the face of the instrument sufficient uncertainty and ambiguity existed to justify the admission of oral evidence as to the circumstances under which these changes were made, and the intent and purpose of the parties with respect to the meaning of the agreement as finally approved. *Parnell v. Stanfield*, 135 Cal.App.2d 804, 288 P.2d 118.

The appellant testified that when he delivered his bid to the respondents on or about April 6, 1950, he was told that they did not have the final profile of the sewers yet; that he went back a couple of days later and they then had the final profile; that "So we rechecked the job and changed the price, and put the lineal foot price on it, and I initialed it, each one"; and that Mr. Shidler then signed it. He also testified

that his partner was not present when the bid was signed.

[3] The testimony of the respondents was to the effect that the appellant and his partner were both present when the bid was presented, and that the changes were made at that time, before the bid was approved; that it was known to all parties that the respondents did not own all of the tract and intended to develop 60 lots only, with the hope of developing more later; that the bid was accepted on a "unit price basis"; that the bid as originally submitted covered the work on the entire 160 lots; and that the totals of the various figures were not changed because it could not be known at that time how much work would be required. The appellant's partner testified that he and the appellant entered into the agreement with the respondents with respect to this work; that he was present when the bid was presented to the respondents; that when the bid was presented there was a discussion with respect to the unit prices; that as a result of the discussion the unit prices were changed; that those changes were initialed by the appellant; that the total figures were crossed out; that "There was no use changing totals of figures because Mr. Shidler at that time didn't know how many houses he was going to build so we couldn't estimate how much work was to be done so we bid on a unit price basis"; that the understanding was that the agreement could be terminated at any time providing he and his partner were paid for the work they had already done; and that he later told his partner that he could see no basis for a suit "because all that work was based on a unit price bid." There was no evidence that the respondents built any houses other than those on the 60 lots which they originally owned. The evidence supports the court's findings with respect to the terms of the agreement that was actually made.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

136 Cal.App.2d 751

The PEOPLE of the State of California,
Plaintiff,

v.

Fred BATES, Defendant.

Cr. 5086.

District Court of Appeal, Second District,
Division 1, California.

Nov. 7, 1955.

Hearing Denied Dec. 7, 1955.

Proceeding on a petition for writ of error coram nobis. The District Court of Appeal, White, P. J., held that coram nobis was not available since the errors complained of were all correctible on appeal or motion for new trial.

Petition denied.

1. Criminal Law §997(2, 6)

Writ of error coram nobis issues to correct error of fact existing at time of trial but unknown to trial court through no fault of petitioner and which fact, had it been known, would have resulted in different judgment or would have prevented rendition of challenged judgment; but writ does not issue to correct error of law or to redress irregularity occurring at trial that could be corrected on motion for new trial or by appeal.

2. Criminal Law §997(4, 5)

Coram nobis could not be availed of to challenge sufficiency of evidence to establish guilt, to challenge adequacy of representation at trial, or to charge prejudicial misconduct on part of trial judge and deputy district attorney.

3. Criminal Law §997(6)

The writ of error coram nobis is not a catch-all by which those convicted may litigate and relitigate propriety of their convictions ad infinitum, but serves limited useful purpose of correcting errors of fact which cannot be corrected in any other manner.

4. Criminal Law §997(2)

The writ of error coram nobis is not available where other and adequate remedies exist.

No appearance for plaintiff.

Fred Bates, in pro. per.

WHITE, Presiding Justice.

Defendant filed this petition for a Writ of Error *Coram Nobis* in the Superior Court of Los Angeles County. Because the judgment rendered herein had been affirmed by this court, *People v. Bates*, 126 Cal.App.2d 144, 271 P.2d 963, the petition was transmitted to this court for consideration. Penal Code, § 1265.

After trial before a Judge of the Superior Court of Los Angeles County, defendant was convicted of two counts of first degree robbery. He admitted a prior conviction of the crime of grand larceny for which he served a term of imprisonment in the penitentiary of the state of Virginia. After commission of the crimes charged against him in California, he went to Louisiana and was there convicted of armed robbery. Upon his release from the Louisiana penitentiary he was returned to Los Angeles for trial. Following his conviction and denial of his motion for a new trial defendant was sentenced to State Prison.

From the judgment of conviction and the order denying his motion for a new trial he prosecuted an appeal to this court on the sole ground that the evidence was insufficient to support the finding of guilt. On June 22, 1954, both the judgment and the order were affirmed *People v. Bates, supra*.

In his petition now before us, defendant again challenges the sufficiency of the evidence to establish his guilt beyond a reasonable doubt. He makes the further claim that the attorney whom he employed to defend him at the trial (now deceased) "failed, neglected or refused to give proper and adequate representation and protection of your affiant's rights in that he failed and refused to ask for and secure a jury trial which your affiant demanded * * *".

It is also alleged that said attorney "failed, and neglected and refused to make the necessary motions and objections to protect his (affiant's) rights * * *"; that his attorney failed to obtain the presence of his witnesses to testify for defendant, and oth-

erwise failed to properly represent the accused. He also charges prejudicial misconduct on the part of the trial judge and the deputy district attorney. Error is also claimed because of the allegation charging defendant with the aforesaid prior conviction (which he admitted at the trial).

[1-4] Defendant's petition is totally insufficient to warrant issuance of the writ prayed for. As was said in *People v. Martinez*, 88 Cal.App.2d 767, 771, 199 P.2d 375, 378:

"The writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal. It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment. [Citing cases.]

"These cases dispose of the contentions that the evidence produced on the hearing at the time of fixing the degree of the crime was insufficient to show first degree and, at most, showed manslaughter; that if his counsel had not advised him improperly to plead guilty he would never have been convicted of first degree murder; that by failing to move for a reduction of the degree of the crime, or by failing to appeal, his counsel caused him to be deprived of his liberty without due process. The choice of counsel was defendant's. It was at all times within the power of defendant to choose his own counsel or to appeal."

In the case now engaging our attention, defendant was represented at the trial by an attorney of his own choosing and again, on his appeal, was likewise so represented. One of the claimed errors set forth above, viz., insufficiency of the evidence, was determined adversely to the defendant on his appeal, and the other claimed errors could have been corrected on the appeal or on the motion for a new trial interposed by defendant. "The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and re-litigate the propriety of

their convictions *ad infinitum*. In the vast majority of cases a trial followed by a motion for a new trial and an appeal affords adequate protection to those accused of crime. The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But it is well-settled law in this and in other states that where other and adequate remedies exist the writ is not available." *People v. Martinez*, supra, 88 Cal.App.2d at page 774, 199 P.2d at page 379.

The petition is denied.

DORAN, J., concurs.



137 Cal.App.2d 1

Everett L. BURCH, Plaintiff and Appellant,
v.

John D. SLAMIN et al., Defendants
and Respondents.
Civ. 16434.

District Court of Appeal, First District,
Division 2, California,
Nov. 15, 1955.

Action growing out of automobile collision. Defendants moved to dismiss the action upon the ground that it had not been brought to trial within the five year period prescribed by code provision. The Superior Court, City and County of San Francisco, Herman A. Van der Zee, J., entered an order granting the motion and dismissing the action. The plaintiff appealed. The District Court of Appeal, Dooling, J., held that where party did not show that attempted plea in abatement, on ground of pendency of action in other county involving same subject matter, was, in fact, a good plea, its filing did not preclude dismissal of action for failure to bring it to trial within five year period prescribed by code provision.

Order affirmed.

1. Abatement and Revival ⇨6

Where complaints are filed in two counties involving the same subject of action, the county in which summons is first served acquires jurisdiction of entire controversy, and the action in the other county is subject to abatement on the ground of pendency of other action.

2. Dismissal and Nonsuit ⇨60(2)

Where party did not show that attempted plea in abatement, on ground of pendency of action in another county involving same subject matter, was, in fact, a good plea, its filing did not preclude dismissal of action for failure to bring it to trial within five year period prescribed by code provision. Labor Code, § 3852; West's Ann.Code Civ.Proc. § 583; Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, § 501 et seq.

3. Dismissal and Nonsuit ⇨71

Upon defendant's motion to dismiss for failure to bring action to trial within five year prescribed period, where plaintiff showed that defendants had filed an answer which included a plea in abatement on ground of pendency of another action in another county involving same subject matter, but record did not show that summons had been served first in the other action, plaintiff did not sustain burden of proving the impossibility or impracticability of bringing action to trial within period. West's Ann.Code Civ.Proc. § 583.

4. Pleading ⇨106(2)

In action for damages arising out of automobile collision, where defendants filed an answer which included a plea in abatement on ground of pendency of another action in another county involving same subject matter, but plea did not allege that summons had been served first in the other action, plea in abatement was insufficient.

5. Dismissal and Nonsuit ⇨50

Where parties, who had filed answer which included a plea in abatement, on ground of pendency of action in another county involving same subject matter, later moved to dismiss action for failure to bring it to trial within five year period prescribed

by code provision, parties were not estopped from taking advantage of delay parties themselves had induced by their plea in abatement. West's Ann.Code Civ.Proc. §§ 583, 597.

Delany, Fishgold, Freitas & Rowe, Matthew M. Fishgold, San Francisco, for appellant.

Daniel J. O'Brien, Jr., Daniel J. O'Brien, III, San Francisco, for respondents, Frank McNulty and L. M. McNulty, doing business as McNulty Lumber Company, and Andrew Conway, Mary M. Conway, Thomas A. Culligan, Jr., and Kathleen Culligan, doing business as Conway and Culligan.

DOOLING, Justice.

Plaintiff appeals from an order granting a motion to dismiss his action on the ground that it had not been brought to trial within five years. Code Civ.Proc., sec. 583. The action grows out of a three-automobile collision in which the plaintiff and the defendants Slamin and McNulty was each the driver of one of the three cars. Plaintiff had with him as a passenger at the time of the collision one Belfield, an employee, who was killed. His wife was awarded \$8,550 against plaintiff by the Industrial Accident Commission. The present action was brought in San Francisco by plaintiff under Labor Code, section 3852 to recover the amount of this award on his own behalf and additional damages for Belfield's widow.

Defendant Slamin did not appear in the action but defendant McNulty and other named defendants filed an answer which included an attempted plea in abatement based on a pending action in San Mateo County arising out of the same collision in which McNulty was plaintiff and Burch, Slamin et al. were defendants. Nothing further was done in the San Francisco action until the motion to dismiss was made.

In opposition to the motion to dismiss one of plaintiff's attorneys filed an affidavit reciting the fact and date of the bringing and the pendency of the San Mateo County

action, the purported plea in abatement based thereon, and counsel's failure to set the cause for trial "relying upon the contention of the moving parties" and "waiting for the final disposition of the action pending in San Mateo County as alleged in the Answer filed by the defendants making the Motion to Dismiss." Affiant concluded: "That until the final disposition of the action pending in San Mateo County * * * it would be impracticable and futile to try this action * * * for the reason that said defendants contend that a disposition and determination of the action pending in San Mateo County would determine in substantial measure the issues pending in this action."

[1] Where complaints are filed in two counties involving the same subject of action the county in which summons is first served acquires jurisdiction of the entire controversy and the action in the other county is subject to abatement on the ground of another action pending. *M. H. Golden Const. Co. v. Superior Court*, 98 Cal.App.2d 811, 815-816, 221 P.2d 218; *Myers v. Superior Court*, 75 Cal.App.2d 925, 930, 172 P.2d 84; *Gorman v. Superior Court*, 23 Cal.App.2d 173, 72 P.2d 774.

[2] If the plea in abatement was in fact good, under the doctrine of *Pacific Greyhound Lines v. Superior Court*, 28 Cal.2d 61, 168 P.2d 665, it appears that the failure to bring the action to trial during the time that the San Mateo County action was pending would be excused on the ground that it was impossible or impracticable to do so. In the *Greyhound* case the court held that where one party was in the military service during World War II, even though he had not in fact asked for a stay, the failure to bring the action to trial was excused where a stay, under the *Soldiers' and Sailors' Civil Relief Act*, 50 U.S.C.A. Appendix, § 501 et seq., would have been mandatory if applied for. So here, while the trial court in the San Francisco action did not enter an interlocutory judgment of abatement, if it was mandatory that it do so if the question had been brought to trial,

the rule of the *Greyhound* case would appear to be applicable.

[3, 4] The burden was on the plaintiff in opposition to the motion to establish facts showing the impossibility or impracticability of bringing the action to trial. Appellant did not meet this burden. While he showed that the San Mateo County action was filed prior to the filing of his action in San Francisco he did not show, and it nowhere appears in the record, that summons was served in the San Mateo County action before it was served in the action in San Francisco. Indeed respondents' attempted plea in abatement was insufficient in the same particular and would have been subject to general demurrer on that ground.

Appellant states in his closing brief that summons was first served in the San Mateo County action, but there is nothing in the record to support this assertion. Even if it is the fact that fact was not proved in the trial court and the trial judge was required to act on the evidence produced before him. That evidence failed to show that the San Mateo County court first acquired jurisdiction and therefore failed to show that the San Francisco action was in fact subject to abatement.

[5] Appellant argues that in any event respondents should be estopped by their conduct to take advantage of the delay which they induced by their plea in abatement. It is impossible to find the elements of estoppel in this case, even if estoppel is available in this type of situation, which seems doubtful. *Bank of America Nat. Trust & Savings Ass'n v. Moore & Harrah*, 54 Cal.App.2d 37, 43-44, 128 P.2d 623. How could appellant be misled?

Appellant knew when summons was served on him in the San Mateo County action. He therefore knew whether or not the plea in abatement was good in fact. He had a ready remedy if it was not good under Code of Civil Procedure, section 597, by asking the court to try first and separately the issue raised by the plea in abatement.

There is nothing in the facts of this case to make the rule announced in *Rose v.*

Knapp, 38 Cal.2d 114, 237 P.2d 981, applicable. There the result in the main case depended on the outcome of another action pending on appeal. Here the court having jurisdiction could proceed to trial without regard to the other pending action.

The order is affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



136 Cal.App.2d 834

PACIFIC CONCRETE PRODUCTS CORPORATION, a California Corporation,
Plaintiff and Appellant,
v.

John S. DIMMICK and E. T. Dimmick, co-partners doing business under the name and style of Adobe Engineers, et al., Defendants and Respondents.

Civ. 21133.

District Court of Appeal, Second District,
Division 1, California.

Nov. 9, 1955.

Hearing Denied Jan. 5, 1956.

Claim and delivery action for possession of equipment for manufacture of concrete blocks, wherein plaintiff procured immediate possession of the equipment. The Superior Court, Los Angeles County, Clyde C. Triplett, J., rendered judgment for defendants for agreed value of the equipment, and plaintiff appealed. The District Court of Appeal, White, P. J., held that finding that defendants had purchased the equipment from plaintiff and had paid for it and were entitled to possession of equipment when action was commenced was supported by substantial evidence.

Judgment affirmed.

1. Replevin ⇨103(3)

Where plaintiff in claim and delivery action procured immediate possession of personal property and was unable to re-

store possession to defendants who were entitled to possession of such property at time of commencement of action, defendants were entitled to judgment for agreed value of such property. West's Ann.Code Civ. Proc. §§ 509 et seq., 667.

2. Replevin ⇨8(4)

The right of plaintiff to possession of personalty at time of commencement of action determines plaintiff's right to relief in claim and delivery action and plaintiff's right to possession at any other time is not in issue. West's Ann.Code Civ.Proc. § 509 et seq.

3. Replevin ⇨71(2)

In claim and delivery action for possession of personalty, evidence as to earlier contract with a stranger to action for conditional sale of the personalty to plaintiff was properly excluded. West's Ann.Code Civ.Proc. § 509 et seq.

4. Appeal and Error ⇨931(1)

Where it is contended on appeal that there was no evidence to sustain trial court's finding, all conflicts in the evidence must be resolved in favor of respondent and all legitimate and reasonable inferences indulged to uphold finding, if possible.

5. Appeal and Error ⇨989

Where verdict or judgment is attacked as unsupported by the evidence, the power of reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury or trial judge.

6. Appeal and Error ⇨996

Where two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

7. Replevin ⇨72

In claim and delivery action for possession of equipment for manufacture of concrete blocks, finding that defendants had bought and paid for equipment and were entitled to possession thereof when action was commenced was supported by substantial evidence as to oral agreement with vice-president and general manager of plain-

tiff corporation for purchase of equipment and payment therefor by delivering concrete blocks on general manager's order for account of plaintiff corporation. West's Ann. Code Civ.Proc. § 509 et seq.

8. Frauds, Statute of ⚡139(1)

Where oral agreement for exchange of personal property had been fully performed, failure of record to disclose written confirmation of oral agreement was immaterial.

9. Appeal and Error ⚡931(7)

On appeal from judgment for defendants in claim and delivery action for possession of equipment for manufacture of concrete blocks, in support of finding that defendants had bought and paid for equipment pursuant to oral agreement with vice-president and general manager of plaintiff corporation, reviewing court must assume that trial court found that equipment was not vital or essential to operation of business of plaintiff corporation and that sale of \$2,752 worth of equipment was in the regular course of business of plaintiff corporation which was then buying on contract and presumably had possession of some \$40,000 worth of equipment. West's Ann. Code Civ.Proc. § 509 et seq.

10. Corporations ⚡542(1)

Statute governing sale or other disposition by corporation of all or substantially all of its property had no application to sale of \$2,752 worth of equipment for manufacture of concrete blocks in regular course of business by corporation which was buying on contract and presumably had possession of some \$40,000 worth of equipment. West's Ann.Corp.Code, § 3901.

11. Corporations ⚡405

Except as expressly restricted, general manager of a corporation has power to do in the name of corporation everything the corporation itself could do, and power of general manager to perform a particular act will be inferred from his general authority.

12. Corporations ⚡405

Vice-president and general manager of corporation, in absence of express restriction had authority to do anything which in his judgment was suitable to protect the

interests of corporation or preserve its property.

13. Corporations ⚡432(12)

In claim in delivery action by corporation for possession of equipment for manufacture of concrete blocks, trial court could infer under evidence that vice-president and general manager of corporation, who attended to and managed all its affairs both before and after corporation became financially embarrassed, had full authority to act for and bind corporation in the making and performance of oral agreement with defendants to sell such equipment to defendants in exchange for concrete blocks to be delivered by defendants for account of corporation. West's Ann.Code Civ.Proc. § 509 et seq.

Dely T. Walton, Los Angeles, for appellant.

John W. Pares, Long Beach, for respondents.

WHITE, Presiding Justice.

In this action, plaintiff, Pacific Concrete Products Corporation, sought and procured the immediate possession of certain personal property under the provisions of Section 509 et seq. of the Code of Civil Procedure. During the trial it was stipulated by the parties that the property was worth \$2,742 and that, in the event of judgment for defendants, plaintiff was unable to restore possession to them. Plaintiff has appealed from a judgment for defendants for \$2,742 and costs.

[1] One of appellant's contentions is that "where the cause of action is in claim and delivery, no authority appears to embrace a claim for damages * * *" In the instant action, however, the judgment is not for damages but for the value of the property. "In an action to recover the possession of personal property * * * if the property has been delivered to the plaintiff * * * judgment for the defendant may be for * * * the value thereof, in case a return cannot be had * * *." Section 667 of the Code of Civil Procedure.

[2, 3] As stated by appellant in its opening brief, the right to possession by plaintiff at the commencement of the action determines its right to relief in claim and delivery. It follows that appellant's right to possession of the property at any other time is not in issue. The trial court did not err in excluding evidence respecting appellant's earlier unrecorded conditional purchase contract with a stranger to this action.

The court found, among other things, that it is not true that at the time of the commencement of the action plaintiff was entitled to the possession of said property; and that the allegations of respondents' affirmative defense are true. In effect, the affirmative defense was that respondents had bought and paid for the property and were at the time of the commencement of the action entitled to possession thereof.

In appellant's opening brief it is stated that "There is absolutely no evidence in the record to sustain any such purchase from plaintiff of the personal property which is the subject matter of this litigation, or any writing confirming any such arrangement, alleged to be oral and later reduced to writing. No evidence was offered of any such character, and we are convinced none is or was ever in existence."

[4-6] "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict [or judgment] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury [or judge]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184.

In support of the judgment from which the instant appeal was taken, we find in the record before us the following:

John S. Dimmick, one of the defendants testified that he and his mother are partners doing business under the fictitious firm name of Adobe Engineers; that plaintiff was not on the commencement of the action entitled to possession of the "racks and pallets" (equipment for the manufacture of cement blocks) because plaintiff had sold them to defendants; that defendants had paid for them by delivering \$3,200 worth of cement blocks; that Nathan D. Gorin, plaintiff's vice-president and general manager, had told Dimmick where to deliver the blocks; that the blocks had been delivered as indicated on the delivery slips put in evidence; that most of the persons and firms to whom they had been delivered were unknown to defendants, and the blocks were shipped to them on Gorin's order for the account of Pacific Concrete Products Corporation; that he understood that all these operations were the business of Pacific Concrete Products Corporation. Defendant first learned of Mr. Gorin's connection with Pacific Concrete Corporation when the manager of the Produce Branch of the Bank of America introduced them to each other as managers of similar businesses in the latter part of 1952. That at the time of defendants' purchase of the racks and pallets, he knew that Mr. Gorin was vice-president and general manager, that Laurence Holzman was president and was ill, and he believed that Mr. Walton was secretary-treasurer, and had no active part in the business. Defendants' arrangement was with Mr. Gorin as such general manager. Defendants' own truck was sent to plaintiff's El Monte plant to pick up the racks and pallets. At that time Mr. Gorin told defendant that the corporation owned them, and that he had authority to sell them. Defendant believed Gorin and relied upon his statements and took the racks and pallets in good faith. Defendant did not know that the racks and pallets were being purchased by plaintiff on conditional sale contract.

Gorin testified that he was the vice-president and general manager of the plaintiff corporation; that as such he agreed to sell to defendants the racks and pallets; that at that time Mr. Holzman was in the hospital in Cleveland; that there was a total of is-

sued stock of \$25,000; that Mr. Holzman had \$15,000 and Gorin himself had \$10,000; that when he saw Mr. Holzman in the hospital, both thought he was getting well; that the corporation's need of funds was discussed; and Mr. Holzman told Gorin to use his own judgment about selling some of the equipment they were not using to obtain money to keep things going until Holzman returned. That the object of the transaction with defendants was to raise money to continue the operation of plaintiff corporation and to pay its obligations, including the covering of checks which had been written and returned by the bank; that he sold the racks and pallets in order to make those checks good; that whatever he got from time to time he applied to whatever had to be paid first in his estimation; that he got in close to \$3,000 for those blocks; that he paid the corporation for the portion of the blocks delivered to his own place in Newport; that those blocks were part of the consideration for the racks and pallets; that he did not know that he "could not dispose of any of the equipment unless he got a release under the chattel mortgage"; that he did not tell Dimmick that the corporation did not own the racks and pallets; that all the money received through this transaction with defendants was used for corporate purposes, but none of it was paid on the \$40,000 conditional sale contract covering machinery and equipment which included the racks and pallets.

Delvy T. Walton, attorney for plaintiff, stated during the trial that the conditional sale contract referred to had not been recorded before the sale to defendants.

[7] There is substantial evidence in the record supporting the finding that respondents had bought and paid for the racks and pallets and were entitled to possession thereof when the instant action was commenced.

[8] That the record fails to disclose a written confirmation of the oral agreement of exchange of personal properties is of no consequence, since the agreement had been fully performed.

[9, 10] Appellant further contends that its general manager had no power to bind the corporation by such an agreement and states that no corporate agent has the right to sell "vital property * * * without which it could not operate" and that "the power to operate a business is radically different from the authority to sell its essential machinery". No doubt, that argument was first made in the trial court and we must assume that the trial court found that the racks and pallets were neither vital nor essential and that the sale of \$2,752 worth of equipment was in the regular course of business of a corporation which was then buying on contract and presumably had possession of some \$40,000 worth of equipment, and, according to its general manager, did not need all of it. Section 3901 of the Corporations Code has no application to the facts of the instant action.

[11-13] "The general manager of a corporation is more than a mere agent. Except as expressly restricted, he is empowered in the name of the corporation to do everything the corporation itself could do, and the power to perform a particular act will be inferred from his general authority." (13 Cal.Jur.2d 108, Corporations, sec. 336, and cases there cited.) In the instant action, Gorin, as such vice-president and general manager, had authority to do any act which in his judgment was suitable to protect the interests of the corporation, or to preserve its property. *Los Angeles Lighting Co. v. City of Los Angeles*, 106 Cal. 156, 161, 39 P. 535. From the facts that he was the corporation's vice-president and general manager, and that he attended to and managed all its affairs both before and after it became embarrassed from financial difficulties, the trial court had the right to infer that he possessed full authority to act for and bind it on the occasion of the making and performance of the oral agreement. *Ray v. Borgfeldt*, 169 Cal. 253, 265, 146 P. 679.

The judgment is affirmed.

DORAN, J., and NOURSE, Justice pro tem., concur.

136 Cal.App.2d 744

Alleen S. MILDREN, Plaintiff and Appellant,
v.**Paul S. MILDREN and Jessie Mildren,**
Defendants and Respondents
(two cases).**Civ. 5073, 5074.****District Court of Appeal, Fourth District,**
California.**Nov. 4, 1955.**

Actions of claim and delivery and for forcible detainer against plaintiff's husband and his mother to recover possession of furniture and furnishings or damages and for waste and use and occupancy of realty allegedly conveyed to plaintiff by husband pursuant to property settlement agreement. Defendants filed cross-complaint and the actions were consolidated for purpose of trial and on appeal. The Superior Court, San Bernardino County, Jesse W. Curtis, Jr., J., entered judgments for defendants, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that the findings and judgments in favor of defendants were sufficiently supported by the evidence.

Judgments affirmed.

1. Gifts ⇨49(1)

In claim and delivery action against plaintiff's husband and his mother to recover possession of furniture and furnishings or damages, evidence sustained finding that furniture which plaintiff claimed had been given to her and husband by husband's mother, had been merely loaned to them.

2. Replevin ⇨72

In claim and delivery action against plaintiff's husband and husband's mother to recover furniture and furnishings or damages, evidence sustained findings in favor of defendants on issue of title to property removed by defendants from former marital home, and that other missing property had been removed by others, unknown to defendants, and that remaining furniture had been damaged by others through no fault of defendants.

3. Divorce ⇨255

Interlocutory decree of divorce determining property rights of the parties was res judicata, barring subsequent claim by wife for proceeds of sale of refrigerator disposed of by husband before divorce trial.

4. Use and Occupation ⇨9**Waste ⇨20**

In forcible detainer action against plaintiff's husband and his mother for use and occupancy of realty conveyed to plaintiff as her separate property pursuant to property settlement agreement and for claimed waste in failing to care for orange grove thereon, evidence was sufficient to support findings in favor of defendants.

5. Waste ⇨20

In forcible detainer action against plaintiff's husband and his mother, evidence sustained finding that plaintiff suffered no damage to orange grove conveyed to plaintiff by husband pursuant to property settlement agreement by reason of any claimed negligence of defendants from lack of water or cultivation.

6. Landlord and Tenant ⇨183

Pending trial of divorce action involving validity and effect of claimed property settlement agreement and conveyance of former marital home to wife pursuant thereto, husband and his mother who occupied realty only as a member of his family and not on her own account, were not liable for rental of premises in independent action by wife for forcible detainer, particularly where wife had left premises voluntarily after living with husband thereon for several years after claimed execution of property settlement agreement and there was no agreement to pay rent or any unauthorized holding or retention of premises after separation and prior to trial of divorce action in which rights and obligations of the parties were determined.

7. Use and Occupation ⇨9

In forcible detainer action against plaintiff's husband and his mother for use and occupancy of former marital home allegedly conveyed to plaintiff by husband pursuant to property settlement agreement, evidence sustained finding that husband's

mother occupied the premises only as a member of his family and not on her own account.

Taylor F. Peterson, San Bernardino, for appellant.

Robert McWilliams, Altadena, for respondents.

GRIFFIN, Justice.

Alleen obtained an interlocutory decree of divorce from Paul on the ground of extreme cruelty on April 8, 1953. The main issue presented by defendants' cross-complaint was the question of the nature, character, and title of their home property and its furnishings, in Fontana, on September 20, 1950, the date of separation of the parties. Alleen was awarded the home, together with certain other described personal property, as her sole and separate property, in accordance with the provisions of some previous property settlement agreement entered into by them on or about January 28, 1948. At the trial Paul was given other property and each was ordered to deliver over possession of it accordingly.

On May 13, 1953, Alleen commenced an action in claim and delivery against Paul and his mother, Jessie Mildren, for possession of certain itemized furniture and furnishings, alleging that their value was \$12,500. Damages, in case delivery was not made, were also sought. Jessie answered, denied she was wrongfully or otherwise in possession of them and claimed that certain described items on the list belonged to her, denied that Alleen was the owner of any of them, and alleged that plaintiff was not entitled to possession of them. She also denied that Alleen ever demanded possession of them from her or that she was damaged in any sum.

Paul alleged he was the owner of certain of the articles named and admitted certain allegations of plaintiff's complaint in respect to other items. He alleged that the parties still were husband and wife when the claim and delivery action was filed and claimed that the interlocutory decree was a binding adjudication as to their property rights and as to all issues raised by plain-

tiff's complaint, the answers thereto, and defendants' cross-complaint.

After trial of the issues, the court specifically found that Paul took some of the articles listed by Alleen as belonging to her, but that he had returned everything but a "deep freezer"; that before the trial of the divorce action he sold the freezer for \$75 and never accounted for it; that Jessie took certain of the items listed but these articles belonged to her and not to plaintiff; that all other remaining articles listed were owned by plaintiff on September 20, 1950, and were then in her possession or had been destroyed or were taken by others than these defendants through no fault of theirs. Judgment was entered on May 7, 1954, in favor of defendants.

On May 27, 1953, Alleen filed another action against these defendants for forcible detainer, for waste, and for value of the use and occupation of the home and real property involved, alleging that she was entitled to the possession thereof on September 20, 1950, the date of the separation; that defendants peaceably, but without right, took possession of the same and occupied it until February, 1953, by virtue of threats, etc.; that the reasonable rental value thereof was \$250 per month; that during this period defendants allowed 4½ acres of citrus trees to die for lack of water, to her detriment in the sum of \$10,000. As a separate cause of action she alleged defendants vacated possession on February 1, 1953, and during the period from the date of separation to February 1, 1953, they committed waste thereon in the sum of \$10,000. Defendants separately denied generally these allegations. Paul alleged that on September 20, 1950, this was their marital home; that they were then living together with their minor son Donald in said home; that Alleen voluntarily left it and he continued to live in it with the boy and the boy's grandmother Jessie, who cared for him and the home until February 1, 1953; that no final decree of divorce was ever obtained; that since September 20, 1950, Alleen caused an action to be brought against him in which she made an application for an order requiring him to surrender possession of the property to her; that the appli-

cation was denied, and no appeal was taken from that order. He claims that this order became final and now constitutes a final binding adjudication of that issue; that on April 9, 1953, an interlocutory decree of divorce was entered setting forth the respective rights of these parties in and to the property involved and that it became final; and claims that the use and occupation of the property, from the date of the separation until the trial of the divorce action was taken into consideration in making disposition of the property in the interlocutory decree.

The court found generally in favor of the defendants and that Alleen voluntarily left the home on September 20, 1950; that Paul maintained it and brought his mother in to care for the minor child and the home and that her occupancy was only as a member of the family; that Paul permitted certain orange trees to die for lack of water but that plaintiff was not damaged to the extent indicated by her, and any claimed damage became *res judicata* by reason of the interlocutory decree which finally and subsequently adjudicated their property rights. Judgment was entered on July 16, 1954, for defendants. These two actions were consolidated for the purpose of trial and on appeal.

Without setting forth in detail the contradictory evidence pertaining to the title and claimed ownership of the furniture and furnishings of the home and of the property, and the claimed damage to it, we will give a résumé of the several claims. After 25 years of married life Alleen and Paul came to unhappy differences and Paul, under the provisions of the property settlement agreement, deeded the home property and assigned his interest in the community furnishings which they then owned, to Alleen, as part of that settlement on January 28, 1948, but the parties continued to live on the premises with their two boys, Donald and Paul, Jr., until September, 1950, at which time Alleen voluntarily left the home. Paul, Sr. and Jessie, his mother, remained on the property and occupied it. Alleen subsequently commenced her action for divorce and Paul contested it, claiming

that the property listed by Alleen as her sole and separate property was community property, or property belonging to his mother, himself or others, and asked the court to make a determination of this issue. Paul, his mother and his minor son Donald continued to remain on the property and occupied it until the latter part of January, 1953, or the first part of February, 1953, at which time Paul and his mother moved out, shut off the gas, lights, locked up the house, and told Paul's attorney to notify Alleen's attorney about his removal. Donald returned to live with his mother. During the time Paul and Jessie occupied the premises considerable of the furnishings were removed by them. They claimed it belonged to them. On April 8, 1953, the interlocutory decree of divorce was entered, as heretofore indicated. After Paul and Jessie removed from the premises, apparently Paul, Jr., then about 24 years of age, remained on the premises and slept in the shed. He had no key to the home.

[1,2] At the trial of these actions Alleen had a prepared list of property which she claimed was in the home at the time she left. She admitted some of this had been returned to her by Paul. She testified that considerable portions of it had been removed from the house and that which remained in the home had been damaged to a great extent. There is a conflict in the evidence as to when this loss and damage occurred. It affirmatively appears that after Paul, Sr. and his mother left the home Paul, Jr. found a way to enter the house, and held numerous parties, which included as guests many women of questionable character, for a period of some time thereafter. Portions of the furnishings were destroyed or were taken during this period. The police were called on one occasion and Paul, Jr. was taken to jail. About this time, on February 11, 1953, Alleen came back to the home and occupied the house. She said for some time thereafter men called and inquired for certain girls. The claim of ownership of the furniture by Alleen is that Jessie gave them a considerable portion of it when they were married and during their married

life and that they bought some of it from her. Jessie and Paul denied this and said it was only loaned to them by Jessie. The trial court found in favor of defendants on this issue and found in their favor as to the title of the property taken by defendants from the premises. There is sufficient evidence to support that finding and the further finding that the other missing articles were taken by others, unknown to defendants and that the damage to the remaining furniture was through no fault of defendants.

[3] The court also found that Paul, Sr. disposed of a refrigerator for \$75 prior to the divorce trial and did not account to plaintiff for the proceeds. In failing to give a judgment to plaintiff for this amount apparently the court felt that this item was one of the issues that was or should have been determined in the divorce action when their property rights were in issue and were determined. It properly held that the interlocutory decree was res judicata as to this claim. *Lang v. Lang*, 182 Cal. 765, 190 P. 181.

[4] As to the claim that defendants were liable for the use and occupancy of the property from the date of separation until February, 1953, and for claimed waste in reference to the lack of care of it and the orange grove, there is sufficient evidence to support the trial court's finding in favor of the defendants. From the evidence it does appear that the grove never did operate as a net gain of any import. In most years it was otherwise. There was evidence that the surrounding community grew up with residences and was near certain smog drifts from the Kaiser Steel Mill which it is claimed affected production in the orange grove. It was further shown that Dr. Paul Mildren was then retired on disability insurance, was not able to care for the grove, and was advised by experts that it would not be profitable to further cultivate it. It was further shown that its value had greatly increased for subdivision purposes. There was evidence that the parties owned certain shares of water rights in connection with the property;

that plaintiff allowed these shares to become subject to sale by delinquency in payments for water; that they were sold by reason thereof; and that Paul purchased them under the sale and resold them for about \$150. No water was furnished to the premises thereafter. Plaintiff claims damages by reason of this claimed neglect, which she said occurred subsequent to her separation from Paul and prior to the trial of the divorce action.

[5] In this respect the trial court here found, not only that this claim was barred by the interlocutory judgment in the divorce action under the doctrine of res judicata, but it also found that by virtue of the trees dying from lack of water plaintiff suffered no damage. Regardless of the question of the application of the doctrine of res judicata, the evidence supports the finding that plaintiff suffered no damage by reason of any claimed negligence of defendants from lack of water or cultivation. The evidence shows that on near-by property orange trees were being torn out and the property was being subdivided for homes at greatly increased prices.

[6,7] Since the question of the effect and validity of the claimed property settlement agreement and the deed of the property here in question was being tested in the divorce action, pending the trial of said action, defendants would not be liable for rental of the premises to plaintiff in an independent action such as the one here under consideration, particularly where the court found that plaintiff voluntarily left the premises after living with her husband thereon for several years after the claimed execution of the property settlement agreement, and particularly when there was no agreement to pay rent, nor any unauthorized holding or retention of the premises after the separation and prior to the trial of the divorce action involving and declaring their respective rights and obligations to each other. The court specifically found, upon sufficient evidence, that Jessie occupied the property only as a member of the family of defendant Paul Mildren, and not on her own account. The

findings and judgments rendered in each action as to each defendant are sufficiently supported by the evidence.

Judgments affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



136 Cal.App.2d 808

Clarence P. CRALLE and Betty M. Cralle,
his wife, Plaintiffs and Respondents,

v.

The CITY OF EUREKA, a municipal
corporation, Defendant and
Appellant.
Civ. 8673.

District Court of Appeal, Third District,
California.
Nov. 8, 1955.

Quiet title action by record holders against city, which claimed to hold title to record holders' property under tax deed. The Superior Court, Humboldt County, Delos A. Mace, J., quieted title in record owners, and city appealed. The District Court of Appeal, McMurray, J. pro tem., held that record owners, who knew of city's liens on their property by reason of delinquent assessments, and who relied on Civil Code provisions relating to recording as their assurance such liens were extinguished when the property was purchased, would not be precluded from asserting that they were bona fide purchasers for value, even though they had not investigated city clerk's files for existence of a tax city to city, since charter provision, when considered as recording statute, was not one properly within realm of municipal affairs.

Judgment affirmed.

1. Municipal Corporations ⇨982

Even if city charter provision included within its scope a conveyance running to city, and if filing of deed to city with city

clerk was compliance with terms of such provision, provision could not be construed as provision for giving public notice of tax deeds in view of fact that provision is concerned with qualifications and duties of city tax collector and with keeping of books and records so that public will be informed as to administration of the office, not condition of land titles. St.1895, p. 373, § 57; West's Ann.Civ.Code, § 1214.

2. Municipal Corporations ⇨57

Cities should restrict themselves to municipal affairs. West's Ann.Const. art. 11, § 8.

3. Municipal Corporations ⇨78

A freeholders' charter does not supersede any general law which affects and applies to or involves matters concerning welfare of people of the state as a whole.

4. Municipal Corporations ⇨79

Civil Code provisions relating to recording are matters of general state concern and are not to be abrogated or enlarged by a municipal charter. West's Ann.Civ.Code, §§ 1214, 2911.

5. Quieting Title ⇨43

In quiet title action against city, city could, under answer denying plaintiffs' title and right to possession, have proved whatever claim it might have, including a tax title.

6. Municipal Corporations ⇨519(5)

Record owners, who knew of city's liens on their property by reason of delinquent assessments, and who relied on Civil Code provisions relating to recording as their assurance such liens were extinguished when the property was purchased, would not be precluded from asserting that they were bona fide purchasers for value, even though they had not investigated city clerk's files for existence of tax deed to city, since charter provision, when considered as recording statute applicable to tax deeds, was not one properly within realm of municipal affairs. St.1895, p. 373, § 57; West's Ann.Civ.Code, § 2911.

7. Municipal Corporations ⇨982

City, which had received tax deed to tax delinquent property, was not excluded

from operation of recording statute contained in the Civil Code. West's Ann.Civ. Code, § 1214; West's Ann.Gov.Code, § 6103.

Thomas Cotter, City Atty., Mitchell & Henderson, Eureka, for appellant.

Falk & Falk, Eureka, for respondents.

McMURRAY, Justice pro tem.

Plaintiffs are the record owners of the real property here involved. They purchased it for value on December 15, 1950. At the time of the purchase they knew of claims of the defendant city on account of certain assessments but claim that they are bona fide purchasers for value under Section 2911 of the Civil Code. There were two street assessments which became liens against the property for improvements made on June 19, 1921, and July 21, 1926, respectively, and bonds upon the security of these assessments were issued by which the last installments became due on the above assessments on July 2, 1937, and July 2, 1942, respectively. No judgment foreclosing said liens has been entered although an action was brought therefor against plaintiffs' predecessor in title on June 5, 1941, and dismissed on August 1, 1952, for lack of prosecution. There are no other taxes or liens due and owing defendant city at this time which are a lien against the property.

On May 6, 1941, defendant city's tax collector conveyed this property to defendant by a tax deed for non-payment of delinquent taxes levied against the property for the fiscal year 1922-1923. This deed was not recorded in the Recorder's office of Humboldt County, the county in which the real property is situated, but was filed in the City Clerk's office of said city; the plaintiffs had no actual knowledge thereof.

The above facts were stipulated to in the trial court and defendant city appeals from the judgment quieting plaintiff's title.

Appellant city contends that since the 1941 tax deed was filed in the City Clerk's office the respondents were charged with notice thereof as such filing was in accordance with the provisions of Section

57 of the Charter of the City of Eureka. This provision reads as follows:

"Tax Collector.

"Tax collector, "The Tax Collector shall have been a citizen of the State, and a resident and qualified elector of the city, for at least five years next

"Duties." before his election. It shall be his duty to receive and collect all city taxes, general and special; he shall also collect all city licenses, water rates, harbor dues, cemetery receipts, and such other branches of the city revenue, not otherwise herein provided for, as the Council may direct. He shall keep proper books, showing all moneys collected by him as Tax Collector, and also a book which shall contain a record of every deed given by or on behalf of the city for real estate sold for delinquent taxes or assessments, which book shall be properly indexed, and shall be at all suitable times subject to public inspection; and do and perform such other duties as may be required of him by law or ordinance of said city. He shall pay all moneys collected by him, as Tax Collector, into the City Treasury, weekly. The time and manner of collecting all licenses shall be provided for by the Council." Stats.1895, pp. 356, 373.

By the use of considerable ingenuity appellant urges that this provision is a recording statute since a city charter has the dignity of a state law and must be accorded such weight by the courts. (18 Cal.Jur., Municipal Corporations, sec. 78.) It is seriously contended that this section of the charter, by providing for a "properly indexed" book which is "at all suitable

times subject to public inspection", has made provision for giving notice of its tax deeds in such manner as to give notice thereof to all persons and that such provision is an alternative to the provisions of Civil Code, Section 1214, relating to recording conveyances.

[1] Even assuming that the language of this section of the Eureka charter, "every deed given by or on behalf of the city for real estate sold for delinquent taxes or assessments," includes a conveyance running to the city, and further assuming that a filing of such a deed with the City Clerk was a compliance with the terms of this section, nevertheless we do not think that the section can be construed as a provision for giving public notice of tax deeds.

Section 57 of the charter is entitled "Tax Collector," the marginal note states "Tax Collector, qualifications. Duties." There is no indication of any intention to establish a method of giving notice as to tax deeds. A fair reading of the section must result in a determination that it is concerned with the qualifications and duties of the city tax collector and that the provisions of the section are limited to that office. The provisions as to keeping books and records are to assure that the public will be informed as to the administration of the office, not as to the condition of land titles.

Furthermore, to give an interpretation to the charter section whereby it becomes a recording statute would extend the charter beyond the regulation of municipal affairs. It would be to foster chaos to allow cities to establish recording requirements in addition to those covered by state general laws, the certainty required to expedite title searches would be impaired and rendered more difficult and uncertain if each chartered city were to establish special recording laws.

[2,3] That cities should restrict themselves to "municipal affairs" is explicit in Article XI, section 8, of the Constitution. A freeholders' charter does not supersede any general law which affects and applies to or involves matters concerning the welfare of the people of the state as a whole. *Whyte v. City of Sacramento*, 65 Cal.App.

534, 224 P. 1008; *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745.

[4] We think the provisions of the Civil Code relating to recording are matters of general state concern and not to be abrogated or enlarged by a municipal charter.

[5] Respondents point out that the pleadings and the original theory of the case were based upon the street assessment liens and that there has been a change in theory to one of reliance on the unrecorded tax deed on this appeal. This appears to be true, but since the stipulated facts did refer to the tax deed it is properly before us. Under an answer denying plaintiffs' title and right to possession, the defendant may prove whatever right he may have, including a tax title. *Smart v. Peek*, 213 Cal. 452, 454, 2 P.2d 380.

[6] Appellant attacks the bona fides of respondents, arguing that since respondents knew of the city's liens on the property they should have "suspected the existence of a tax deed and investigated the files of the city clerk's office to allay his suspicions. Having failed to do so, Respondents should be charged with notice of the tax deed." This somewhat novel proposition is based upon the contention that being charged with notice of the provisions of section 57 of the city charter, the failure to go to the city clerk's office (not mentioned in the section) "to allay his suspicions" shows a lack of the good faith required to constitute one a bona fide purchaser. Having held that the provision of the charter relied upon, considered as a recording statute, is not one properly within the realm of municipal affairs, we do not now agree with appellant's position on this phase of the case.

Respondents, knowing of the city's liens on the property by reason of delinquent assessments, relied upon the provisions of Section 2911 of the Civil Code as their assurance that these liens were extinguished when the property was purchased. This reliance was well founded and was upheld by the trial judge on the basis of *Scheas v. Robertson*, 38 Cal.2d 119, 238 P.2d 982, wherein it is pointed out that Civil Code,

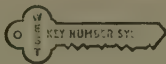
Section 2911, allows one to be a bona fide purchaser for value if he relies on the section for the extinguishment of the liens therein set forth.

Appellant cites many cases relating to notice other than record notice as affecting the status of a grantee. All of the cases correctly state the law applicable to their facts, but none are analogous to the instant case.

[7] If appellant had recorded the tax deed in the County Recorder's office pursuant to Section 1214 of the Civil Code it would have prevailed here. We find no exception in that code section excluding appellant from its operation. In view of the provisions of Government Code, Section 6103, exempting cities from payment of fees for certain filings or for the performance of any other official service, it is difficult to understand appellant's reluctance to comply with the general laws of this state.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



136 Cal.App.2d 913

Genevieve Darlene CLEWETT, Plaintiff
and Respondent,

v.

Douglas Wellington CLEWETT,
Defendant and Appellant.

Civ. 21256.

District Court of Appeal, Second District,
Division 2, California.

Nov. 14, 1955.

As Modified Dec. 8, 1955.

Action for divorce on the ground of extreme cruelty. Judgment for the wife in the Superior Court, Los Angeles County, C. Clinton Clad, Judge pro tem., and the defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where the evidence was conflicting and sole

claim on appeal was insufficiency of evidence, the appellate court had no other function to perform than that of affirming the judgment.

Judgment affirmed and penalty imposed for frivolous appeal.

1. Appeal and Error ⇨931(1)

Upon an appeal, every intendment is to be indulged in which tends to support the judgment, and every reasonable inference which tends to support a finding must be accepted.

2. Appeal and Error ⇨930(1)

On appeal, the evidence is to be construed most strongly in favor of the respondent, and all conflicts resolved in support of the verdict.

3. Appeal and Error ⇨1001(1)

Where appellant urges the insufficiency of evidence to sustain the findings of the jury, rule is that such contention requires appellant to demonstrate that there is no substantial evidence to support the challenged findings.

4. Appeal and Error ⇨939

When a verdict is attacked as being unsupported, power of an appellate court begins and ends, with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, supporting the conclusion reached by the jury.

5. Appeal and Error ⇨996

Where two or more inferences can reasonably be deduced from the facts, the reviewing court cannot substitute its deductions for those of the trial court.

6. Divorce ⇨184(6)

Where divorce was granted wife on ground of husband's extreme cruelty and the evidence was conflicting and appellant's sole claim was insufficiency of evidence, the Appellate Court had no function to perform other than that of affirming the judgment.

7. Courts ⇨104

Where an appellant has failed to show that the trial court was wrong, reviewing court need not engage in a dissertation up-

on the law for the purpose of demonstrating that the court was right.

8. Divorce *§*184(6), 194

Where wife was granted a divorce on conflicting evidence and the sole claim on appeal was insufficiency of evidence, seeking to have the appellate court reweigh the evidence, judgment was affirmed and \$100 imposed for taking a frivolous appeal. Rules on Appeal, rule 26.

Russell A. Holt, Temple City, for appellant.

Juaneita M. Veron, Huntington Park, for respondent.

ASHBURN, Justice pro tem.

[1-5] Defendant husband appeals from an interlocutory judgment of divorce which was granted upon the ground of extreme cruelty. Under a claim of insufficiency of the evidence appellant's counsel argues the weight of the same, endeavoring to induce this court to reweigh it. "Upon an appeal every intendment is to be indulged in which tends to support the judgment, *Hind v. Oriental Products Co., Inc.*, 195 Cal. 655, 661, 235 P. 438, and every reasonable inference which tends to support a finding must be accepted. In *re Estate of Bristol*, 23 Cal. 2d 221, 223, 143 P.2d 689. The evidence is to be construed most strongly in favor of the respondent and all conflicts resolved in support of the verdict. *Patten & Davies Lumber Co. v. McConville*, 219 Cal. 161, 164, 25 P.2d 429. And where appellant urges the insufficiency of the evidence to sustain the findings of the jury the rule is that, 'Such contention *requires defendants to demonstrate* that there is no substantial evidence to support the challenged findings.' *Nichols v. Mitchell*, 32 Cal.2d 598, 600, 197 P.2d 550, 552. (Emphasis added.) It is said in *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184, that: 'It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or un-

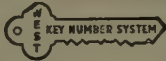
contradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" *Hartzell v. Myall*, 115 Cal.App.2d 670, 672, 252 P.2d 676, 677. To the same effect see *Dubosclard v. Dubosclard*, 112 Cal.App.2d 342, 343, 246 P.2d 124. That this is especially true with respect to the issue of extreme cruelty appears from numerous decisions exemplified by *Polk v. Polk*, 50 Cal.App.2d 653, 123 P.2d 550; *Ganann v. Ganann*, 109 Cal.App.2d 346, 240 P.2d 722; *Margolis v. Margolis*, 115 Cal.App.2d 131, 251 P.2d 396; *Fleming v. Fleming*, 95 Cal. 430, 30 P. 566; *Bixby v. Bixby*, 120 Cal.App.2d 495, 261 P.2d 286.

[6,7] Appellant's brief shows that the evidence at bar is conflicting and leaves no function for this court to perform other than that of affirming the judgment. *Sonkin v. Hershon*, 130 Cal.App.2d 491, 492, 279 P.2d 156, 157: "It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled. *Gillespie v. Gillespie*, 121 Cal.App.2d 95, 97, 262 P.2d 607." And in *Re Estate of Phelps*, 132 Cal.App.2d 850, 853, 283 P.2d 293, 295: "Where an appellant has failed to show that the trial court was wrong it is not incumbent upon a reviewing court to engage in a dissertation upon the law for the purpose of demonstrating that the court was right."

[8] The rule to which we have just adverted has been reiterated so often and with so little effect upon certain segments of the bar that it seems to call in this instance for application of rule 26 of Rules on Appeal, which provides that in case of a frivolous appeal, "the reviewing court may impose upon offending attorneys or parties such penalties * * * as the circumstances of the case and the discouragement of like conduct in the future may require."

The judgment is affirmed and the attorney for appellant is fined the sum of \$100 for taking a frivolous appeal, such amount to be added to respondent's costs on appeal.

McCOMB, Acting P. J., and FOX, J.,
concur.



136 Cal.App.2d 898

The PEOPLE of The State of California,
Plaintiff and Respondent,
v.

George B. WORKMAN, Defendant
and Appellant.
Crim. 3107.

District Court of Appeal, First District,
Division 1, California.
Nov. 14, 1955.

Prosecution for two counts of lewd and lascivious conduct with minor children and one count of sodomy. The Superior Court, County of San Mateo, Louis B. Dematteis, J., entered judgment of conviction on one count of lewd and lascivious conduct and on count charging sodomy, and defendant appealed. The District Court of Appeal, Bray, J., held that mother of prosecution witness should have been permitted to testify as to her son's bad reputation for truth among his fellow workers even though she had not heard his reputation discussed in the community at large, but refusal to permit such testimony did not constitute reversible error.

Affirmed.

1. Criminal Law ⇨1153(2)

Witnesses ⇨354

Whether witness is sufficiently qualified to express an opinion on reputation is a matter primarily in the discretion of trial court and such discretion will not be interfered with on appeal unless an abuse appears.

2. Witnesses ⇨355

A witness may base his testimony of good reputation on the fact that he has

never heard anything against the person's reputation, but to establish a bad reputation, a bad report must of necessity have been discussed generally in the community.

3. Criminal Law ⇨1186(4)

Witnesses ⇨355

In prosecution for lewd and lascivious conduct with minor child and sodomy, mother of prosecution witness should have been permitted to testify as to her son's bad reputation for truth among his fellow workers even though she had not heard his reputation discussed in the community at large, but refusal to permit such testimony did not constitute reversible error. West's Ann.Const. art. 6, § 4½; Pen.Code, §§ 286, 288.

4. Criminal Law ⇨706

Where district attorney recalled prosecution witness in rebuttal and witness testified briefly to some matters that he had already testified to and there was no objection to the recalling of such witness nor to any of his testimony, there was no misconduct in act of district attorney even though defendant claimed witness was recalled merely to appeal to sympathy of jury.

5. Criminal Law ⇨683(1), 1171(1)

Where prosecution failed to cross-examine defense witness but after defendant rested his case, recalled such witness and asked if he had ever been convicted of a felony, such testimony was not proper surrebuttal, but was not prejudicial misconduct by district attorney.

Thomas B. Gallen, Daly City, for appellant.

Edmund G. Brown, Atty. Gen., of Cal.,
Clarence A. Linn, Asst. Atty. Gen., Victor
Griffith, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant was tried on three counts: (1) violation of section 288, Penal Code—commission on October 14, 1954, of a lewd and lascivious act upon the person of Virgil, a child of 7 years; count 2, violation of section 286, Penal Code—commission on the same day of sodomy upon the person of

the same child; count 3, violation of section 288, Penal Code—commission on October 17, 1954, of a lewd and lascivious act upon the person of Joseph, a child of 9 years. A jury acquitted defendant of count 1 and convicted him of the other counts. Defendant appeals from the judgment and the order denying a new trial.

Questions Presented.

1. Should testimony of defendant's mother as to the bad reputation of her son James for truth and integrity have been admitted?

2. Alleged misconduct of district attorney

(a) in recalling Virgil in rebuttal;

(b) in recalling in surrebuttal one of defendant's witnesses to impeach that witness because of conviction of a felony.

Evidence.

Virgil and Joseph are the sons of James Workman. His wife is confined in a state hospital. The boys lived with their grandparents, Mr. and Mrs. James Murphy. Mrs. Murphy is the mother of both James Workman and defendant. Mr. Murphy is their stepfather. James lived in a nearby house. Defendant, therefore, is the brother of James and the uncle of the boys. He lived with the Murphys, occupying a bedroom adjoining that of the boys. In fact to enter his bedroom he was required to pass through the boys' bedroom. Virgil testified to an act of sodomy committed on him the evening of October 14th, in the latter bedroom, and to prior acts. Joseph testified to a similar act on him on October 17th, and to prior acts. The morning of the 18th Joseph reported defendant's acts to his father. Later that day, on being asked, Virgil told of the acts committed on him. Defendant made an equivocal statement to the officers arresting him. On the stand he denied the charges. Mr. and Mrs. Murphy and two friends of the family testified to being in the house the night of October 14th, playing cards in the living room with the Murphys. Defendant came in and out of the living room with frequency, and none of the four noticed anything amiss. James testified that the relations between him and the Murphys and

defendant were friendly and that Mrs. Murphy at no time had asked him to remove the children from her home. Defendant and the four witnesses above mentioned testified that Mrs. Murphy had requested James to remove the children and as a result James thereafter evidenced ill feeling towards defendant and the Murphys. One of Joseph's school teachers testified that Joseph's reputation for truth was bad. James confronted defendant with the charges made by the boys and was so angry that he threatened to kill defendant with a knife, and would have done so if their mother had not intervened.

With the exception of the equivocal statement of defendant to the arresting officers, the testimony of the boys is uncorroborated. Defendant concedes that their evidence, if believed, and it was by the jury, is sufficient to support the verdicts. He argues, however, that the case being primarily the testimony of the boys against that of defendant, makes the case a close one and hence any error would be prejudicial.

1. Mother's Testimony As To James' Reputation.

[1, 2] Whether a witness is sufficiently qualified to express an opinion on reputation is a matter primarily in the discretion of the trial court, which discretion will not be interfered with on appeal unless an abuse appears. See 27 Cal.Jur. 131-139; *Khan v. Zemansky*, 59 Cal.App. 324, 329, 210 P. 529. There seems to be a difference in the foundation necessary to prove *good* reputation from that necessary to prove *bad* reputation. A witness may base good reputation on the fact that he has never heard anything against the person's reputation. On the other hand, a bad report must of necessity have been discussed generally in the community. See 1 Wharton's Criminal Evidence, 465-466; vol. V Wigmore on Evidence, 3rd ed., § 1614, pp. 484-486. It has been held that evidence of bad reputation for truth, honesty and integrity is properly excluded where the reputation is confined to the vicinity of the person's place of business or among the members of a restricted group of persons. *Cosler v. Norwood*, 97 Cal.App.2d 665, 667, 218 P.2d 800, witness' knowledge of the person's bad reputation

for truth limited to the person's fellow cafeteria workers; *People v. Markham*, 64 Cal. 157, 162, 30 P. 620, witness' knowledge of the person's bad reputation for truth and integrity limited to police officers; *People v. Carnavacci*, 119 Cal.App.2d 14, 17, 258 P.2d 1121, witness' knowledge of the person's bad reputation for peace and quiet limited to three or four people who came into the garage where witness worked. In *People v. Markham*, supra, 64 Cal. 157, 30 P. 620, the court said "to impeach him when the inquiry is as to his reputation for truth, he must have reached the bad eminence of notoriety as a liar." 64 Cal. at page 163, 30 P. at page 623. In *People v. Schmidt*, 79 Cal.App. 413, 249 P. 832, 250 P. 1104, a witness was permitted to testify as to the person's bad reputation where the witness knew his reputation in the locality where the person did business but did not know it in the locality where the person lived. The court said, 79 Cal.App. at pages 418-419, 249 P. at page 834: "A person in a large city may not be known to his next door neighbor, but may be known 20 miles away where he does his business. The former strict ruling on this class of testimony has been relaxed, in view of our modern methods of rapid transit, which enable a person to have his home in one place while he does business in another far away." *V Wigmore on Evidence*, 3rd ed., p. 488, points out that the old rule of "neighborhood" reputation is not appropriate to modern conditions, that today, "especially in large cities, a man may have one reputation in the suburb of his residence and another in the office or the factory at his place of work; or he may have one reputation in his place of technical domicile in New York and another in the region of the mines of Michigan or the steel-mills of Ohio where his investments call him for supervision for portions of time. There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the man."

The latest expression of the California Supreme Court on this subject appears in *People v. Cobb*, 45 Cal.2d 158, 287 P.2d 752.

There the character witness was offered to testify to the defendant's good reputation in the neighborhood where the defendant worked although the witness did not know his reputation where the defendant lived. The trial court rejected the offer. The Supreme Court in holding that the trial court erred, stated, 45 Cal.2d at page 164, 287 P.2d at page 755: "Therefore, it would be illogical to say that reputation evidence should be limited to the community of one's residence to the exclusion of the community of one's place of business; and if it is shown that a general reputation exists in the community of one's place of business, and that the witness has sufficient knowledge of it, the witness should be permitted to testify concerning such general reputation."

We like the language of Mr. Presiding Justice White in his dissenting opinion in the *Cobb* case, Cal.App., 279 P.2d 997, the Supreme Court's decision on hearing we have just stated. After referring to cases which held that reputation in the vicinity of the person's place of business or among a restricted group of persons could not be shown, such as *People v. Soules*, 41 Cal. App.2d 298, 306, 106 P.2d 639; and *People v. Griner*, 124 Cal. 19, 21-22, 56 P. 625, he stated, 279 P.2d at page 1000: "We are persuaded that the true and correct rule is that stated in *People v. Derrick*, 85 Cal.App. 406, 409, 259 P. 481, 482, as follows: 'In this age of rapid transit and quick communication it is not only conceivable, but a matter of common knowledge, that business men may acquire no reputation one way or the other in the community in which they actually reside, and bear an excellent reputation miles distant where they follow their daily vocations and come in contact with many associates. *People v. Schmidt*, 79 Cal.App. 413, 249 P. 832 (250 P. 1104); see also *State v. Henderson*, 29 W.Va. 147, 1 S.E. 225-240; *State v. Cushing*, 14 Wash. 527, 45 P. 145-147, 53 Am.St.Rep. 883. Any other view would prevent many eminent citizens from proving well-earned reputations.'" While both the Supreme Court and Mr. Presiding Justice White were considering evidence of good reputation, we can see no reason why

the same rule would or should not apply to evidence of *bad* reputation.

[3] In our case, defendant's mother, Mrs. Murphy, first said she knew her other son's, James', reputation for truth and honesty in the community where he lived for the past 16 years and that it was bad. On recross-examination she stated that she had not heard his reputation discussed by the community at large but by his fellow workers. Defendant then asked her if she had discussed his reputation with his circle of friends and the people who came to visit in her home. Objection was sustained to this question, the court holding that the witness had not shown familiarity with James' general reputation in the community. Defendant made no effort to qualify the witness further, and the court struck out Mrs. Murphy's testimony as to James' reputation. The court should have permitted Mrs. Murphy's testimony to stand. James' reputation among his fellow workers would be in line with modern conditions. Mrs. Murphy should have been permitted to show that added to that there was a like reputation among his circle of friends and the people who visited at their home.

However, under the circumstances of this case we do not feel that the error was prejudicial. The prosecution's case did not, in any material degree, depend upon his testimony. Art. VI, § 4½, Const.

2. District Attorney.

[4] (a) At the close of defendant's case, Virgil was recalled in rebuttal. He testified briefly to some matters to which he had already testified. Defendant contends Virgil was recalled merely to appeal to the sympathy of the jury, by showing again "a little boy whose family situation—completely apart from the issues on trial—cried aloud for that sympathy." Defendant at no time objected to the recalling of Virgil, nor to any of his testimony. While the testimony was merely repetitious, and could have been ruled out on objection, we see no misconduct in the act of the district attorney. There was a time element which was important in the case and which the district attorney apparently wanted to narrow down.

[5] (b) James Murphy, stepfather of defendant and James Workman, testified for the defense, and was not cross-examined by plaintiff. After defendant rested his case, plaintiff recalled Murphy and asked him if he had ever been convicted of a felony. He replied that he had. Thereupon defendant objected on the ground that this was not proper surrebuttal and that plaintiff could not impeach its own witness. The court struck out the answer and instructed the jury to disregard it. Defendant assigns the asking of this question as misconduct. While it is true it was not surrebuttal, nevertheless the question could have been asked on cross-examination, and had plaintiff asked permission to recall the witness for cross-examination instead of calling it surrebuttal, it would have been in the discretion of the trial court to have allowed plaintiff to do so, even though it was at the end of the case. Moreover, plaintiff was not attempting to impeach its witness. Murphy was defendant's witness. See *People v. McFarlane*, 134 Cal. 618, 620, 66 P. 865, 67 P. 138. There was no misconduct here.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



136 Cal.App.2d 737

Gregory LILLEY, a Minor, by his Guardian ad litem, Robert Lilley, and Robert Lilley, Plaintiffs and Respondents,

v.

KEY SYSTEM TRANSIT LINES, a corporation, Defendant and Appellant.

Civ. 16470.

District Court of Appeal, First District, Division 1, California.

Nov. 4, 1955.

Rehearing Denied Dec. 2, 1955.

Hearing Denied Dec. 28, 1955.

Action by guardian ad litem on behalf of minor for personal injuries and guardian's medical expenses incurred when bus passed over minor's foot after minor alight-

ed from bus. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment for plaintiffs and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that allowing plaintiffs during rebuttal to introduce evidence which might have been part of their case in chief and also allowing plaintiffs to amend their complaint at that time were matters within the sound discretion of the trial court and not prejudicial to defendant, and also instructions given by trial court were proper and adequate.

Judgment affirmed.

1. Trial ⚡59(2)

The order of proceedings at a trial is within the sound discretion of the court. West's Ann.Code Civ.Proc. § 607.

2. Trial ⚡63(2)

In action by guardian on behalf of minor for personal injuries and medical expenses incurred by guardian, permission by court allowing plaintiffs during rebuttal to offer evidence that was really part of their case in chief was not an abuse of discretion by the trial court, where defendant did not object or claim surprise or prejudice for allowing such testimony.

3. Appeal and Error ⚡1041(4)

Pleading ⚡236(6)

In action by guardian on behalf of minor for personal injuries and medical expenses incurred by guardian, allowing plaintiffs during the rebuttal, to amend complaint to allege that minor plaintiff was passenger of defendant at time he was injured, was not an abuse of discretion of trial court, and was not reversible error, where there was no prejudice to defendant.

4. Carriers ⚡320(2, 25)

In action by guardian on behalf of minor for personal injuries and medical expenses incurred by guardian when minor's foot was run over by bus, evidence as to whether minor had reasonable opportunity to leave bus and whether he had safely left the bus when the accident occurred, and also whether he had reached a place outside the sphere of any activity

of the carrier which might reasonably constitute a mobile hazard to him as a passenger, was sufficient for the jury.

5. Appeal and Error ⚡882(12)

Instructions to jury on carrier-passenger relationship and degree of care required of carrier could not be complained of by defendant on appeal who had requested two instructions upon this very subject.

6. Trial ⚡260(8)

In action by guardian on behalf of minor for personal injuries and medical expenses incurred by guardian when bus from which minor had alighted passed over his foot, refusal of trial court to give requested instruction on "unavoidable or inevitable accident", was not error as subject was adequately covered by instructions which court gave on "negligence" and "proximate cause".

Donahue, Richards, Rowell & Gallagher, Oakland, for appellant.

Robert A. Kaiser, Oakland, for respondents.

FRED B. WOOD, Justice.

The jury awarded the minor plaintiff \$1,250 for personal injuries and his father \$273 for medical expenses incurred. Defendant moved for and was denied a new trial and then appealed from the judgment. It claims error in the admission of certain testimony, the allowance of an amendment to the complaint, and the giving and refusing of certain instructions.

(1) *Over the objection that it was not rebuttal testimony, plaintiffs were allowed, during their rebuttal, to adduce evidence that was really a part of their case in chief.*

[1] The order of proceedings at a trial is within the sound discretion of the court; e. g., after the plaintiff has adduced evidence on his part and defendant has put in his defense, they "may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case". Code of Civ.Proc., § 607.

[2] Here, defendant did not claim surprise or that the defense was prejudiced by allowing this testimony out of order; nor did it move for a reasonable continuance to meet the situation thus presented. It claimed merely that this was "improper" rebuttal testimony. This testimony was not upon a new subject. It bore directly upon matters mentioned in plaintiffs' opening statement and concerning which testimony had already been received. Also, it was adduced on a Monday and there was evidence that the witness was out of the state the preceding week (during which plaintiffs presented their case in chief), that plaintiffs' counsel found the witness on the preceding day (Sunday) and then went out to talk to her.

Under these circumstances we find no abuse of discretion in the allowance of this testimony out of order.

(2) *Defendant claims it was reversible error to allow plaintiffs, during their rebuttal, to amend the complaint to allege that the minor plaintiff was a passenger of defendant at the time he was injured.*

[3] This, too, is a matter that rests in the sound discretion of the trial court. The evidence showed that the injury occurred shortly after plaintiff got off defendant's bus. Defendant's objection was that the motion was "untimely"; that plaintiffs' counsel had known for at least 11 months that the boy was possibly a passenger; and that it was not fair to expect a defendant retroactively to defend a case on the basis that plaintiff was a passenger rather than a member of the ordinary public. Nothing further was then said by the defendant concerning any possible prejudice to the defense and no request was made then or later during the trial for an opportunity to adduce further evidence on that subject, nor for a continuance thereafter.

Under these circumstances (see cases collected in 2 Witkin on California Procedure 1605-1606 and 1611-1613) we find no abuse of discretion in the allowance of the amendment.

(3) *Defendant says that the minor plaintiff was obviously not a passenger at the*

time of the accident; therefore, instructing the jury on the carrier-passenger relationship and the degree of care required of a carrier was prejudicial error.

The weakness of this argument lies in the premise that he "obviously" was not a passenger. We can not say that as a matter of law. There was evidence for the jury to determine as a fact whether the passenger relationship still existed or not.

There was evidence that the bus was crowded with school children, some standing in the aisles. They were very noisy, there was quite a bit of yelling. The windows were open and children were leaning out the windows. The bus stopped and plaintiff got out the back door. The front end of the bus was a foot or two from the curb, the back was about five feet from the curb. Plaintiff, when he alighted, started to walk alongside and waived to his boy friends when one of the boys, leaning out of a window, grabbed plaintiff's hand and in a couple of seconds the bus started. He was a foot or two from the bus at the time. Plaintiff then fell and the bus ran over his foot. The bus driver, who had had this school bus for some time, admitted the windows could have been open and that children could have been riding with their heads out of the windows. He had seen them doing it before. It was a usual occurrence for the children to do so. The children on the bus yelled to the driver to stop (immediately after the accident), a fact which the driver denied.

[4] This evidence presented a question for determination by the jury: Did the minor plaintiff have a reasonable opportunity to leave the bus, had he safely left the bus, when the accident occurred, *Boa v. San Francisco-Oakland T. Rys.*, 182 Cal. 93, 98-101, 187 P. 2? Had plaintiff reached a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile hazard to him as a passenger, *Dayton v. Yellow Cab Co.*, 85 Cal.App.2d 740, 745, 193 P.2d 959?

In cases upon which defendant relies, it either clearly appeared, or the trier of the facts had found upon sufficient evi-

dence, that the passenger had reached a place outside the sphere of danger: *Choquette v. Key System Transit Lines*, 118 Cal.App. 643, 5 P.2d 921, passenger had left street car and walked to a train crossing, where she was hit by a train; *McAlpine v. Los Angeles Ry. Corp.*, 67 Cal.App.2d 486, 154 P.2d 911, passenger had alighted, stepped into a loading zone and walked 50 feet to front end of zone; *MacLean v. City & County of San Francisco*, 127 Cal.App.2d 263, 273 P.2d 698, passenger, after alighting, stepped upon a slippery substance on the street and fell. *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 108 P. 682, 27 L.R.A.,N.S., 764, is inapplicable because defendant was not negligent. The motorman started in response to an unauthorized bell signal rung by a passenger, which the conductor immediately countermanded.

[5] Moreover, defendant is not in a position to complain, for upon its request the court gave two instructions upon this very subject. (See cases collected in 4 Cal.Jur. 2d 422 at 423, Appeal and Error, § 557.)

[6] (4) *Defendant complains of the refusal to give its instruction on "unavoidable or inevitable accident."* The gist of the instruction was a definition of that term as simply denoting "an accident that occurred without having been proximately caused by negligence."

That subject was adequately covered by instructions which the court gave on "negligence" and "proximate cause." As said in *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823, "if the accident was inevitable or unavoidable that is the same thing as to say that the defendant was not negligent, or that his negligence, if any, did not cause the accident. In other words, it is to say that the plaintiff has failed in his proof." 37 Cal.2d at pages 121-122, 230 P.2d at page 826, quoting an earlier case. See also *Johnston v. Orlando*, 131 Cal.App.2d 705, 711-712, 281 P.2d 357.

(5) *Defendant claims, also, prejudicial error in the court's refusal to give its proffered instruction on proximate cause, but*

the subject matter of that instruction was fully and adequately covered by instructions which the court did give.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; *SCHAUER* and *SPENCE, JJ.*, dissenting.



136 Cal.App.2d 860

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Frank KEELIN, Defendant and Appellant.
Cr. 2622.

District Court of Appeal, Third District,
California.

Nov. 9, 1955.

Defendant was convicted of murder. The Superior Court, Tuolumne County, J. A. Smith, J., rendered judgment, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that victim's statements, which were made in response to questions over a considerable period of time and at indefinite period after shooting and which contain material which might be inferred to have been defensive in respect to possible burglary charge against victim should not have been received as spontaneous statements.

Judgment and order reversed.

1. Criminal Law — 366(6)

In murder prosecution, victim's statements, which were made in response to questions over a considerable period of time and at indefinite period after shooting and which contain material which might be inferred to have been defensive in respect to possible burglary charge against victim, should not have been received as spontaneous declarations.

2. Criminal Law — 735(1)

A trial court's ruling admitting extrajudicial statements as spontaneous declara-

tions is preliminary only, and jury must ascertain ultimate fact of admissibility before it can consider the evidence.

3. Criminal Law §363

Homicide §200

Both spontaneous declarations and dying declarations, if conditions for admission are found to exist, may be received as exceptions from exclusionary hearsay rule.

4. Homicide §218

It is the function of the trial court primarily to pass upon admissibility of alleged dying declarations, and function of jury to determine whether they were in fact made under a sense of impending death, and, if so, then to determine the credibility and weight to which they are entitled.

5. Criminal Law §777

In murder prosecution, wherein certain of victim's statements were admitted as spontaneous declarations, trial court erred in failing to submit to jury under appropriate instructions the ultimate determination as to admissibility of such statements, with instructions that jury was to disregard statements if it determined them not to have been spontaneous declarations.

6. Homicide §218

In murder prosecution, wherein certain statements of victim were admitted as spontaneous declarations and there was no testimony that they were made while victim was under a sense of impending death, submitting issue as to whether statements constituted dying declarations was error, even though both state and the defendant requested the submission.

7. Homicide §203(1), 214(1)

Where there was no showing, in murder prosecution, that victim, at time he made statements, knew his condition or believed he had been mortally wounded, and statements themselves indicated that they may have been made to shield himself from consequences of a charge that he had stolen money from defendant, statements were not admissible as dying declarations.

8. Criminal Law §1137(2)

It is not every case in which invited error will free trial from challenge when

such error caused or contributed to a miscarriage of justice.

9. Witnesses §257

A writing used to refresh recollection of a witness does not by such use become itself admissible as evidence.

10. Criminal Law §1169(1)

Witnesses §257

In murder prosecution, wherein police officer testified that his testimony concerning witnesses' statements was based in part on recollection and in part on his unofficial written report, the written report, which officer used to refresh his memory, was not admissible, and its admission was prejudicial.

11. Criminal Law §406(2)

Where defendant in murder prosecution was held four days without being advised of his right to a hearing or right to counsel, and was interrogated during this period, and then taken before coroner's inquest and there, after being advised that district attorney was his attorney, was questioned, and subsequently was held until he was produced before grand jury, admission of evidence of defendant's statements at inquest violated defendant's constitutional right not to be compelled to be a witness against himself.

James R. Hardin, Sonora, Edmund L. Gorgas, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was indicted by the grand jury of Tuolumne County under a charge of murdering one Raymond T. Etherton. He was tried and the jury found him guilty of murder of the second degree. He appeals from the judgment, which followed and from the order denying him a new trial.

We may say generally that it was the theory of appellant that on the occasion of the killing Etherton had burglariously entered appellant's domicile and was in the act of stealing money; that whatever wounds appellant inflicted upon Etherton

were inflicted at that time and place and that, under the circumstances, the homicide was justifiable. It was the theory of the prosecution that, although some shots had been fired in appellant's domicile, nevertheless no serious wounds had been then inflicted and that Etherton had left the domicile and been gone therefrom for some time when appellant followed him and fired the fatal shots without excuse or justification. There is in the record substantial evidence in accordance with the theory of the prosecution, which supports the judgment. There is also substantial evidence in the record which supports the theory and the defense of appellant. The errors complained of have to do with the admission of evidence and with instructions given, and these errors are claimed to have been magnified in legal effect by the denial to appellant of his constitutional rights. We agree with appellant that the judgment and order appealed from must be reversed.

In order to present the assignments of error we think it necessary to state the pertinent evidence substantially in the order in which it was introduced in the trial court. By stipulation a map was received which shows the following physical facts concerning the scene of the crime: As one leaves the City of Sonora on highway 108 and travels north he passes the intersection of a road leading to the east. At a distance of 980 feet from the highway on that intersecting road is a place called "Indian Camp". At that point defendant, hereinafter called "appellant", lived in a trailer house owned by him. Etherton lived in a lean-to contiguous to appellant's trailer. Along the westerly side of the highway there is an abrupt upslope or bank with a height varying from four to ten feet.

A Doctor Boice was called. He had performed an autopsy upon the body of Etherton. He testified that he observed on the body the following bullet wounds: One bullet had entered at the left side below the rib cage, traversed upward and to the spine and had shattered into small bits when it contacted the spinal column. It had passed through several loops of intestines on the way. Another bullet had entered below the rib cage, had gone through the liver, sever-

ing the main branch of the hepatic artery and had lodged back of the liver. Two other bullets had inflicted only flesh wounds. There was also a large stellate lesion on the forehead of the decedent, presenting a jagged, torn area. Its appearance indicated that it had been made by some type of blunt instrument or, as the witness stated, "it looked like a rock * * * like something a rock had produced." The witness said that, considering that the body of decedent was found on the highway 980 feet from the trailer, he could have walked or run from the trailer house to the highway, although he would have been in great pain; that such a journey would be improbable but not impossible; that he would have been bleeding profusely; that the witness had found two quarts of free blood in the abdominal cavity; that when an artery of that size is bleeding it is improbable that a man would go very far; that if he ran or walked the exertion would increase the flow of blood from the wound. The witness said further that either of the two abdominal wounds could have caused death; that from the wound which perforated the bowel death would be expected within 24 hours, but that, considering the wound that severed the hepatic artery, it would be inconsistent with probability "that he would have lived at all." Said the doctor: "With either [wound] it was unlikely for him to live over 10 to 15 minutes, half an hour at the longest, even if he were lying down." The foregoing testimony was given on direct. On cross-examination the witness testified as follows: With respect to the wound which severed the hepatic artery he would doubt that Etherton could have walked more than a few steps, and that from the loss of blood he would not have expected him to live very long and would say he would go into such profuse shock that he wouldn't be able to walk; that he would pass right out; that he doubted if with that wound he could walk the length of the court room in which the trial was held; that he would go into shock; that notwithstanding all that, it might be possible to walk a greater distance as sometimes under such circumstances humans will do very remarkable things; that the witness doubted it would be possible

for Etherton to walk 980 feet with the amount of blood he had lost since blood pours out rapidly from a blood vessel like the hepatic artery and the victim would go into shock in 2 or 3 minutes at the very minimum—profound shock. The witness' attention was called to his testimony at the coroner's inquest preceding the trial in which he stated that in his opinion it would be possible for Etherton to have walked appreciable distances, although awfully hard. Said the witness: "It would be awfully hard for him to walk with this one [the wound that severed the artery], but I suppose he did." The witness said that with the wound that severed the bowels, it would have been difficult for him to have walked any appreciable distance, but he could have done it; that it wasn't absolutely impossible. Said the witness after reading his previous testimony: I couldn't say it is absolutely impossible. Like I said there, I think it's highly unlikely a man could walk that far." Concerning the stellate wound upon Etherton's forehead, the witness said he thought it could not have been caused by falling and hitting his head on the ground, although if he pitched down a bank it could have happened; that in his opinion a blunt instrument had been used to inflict that wound.

The Sonora Chief of Police testified. He said they had arrested the appellant at his trailer house and that a search of the trailer house disclosed a wallet containing something over \$60, and a second wallet with \$1 in it; that, although they had found a bullet hole in the wall of the trailer and several spent cartridge cases and a rifle, they found no bloodstains; that going down the road toward the highway, which road was wet and muddy, they had found no bloodstains until near, and upon, the highway.

Two men, a Mr. Johnson and a Mr. Bezemer, at 5 o'clock on the morning of the homicide had left Sonora and just before reaching the intersection of the state highway with the side road had observed in the darkness what appeared to be the figure of a human being lying on the side of the road. Another figure appeared to be bending over it. They passed the spot and then determined to return and investigate. They

then saw the figure of Etherton on the highway and observed, upon the bank, another person, who quickly disappeared. Johnson was the first of the two to testify. He said that he observed the two figures on the highway, one bending over the other and when he had turned his car about and come back to the scene the one that had been standing was on the bank. He could not say whether that person was large or small or whether it was a man or a woman, although it looked to be a man. The figure wore a long brown coat, but he couldn't tell whether it was a raincoat or an overcoat, it was so dark. He had not noticed whether the figure wore a hat or not and he had not had a look at the features. He said he could not recall anything except that it was someone dressed in a long coat who was on the bank. He said he had asked Etherton as he lay on the road if he had been run over and Etherton replied "No" and said he had been shot. The witness then told Bezemer to stay there while he went to get the police. He drove to Sonora and after the police arrived he left the scene. He had observed a rock about a foot from Etherton's body and saw no other rocks in the immediate area. On cross-examination he said as to the person he had seen standing over Etherton that he could not tell whether he was tall or short, heavy or slight. Bezemer next took the stand and testified much as had Johnson. He had seen the figure which had been bending over Etherton, going up the bank. He said the figure wore a long overcoat; that he couldn't swear it was a man; he couldn't recollect the color of the overcoat, nor identify the coat as the coat of appellant which was shown to him. He spoke to Etherton and asked him what had happened. At this point counsel for appellant objected that no proper foundation had been laid to introduce any statement of Etherton. Said the court: "Are you going to introduce a dying declaration?" Prosecuting attorney: "Not at this time, Your Honor. [Counsel for Appellant]: The answer would be hearsay, except only a dying declaration. The Court: I think it would be hearsay unless you are going to introduce a dying declaration. [The Prosecuting Attorney]: We'll

just wait then." After a few questions had been asked and answered, the court, interrupting the examination, said: "It might be part of the *res gestae*. I think it probably would be. I think I'm going to reverse myself if he wishes to ask that question. I'm going to reverse that. Mr. Bezemer would you state what the person on the road said to you? [To defendant's counsel]: That may go in over your objection." The witness said he had asked Etherton what had happened and Etherton had said: "I been shot". Said the court: "I think you ought to ask him to give all the conversation. A. I said 'Who shot you?' He said 'Frank.' I said, 'where does he live?' He said 'lives in a trailer court, Indian Trailer Court, or something like that.' Q. Did he say how long he had been out on the road? A. He said between two and half to three hours." The witness said that while he talked to Etherton nothing was said as to where Etherton had been when he was shot and that the witness had not asked him that.

The next witness whose testimony is pertinent here was one of the two officers whom Johnson had summoned. The officers had come together. Kalakian was the superior and a police sergeant of the Sonora Police Department. His companion, Shelton, was a patrolman. Kalakian said that they found Etherton "lying there [in the road] in a lot of blood. He was covered with blood." The following then occurred:

"Q. Now, did you talk to the man at all on the road? A. I did.

"Q. And what did he say to you? A. I asked him what happened to him.

"[Counsel for Appellant]: I take it we can make the same objection and have the same exception?

"The Court: I will overrule the objection."

The witness then stated that he had asked Etherton what had happened and had been told that he had been shot. The witness continued: "I said 'how many times and where?' He said 'Three times in the guts.' I said, 'Who shot you?' He said, 'Frank.' I said 'Frank who?' He said, 'I don't know his last name.' I said, 'Where does he live?'

He says, 'He lives in a trailer house in the Indian Camp.' When I got that information, I asked, 'What else happened?' He said, 'Then he tried to finish me off with a rock, bash me in the head with a rock, finish me off.' Officer Shelton was there. He kept questioning him while I went to telephone for the ambulance." He stated that Etherton was still conscious when he returned, but he remembered no further statements. "Q. How long was it from the time you summoned the ambulance until the man was taken away by the ambulance? A. Not very long. I would say ten or fifteen minutes possibly. Q. Was the man conscious at the time he was loaded into the ambulance? A. He was." On cross-examination he added: "One thing I forgot to mention. I said, 'why did he shoot you?' He said, 'He claimed I robbed him of \$80.00, but I didn't.' Q. He mentioned a figure? A. Yes. Q. \$80.00? A. Yes." When asked if Etherton mentioned where he, Etherton, had been when the shooting took place, the witness said he remembered nothing of that. On redirect he supplemented Etherton's statement by saying that Etherton had told him appellant had shot him with a pistol. Officer Shelton followed Kalakian to the stand. He said Etherton was lying on a rock that was covered with blood. He was then asked to relate the conversation he had with Etherton. No further objection was made at that time to the introduction of that evidence. Shelton testified as follows: "Well, the first thing that was asked him was 'What happened?' And he said that he had been shot, and then he was asked 'Where?' and he said 'In the guts.' And 'how many times?' and he said 'Three times,' and then he was asked 'Who shot you?' and he said, 'Frank.' The next question was 'Frank who?' and he didn't know the last name. He said, 'I don't know', and then the next question was 'Where does Frank live?' and his answer was 'In the Indian Camp in a trailer house.'" Said the witness: "There is one thing I would like to add there. When he said he was shot, he said, 'and he tried to finish me off with a rock in the head.'" The witness said that when Etherton was asked what he had been shot with he said he

had been shot with a pistol and when asked where he was when he had been shot Ether-ton replied that he had been in bed when he was shot. On cross-examination the witness stated with regard to elapsed time that he and Kalakian had been contacted in front of the Sonora Inn at 5:10 A.M., December 5, 1954; that when the ambulance was called it was 5:15; that the ambulance arrived at 5:28; that Etherton was alive when he entered the ambulance.

In a statement made by officers Kalakian and Shelton to Police Chief Campbell, which report, signed by both officers, was later introduced into evidence upon the theory that it constituted past recollection recorded, there was the following statement: "The victim was lying in a pool of blood, and good deal of smeared blood near where his pants was found. The pants was also soaked with blood. A bloody rock was found under the victim's left hip, with which the victim claimed Frank had used to beat him on the head, trying to finish him off."

We think the court erred in admitting in evidence the statements of Etherton, and that nothing occurred thereafter to cure the error. As we have noted, when the subject was first touched upon counsel for the appellant objected that the statements were hearsay unless brought within the dying declaration exception to the hearsay rule. This objection was sustained by the court. Quickly thereafter, however, the court announced that it would permit the statements as being part of the "res gestae". By this we feel sure the court referred to spontaneous declarations, rather than verbal acts. Wigmore, 3rd ed., Vol. 6, sec. 1745, at page 132, discusses the distinction and quotes the following from *Keefe v. State*, 50 Ariz. 293, 72 P.2d 425, 427:

"There has been such a confusion of ideas and such indiscriminate use of the words 'res gestae' that it is almost impossible, on reading the decisions involving this question, to discover the real extent of the exceptions and the principles involved therein. The phrase 'res gestae' means literally 'the thing done' and it is used in law as meaning the circumstances which are

the automatic and undesigned incidents of the particular act in issue, and which are admissible in evidence when illustrative and explanatory of the act.

* * * The phrase is frequently applied to statements or explanations made in regard to an act in question by witnesses thereof. Such statements or explanations, however, are properly divided into two classes, and the admissibility of the respective classes is based upon entirely different principles of law and logic. They may be defined as 'spontaneous exclamations' and 'verbal acts.' It is generally due to a confusion of these two classes of evidence and the principles governing their admissibility that the conflict between the many apparently irreconcilable decisions has arisen.

"A spontaneous exclamation may be defined as a statement or exclamation made immediately after some exciting occasion by a participant or spectator and asserting the circumstances of that occasion as it is observed by him. The admissibility of such exclamation is based on our experience that, under certain external circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him. * * *

"Verbal acts are utterances which accompany some act or conduct to which it is desired to give a legal effect. When such act has intrinsically no definite legal significance, or only an ambiguous one, its legal purport or

tenor may be ascertained by considering the words accompanying it, and these utterances thus enter merely as a verbal part of the act. * * *

As to the conditions under which spontaneous declarations may be admitted, the authority referred to says in section 1749, at page 139:

"* * * [T]he statement must have been made under circumstances calculated to give some special trustworthiness to it, and thus to justify us in exempting it from the ordinary test of cross-examination on the stand. This principle is represented, in the present Exception [spontaneous statements], by the phrase, often repeated, that the statement must from the circumstances 'derive a degree of credit independently of the declaration', i. e. other than the faith to be given to an ordinary extrajudicial assertion. This circumstantial guarantee here consists in the consideration, already noted (ante, sec. 1747), that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be 'spontaneous', 'natural', 'impulsive', 'instinctive', 'generated by an excited feeling which extends without let or break-down from the moment of the event they illustrate.' * * *

After quoting from many decisions, Professor Wigmore (sec. 1750, p. 142 et seq.) summarizes as follows:

"From the judicial expositions the following limitations, and these only, may legitimately be deduced:

"(a) *Nature of the occasion.* There must be some occurrence, startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting. * * *

* * * * *

"(b) *Time of the utterance.* The utterance must have been *before there has been time to contrive and misrepresent*, i. e. while the nervous ex-

citement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings.

* * * * *

"Furthermore, there can be *no definite and fixed limit* of time. Each case must depend upon its own circumstances: * * *

"Thus the application of the principle thus depends entirely on the circumstances of each case.

* * * * *

"(c) *Subject of the utterance.* The utterance must *relate to the circumstances of the occurrence preceding it.*"

[1] As we have noted, the trial court admitted Etherton's statements over objection and at a time when it had before it only the bare facts that Etherton had been killed by gunfire, and the testimony of the autopsy surgeon which indicated that in the witness' opinion little time elapsed between the entrance of the bullet that severed the hepatic artery and ensuing profound shock and death. The witness' testimony on this did not exclude the possibility of the lapse of considerable time. Before admitting the extrajudicial statements it was the duty of the trial court to preliminarily go into and receive available evidence touching the quality of the statements as coming within the spontaneous statement exception to the hearsay rule. This was not done and over objection the conversations held with Etherton were admitted. Twice the objection was made and twice it was overruled. While it was not repeated as to succeeding witnesses, it is not to be held that the objection was thereby waived. Without there being any attempt to qualify the hearsay statements, other than such qualification as was furnished by the testimony of the autopsy surgeon, the extrajudicial statements were admitted as spontaneous declarations. The statements themselves contained much from which it could be inferred that they were not qualified as spontaneous declarations. They were made in response to questions; they were made over a considerable period of time; they indicated at least this much re-

flection, that when Etherton was asked why appellant had shot him he had replied that appellant claimed he, Etherton, had robbed him of \$80, but that the charge was not true. It certainly could be inferred from the defensive matter included in Etherton's extrajudicial statements that he was protecting himself from a charge that might be made that he had burglariously entered the trailer house of appellant with intent to rob him. If there had been an inquiry into the qualifications of the extrajudicial statements as being either dying declarations or spontaneous declarations, the matters later appearing in the case would have been revealed. It would have been revealed that Etherton had said he had been shot in bed, by which he must have meant his bed in the lean-to contiguous to appellant's trailer, indicating again a considered defensive statement against a possible charge of burglarious entry. On this point it is the claim of the prosecution that Etherton could not have been shot, as he said he was, in his bed. In short, the prosecution finds itself arguing that there was fabrication in fact in Etherton's extrajudicial statements. It would have been further revealed that Etherton said he had been lying on the highway for two and a half to three hours, a period of time affording ample opportunity for reflection and for fabrication. Etherton's statements also conflict with the inferences to be drawn from the autopsy surgeon's testimony as to the length of time Etherton could have lived and spoken after the severance of the hepatic artery. If it be considered that he falsified when he said he had been shot in his bed, then he had had time enough to fabricate, for fabricate he did. We think from a consideration of all of the testimony in the record when the ruling was made that the extrajudicial statements of Etherton should not have been received.

[2-4] When at the close of the evidence the cause was submitted to the jury all of the evidence we have related touching the admitted statements as properly qualified spontaneous statements had been received. The question of whether or not these statements qualified as spontaneous declarations was clearly and seriously at issue. Re-

search has not disclosed any ruling by the appellate courts of this state on the subject of whether or not, when conflicting evidence has been received or conflicting inferences can be drawn touching the matter of qualification of spontaneous statements, the ruling of the trial court admitting the statements is final, or, on the contrary, whether or not that issue must be resolved by the jury under instructions by the court defining spontaneous declarations and telling the jury how they are to determine whether or not the statements were qualified; and that if they find them not to have been qualified they are to disregard them. However, we think the issue must be submitted to the jury. We think the ruling of the trial court is preliminary only and that the jury must ascertain the ultimate fact of admissibility before it can consider the evidence. We can see no difference between the issue of admissibility of spontaneous declarations and the issue of admissibility of dying declarations. Both sorts of declarations can only be admitted as exceptions from the exclusionary hearsay rule. Both sorts of declarations are hearsay and both, if the conditions for admission are found to exist, may nevertheless be received in evidence. The proper procedure as to dying declarations and the rule as to who shall ultimately determine if the declarations are dying declarations is well settled in this state. In *People v. Rulia Singh*, 182 Cal. 457, 476, 188 P. 987, 995, it is said:

"The weight of authority in respect to the relative functions of the court and the jury touching the admission and determination of dying declarations is that the court alone shall pass on the admissibility of this character of evidence, and that the jury shall exclusively determine its probative value. * * * Whatever the law may be in other jurisdictions, it is well settled in this state that it is the function of the trial court primarily to pass upon the admissibility of the alleged dying declarations and of the jury to determine whether they were in fact made under a sense of impending death, and, if so, then to determine the credibility and

weight to which they are entitled. If the jury is not convinced beyond a reasonable doubt that the declarant was in extremis and believed at the time that he was, they must, in arriving at their verdict, disregard such declarations. But if, on the other hand, the jury are satisfied beyond a reasonable doubt that the declarant acted under a sense of impending death, they must then determine what facts, if any, are established by his declarations and apply them accordingly. *People v. Glenn*, 10 Cal. 32; *People v. Lem You*, 97 Cal. 224, 32 P. 11; *People v. Thomson*, 145 Cal. 717, 79 P. 435; *People v. Proffumo*, 23 Cal.App. 376, 138 P. 109; *Greenleaf on Evidence*, § 161."

[5] Under the circumstances, therefore, we hold that it was incumbent upon the trial judge, having admitted the statements, to submit to the jury under appropriate instructions the ultimate determination as admissibility with instructions that they were to disregard the statements if they determined them not to have been spontaneous declarations. This was not done.

Upon the subject we have just been discussing the record presents a puzzling situation. Although the statements of Etherton made to the two arriving witnesses and to the two officers and containing so much that was damaging to appellant were by the trial court ruled out when first offered as constituting dying declarations and then admitted upon the theory that they were spontaneous declarations, yet both sides requested that the court give to the jury the instruction found in CALJIC and therein appearing as Number 330, reading as follows:

"Evidence has been received tending to show that the deceased made a statement concerning the circumstances under which he received the injuries which later caused his death. The evidence of that statement may not be considered and must be entirely disregarded by you unless you find from all the pertinent evidence that at the time the deceased made the statement, he was under a sense of impending death,

that he then believed that he was going to die from the injuries thus inflicted, and that he then had no hope of recovery from such injuries. If the statement was made under the conditions I have specified, the jury may and ought to consider it as evidence,
* * *"

If this instruction had been given at the request of the People only, error would have to be declared because the objection of the defense that the declarations of Etherton had not been qualified as dying statements had been sustained by the court. And since thereafter no further attention was paid to the statements as perhaps constituting dying declarations the defense had had no opportunity to present evidence bearing upon the nonexistence of a belief upon the part of Etherton that his death impended and that he had no hope of recovery. But the defense also asked that the same instruction be given. What occasioned this mutual request does not appear in the record.

[6-8] It was error for the trial court to submit to the jury the issue as to whether or not the statements admitted in evidence constituted dying declarations of Etherton. Whenever a dying declaration is offered in evidence the burden is cast upon the one offering the same to establish primarily that it possesses the qualifications of such a declaration. To do this the offeror must establish that the declaration was made under a sense of impending death, that the declarant believed he was going to die from his injuries and had no present hope of recovery therefrom. Preliminarily, it is for the court to determine the admissibility of the proposed declaration and it is the duty of the court to inquire into the facts and circumstances under which the declaration was made and to offer opportunity, if requested, to the party opposing the admission of the declaration to disprove its admissibility. In this case the only time when the question of the admissibility of Etherton's statements as dying declarations was questioned the court sustained defense objections that they were not admissible. Certainly it could not be said that at that time the trial court abused

its discretion in determining that the statements were not admissible as dying declarations. It had before it only the testimony of the doctor that in his opinion Etherton was gravely wounded and probably would soon, after receiving the wound that severed the hepatic artery, pass into profound shock and speedily expire. There was no other attempt by the prosecution to prove that Etherton knew his condition or that he believed he had been mortally wounded. And the prosecution acquiesced in the court's ruling. When the statements had been received they themselves afforded much persuasion that he did not know of the gravity of his wounds and he did not believe that he was about to expire, much less that he had no hope of recovery, for, as we have noted, his statements were those of a man seeking to shield himself from the consequences of appellant's charge that he had stolen money from appellant. We have no hesitancy in declaring that at the close of the evidence, and as a matter of law, the statements of Etherton could not be considered as dying declarations. It was, therefore, error to tell the jury that they could independently pass upon that issue and from the evidence could determine that his statements were dying declarations and so determining could consider them as evidence in the cause, testing their credibility, of course, under the rules given them for that purpose and applicable to all evidence before them. But, as we have said, both the prosecution and the defense requested the court to give this instruction and, therefore, it is apparent that the error, so far as the defense be concerned, is open to the charge that it was invited error of which they cannot complain. Nevertheless, error is nonetheless error and is no less operative on deliberations of the jury because the erroneous instruction may have been requested by counsel for the defense. After all, it is the life and liberty of the defendant in a case such as this that is at hazard in the trial and there is a continuing duty upon the part of the trial court to see to it that the jury are properly instructed upon all matters pertinent to their decision of the cause. It is not every case in which invited error will free the trial from the

challenge that such error caused or contributed to a miscarriage of justice. The jury were told that it was for them to determine whether or not they were dying declarations. We cannot say, as a reviewing court, that the jury may not, incapable as they were of testing these statements by the somewhat technical rules of law governing their admission, have considered them to be such, and if they did, then there was injected into the trial considerations that ought not to have been before the jury. In summation upon this matter of the statements of Etherton, it is our view that these statements ought not to have been introduced in the cause either as dying declarations or as spontaneous declarations and that their injection into the cause must have been seriously detrimental to appellant's defense.

[9] Appellant contends that the trial court committed prejudicial error in admitting into evidence the written report which the two investigating officers made to their chief. We think this contention must be sustained. This document was admitted after cross-examination of officer Shelton, the last to testify of the four witnesses who saw Etherton as he lay upon the highway. The two arriving witnesses, Johnson and Bezemer, had said that they could not by any means describe the figure they had seen stooping over Etherton and later ascending and disappearing over the bank of the highway; that they could not be certain whether it was a man or a woman they had seen and could only say that it wore a long overcoat. They had given their reasons for this, that is, that it was dark, they did not get a good look, and were concerned with the man lying in the road. Of course, and properly enough, neither of the officers testified that either Johnson or Bezemer had made statements to them contradictory to their direct statements on the stand, nor was any effort made to impeach either Johnson or Bezemer upon the ground that he had made such statements. Nevertheless, the typewritten and signed report which the two officers gave to their chief contained this matter: "Mr. Harry Johnson stated that he saw a man running from the scene when they first discovered the victim.

Mr. Johnson described the man as being elderly, slender built, and wearing glasses." Appellant was an elderly, slender man who wore glasses, and the sentence we have quoted from the typewritten report was the only evidence of a descriptive nature that identified appellant with the figure seen bending over Etherton. Appellant denied that he had approached Etherton on the highway or that he had been the person seen climbing the bank and disappearing from the roadway. When counsel for the appellant cross-examined officer Shelton he sought to develop that there were certain things testified to by him that had been omitted from his *official* report, and Shelton, evading this charge of omission, stated that the things inquired about had been contained in his *unofficial* typewritten report to the police chief; that he had this typewritten report in his pocket where he had had it for several days and that the matters inquired about did appear in that report. On counsel's request the officer produced the report and counsel called his attention to the sentence containing the detailed description of appellant which we have quoted above. The following occurred:

"Q. I want you to read to yourself, if you will, this paragraph right there, starting 'Mr. Harry Johnson' and ending with that word. Just read it to yourself if you will. A. Yes, sir, that is what he said.

"Q. What you have got here in this report is this: 'Mr. Harry Johnson stated that he saw a man running from the scene when they first discovered the victim. Mr. Johnson described the man as being elderly, slender built, and wearing glasses.' That is tailor-made for this defendant, isn't it? A. It could be.

"Q. Tailor-made—slight, elderly, and wearing glasses. A. It could fit him.

"Q. It sure could, couldn't it? As a matter of fact, Mr. Johnson didn't tell you any one of the things in the report. A. Yes. He said he was wearing a long overcoat, and if I've got it in the report, he must have said something about the rest of it.

"Q. He doesn't say one word in your description about a long overcoat, and you

told me a minute ago the best description he could give was a man wearing a long overcoat. A. Yes. I remember that long overcoat.

"Q. You told me just a little while ago he didn't mention any of these things about being elderly, or slightly built, or wearing glasses. Isn't that a fact—about two minutes ago? A. I said I didn't remember, I believe. I think I said I didn't recall that."

Upon redirect the prosecuting attorney offered the report in evidence as an exhibit upon the basis that it represented past recollection recorded. Its receipt into evidence was objected to upon the ground that it was hearsay; the objection was overruled and the document was received in evidence. A writing used to refresh the recollection of a witness does not by such use become itself admissible as evidence in the cause. In re Estate of Packer, 164 Cal. 525, 530, 129 P. 778, 780. We quote the following from that decision:

"* * * Even if it be assumed that the circumstances were such as to authorize the use of the letters to refresh the witness' recollection * * *, the party calling her was not thereby authorized to put the papers before the jury. Such a paper is 'in no sense testimony. * * * The opponent, but not the offering party, has a right to have the jury see it. * * * That the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established.' 1 Wigmore on Evidence, § 763. And such seems to be the fair construction of section 2047 of the Code of Civil Procedure, which expressly declares the right of the *adverse party* to read the writing to the jury. * * * To permit this to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit." See also In re Estate of De Laveaga, 165 Cal. 607, 133 P. 307; People v. Lanterman, 9 Cal.App. 674, 100 P. 720; Hawkins v. Sanguinetti, 98 Cal.App.2d 278, 220 P.2d 58.

Seeking to justify the introduction of this document in evidence, the Attorney General here argues as follows: "The witness testified in effect that the contents of the report were accurate; that the report was made shortly after the occurrence of the offense related therein, and that at the time of the trial he had no independent recollection of the contents of the report. The rule is that a written memorandum which contains a statement of facts which were fresh in the writer's mind at the time [of] the memorandum may be introduced in evidence as past recollection recorded if the witness at the time of the trial testifies that after looking at the memoranda he is unable to refresh his memory therefrom and is unable to testify independently concerning the facts stated in the memorandum." We do not read the record as being in accord with these statements as to its contents nor as measuring up to the rule relied upon. The following occurred:

"Q. I will ask you this, Mr. Shelton. * * * How much of your testimony that you gave here in Court yesterday and today is based upon this report? A. Quite a bit of it.

"Q. How much of the testimony that you have given is based upon your independent recollection of events as they happened? A. I believe it's about half and half. * * *

"Q. How much of the testimony that you have given, Officer, relative to the statements of either the deceased or Mr. Keelin is based upon your accurate memory at this time of what happened, or upon any report you made, or any discussion you had with other officers? A. I tried not to talk about it to other people, because I don't think that's right—people that weren't involved in the case. * * *

"Q. You are quite sure all of these items you have mentioned here—this very definite description, was given to you on that morning by Mr. Johnson? A. That was given to Sergeant Kalakian and I.

"Q. You are quite sure? A. As far as I know, yes, sir.

"Q. Were you mistaken then in your testimony a little while ago when you stated

Mr. Johnson told you the man was going up the bank and had an overcoat on and he couldn't see much else because he went out of sight? A. I hadn't read that report for quite a while, so I didn't recall that.

"Q. How long has it been since you read the report? A. Two or three days. * * *

"Q. Now, Mr. Shelton, as I understand it, this all took place December 5. It's now March 3, is it not, or March 2, three months ago. A. Yes.

"Q. Now, when Mr. Gorgas [Counsel for appellant] talked to you about that and you got it out of your pocket and he mentioned the statement that Mr. Johnson had stated that he saw a slightly built man with glasses and a long coat leave and go up a bank, does that refresh your recollection? A. After I read this.

"Q. Do you now recall whether Mr. Johnson actually told you those things? A. The way I remember it he says that he may have been wearing glasses. He seen a flash or something of light. I don't recall the exact words, but I got it down in the report."

[10] In our view the foregoing will not support a claim that the witness had no recollection at the trial independently of the memorandum or of the contents thereof. The document was inadmissible and its admission may well have gravely prejudiced the defense. For instance, in addition to the paragraph in which was contained the description of the figure as being "elderly, slender built and wearing glasses" there was the following matter which had not been theretofore testified to: "A bloody rock was found under the victims left hip, with which the victim claimed Frank had used to beat him on the head, trying to finish him off." Up to that time and on this subject there had been testimony that Etherton had claimed Frank had tried to finish him off with a rock, but there had been none in which he referred to a certain bloody rock found under his left hip and identified as the rock with which appellant had tried to "finish him off." The significance of this additional hearsay statement not otherwise introduced in evidence can

hardly be minimized when we recall again that it was the theory of the prosecution that the fatal shots had been fired and the beating had occurred after the affair in the trailer house had been closed out by the departure of Etherton, and at a time when appellant had followed Etherton down to the highway. It is also passing strange that if Etherton claimed that the bloody rock found under his left hip was the one with which he had been beaten by appellant, it was never brought to the trial and placed in evidence as an exhibit. Such treatment of the memorandum "spotlights" the direct testimony of its maker; and the memorandum may, along with other exhibits, find its way into the jury room and its effect thus be magnified out of all proportion to the oral testimony of the various witnesses.

[11] Appellant contends that the trial court erred in admitting in evidence, over his objection, testimony given by him before the coroner's inquest. In examining this contention it should be stated that appellant was arrested early in the morning of December 5th and was kept in custody until the inquest was held on December 9th at 7:30 in the evening. During that time he had asked for and had been denied counsel. He was produced at the coroner's inquest by the officers in whose custody he had remained, was sworn as a witness and questioned at considerable length by the sheriff, by the district attorney and by one or more coroner's jurors. He had at no time been informed of his right to counsel nor had he been taken before a magistrate who might inform him thereof. In fact, he testified that it was during this period he demanded to be allowed to have an attorney and was told by his custodians that the district attorney was his attorney. There appears to be no denial in the record that this occurred. During the trial the People called the sheriff to the stand and began to question him concerning statements made by appellant at the inquest. Objection was made, based on the facts and circumstances we have related, that to permit these statements to be used would violate the appellant's constitutional right not to be compelled to be a witness against

himself. The objection was overruled. Although a transcript of the testimony before the coroner was not admitted in evidence, the sheriff was questioned at some length as to the questions asked the appellant at that inquest and as to the appellant's answers to the questions. There can be no doubt from the record that a great deal of his testimony before the coroner was thus introduced into the record, it being the theory of the district attorney that the objection was not good as against admissions. He said, "It was my understanding admissions could be introduced even if extracted by force." The use of these statements was error. The matter is covered by the case of *People v. O'Bryan*, 165 Cal. 55, 61, 130 P. 1042, 1044. In that case the statements used were elicited from the defendant when he had been taken before a grand jury. We see no difference in so far as the protection of the Constitution be concerned. The Supreme Court said:

"This testimony should not have been admitted. The course pursued was in violation of the constitutional right of every person not to 'be compelled, in any criminal case, to be a witness against himself.' Const. Cal., art. 1, § 13. The defendant could not, of course, have been called and required to testify against himself at the trial. The guaranty against being so compelled would be of little value if the same result could be attained by the indirect method of compelling him to testify at some antecedent step of the proceedings against him, and then offering in evidence his statements so extracted. We do not mean to suggest that under no circumstances can testimony given by a person before a grand jury be given in evidence in a subsequent trial of a criminal charge against him. The Constitution protects a person from being *compelled* to be a witness *against himself*. If, at the time he appears, no accusation, formal or informal, has been made against him, he does not in testifying become a witness against himself. Or if, even though charged with crime, he

voluntarily gives evidence against himself, his rights are not infringed by the use of such evidence thereafter. These distinctions are well illustrated by a series of New York cases [citing cases], the result of which is summed up in *People v. Molineux*, 168 N.Y. [264] 331, 61 N.E. [286] 308, 62 L.R.A. 193, in these words: 'When a person testified at an inquest as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been *voluntarily* given after he has been fully advised of his rights and has been given an opportunity to avail himself of them.' Here the defendant when brought before the grand jury was in custody under an accusation of guilt of the crime under investigation. Taken into the presence of that body by the sheriff, sworn and examined without the aid of counsel, and without any instruction as to his rights, it cannot be said that his submission to the interrogation was in any fair sense voluntary. The great preponderance of authority is that testimony so given by a defendant is not to be used against him."

It has been frequently held that a defendant, subpoenaed to testify before a grand jury, who appeared and answered questions in regard to matters on which he was later indicted could have the indictment quashed on application to the court because it was deemed that being subpoenaed to testify before a grand jury investigating a charge or a proposed charge against him was such compulsion that the Constitution was violated. These cases are collated in an annotation appearing in 38 A.L.R.2d at pages 225, 300-301. We have no doubt that under the circumstances disclosed by this record the use of appellant's statements before the coroner at his trial was a violation of his constitutional rights. In saying this we consider what occurred after the coroner's inquest was held. When he testified before the coroner he had been in custody four days, during which time he had been frequently questioned by the police officers

and by the district attorney. They continued to hold him in custody in violation of his right to be taken before a magistrate, to have an attorney and to be informed of his rights, for an additional 7 days, at which time he was taken before the grand jury and again examined by the district attorney and various grand jurors. During that examination he was questioned regarding inconsistencies between statements to the grand jury and statements he had made to the coroner. His indictment followed. Appellant did not seek to appear before either the coroner or the grand jury and it is apparent that he did no more than ignorantly submit to being haled about by his custodians. It was not until 12 days after his arrest and detention that he was arraigned in the superior court and counsel was appointed to represent him.

Appellant contends that his long detention without benefit of counsel and his being compelled to testify against himself before the coroner and before the grand jury while that body was investigating the charge of murder proposed to be placed against him so prejudiced his defense as to amount to a denial of his constitutional right to due process. In addition to what has been heretofore discussed, appellant, in support of this contention, further argues that delay in obtaining counsel deprived him of any representative who could act in his behalf while the facts surrounding the killing of Etherton were still fresh. The truth of this observation cannot be denied. The purposes of the statutes which require that a person detained be taken before a magistrate at the earliest practicable moment which provide penalties if counsel be denied when counsel have been requested, and which punish a refusal to permit counsel to talk with the person detained, are all to provide early representation if it is desired. We think it highly improbable that, had appellant's request for counsel been heeded, he would have been a witness either before the coroner or before the grand jury. The conduct of the prosecuting attorney and of the police officers cannot be too strongly condemned in this respect. (It should be said here that the district attorney in office when these things hap-

pened was not in office when the trial was had.) It is altogether likely that had they kept their oaths to support the Constitution of this State and of the United States and had they kept their oaths to perform their duties under the law this trial would have had a different complexion. We cannot measure the prejudice to appellant; we cannot even say with certainty that prejudice was suffered; but we can be sure that such conduct will not receive the sanction of this Court.

For the reasons given, the judgment and the order appealed from are reversed.

SCHOTTKY and PEEK, JJ., concur.



136 Cal.App.2d 722

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

S. W. THEUS, Defendant and Appellant.
Cr. 5437.

District Court of Appeal, Second District,
Division 2, California.

Nov. 3, 1955.

Murder prosecution wherein defendant admitted altercation which resulted in fatality but contended that victim had pulled knife on him and that he had struck victim in self-defense. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment of conviction of murder in second degree, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law §1159(2)

Reviewing court will not reverse judgment of conviction on ground of insufficiency of evidence unless upon record it can be found that sufficient facts could not have

been found by trier of facts to warrant inference of guilt.

2. Criminal Law §554

In evaluating testimony of defendant accused of murder, trial judge was entitled to take into consideration defendant's interest in case.

3. Criminal Law §260(11)

Argument that witness in murder prosecution was biased in favor of victim and unworthy of belief was proper before trial court where it was trial judge's responsibility to pass upon credibility of witnesses and weight to be given to their testimony, but such argument was futile before reviewing court.

4. Criminal Law §260(11)

Truthfulness of testimony of defendant accused of murder first had to be accepted by trial judge, and argument on appeal from conviction that defendant's testimony alone created reasonable doubt as to his guilt and that such doubt should have been resolved in his favor, was without merit.

5. Criminal Law §260(11)

Where circumstances created conflict with testimony of defendant accused of murder as to whether defendant was belligerent party, trial judge's resolution of conflict was controlling on appeal from conviction.

6. Criminal Law §260(11)

On appeal from conviction, reviewing court was not permitted to reevaluate credibility of witnesses, reweigh evidence, and draw inferences contrary to those drawn by court below.

7. Homicide §244(1)

In murder prosecution wherein defendant admitted altercation resulting in fatality, but contended that victim had pulled knife on him and that he had struck victim in self-defense, evidence was sufficient to sustain conviction of murder in second degree.

Rayfield Lundy, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant appeals from a judgment of conviction of murder in the second degree. His only ground for a reversal is the asserted insufficiency of the evidence. Examination of the record, however, in the light of applicable legal principles, fails to sustain his position.

Defendant and the victim, James Lord, had an altercation on Christmas Day, 1954. He hit Lord three times with a piece of iron pipe, thus causing the latter's death. Defendant plead self-defense on the claim that Lord attacked him with a knife.

Defendant spent the night before Christmas at the home of Miss Cary Williams and Henry Brown on East 99th Street, in Los Angeles. The victim, Lord, lived about a block away. Mattie Bursey, a friend of Miss Williams, roomed in Lord's house. On Christmas morning, at the request of Miss Williams, defendant went over to Lord's residence "to get some coffee from Mattie Bursey." Defendant arrived there between 6:30 and 7:00 o'clock. Upon asking for coffee, he was told by Miss Bursey that she had none. Defendant and Lord then engaged in an argument in the living room. Defendant, however, soon returned to the Williams-Brown address where he spent portions of the day. About 8:30 that morning, Miss Bursey visited her friend Miss Williams and stayed there the rest of the day. Some time before noon, Lord came to the Williams-Brown home. During the course of the day, both defendant and Lord consumed quantities of liquor and had an argument in which defendant used strong and abusive language toward Lord. As a result of his vituperative conduct, defendant was put out of the house. He later returned and was readmitted. Another argument ensued whereupon Harry Brown put defendant out of the house again. Defendant remained outside "walking up and down the south side of the street with what appeared to be a base ball bat in his hand * * *." He then left in his car but soon returned. He "came to the back of the

porch" but Miss Williams would not let him in. He again drove away. Soon thereafter, Lord stated, "I'm going home" and left the Williams-Brown residence. Mattie Bursey then observed defendant following the route in his car that Lord had taken home. Sensing trouble, she ran after them and came upon the scene of the crime where she saw defendant standing over the victim's prostrate body with a club in his hand. This was on a vacant lot right off the sidewalk. Defendant then got into his car and drove away. The victim told the officers "that he had been attacked by a Mr. Theus." Defendant returned to the scene of the fight. Upon being hailed by the officers, he pulled over to the curb. He freely admitted the altercation, stating to the officers that Lord "pulled a knife on him" and that he struck Lord three blows in self-defense with a piece of pipe that he had in his car and which he showed to the officers.

Upon defendant's arrest, a two-bladed clasp knife was found in his hip pocket. He stated that "it was his." At the trial, however, defendant claimed that the knife found in his possession was taken by him from Lord. Miss Bursey, who had roomed at Lord's home for about three months, had never seen a pocket knife in his possession.

At the time of his arrest, defendant complained to the officer about a scratch on his neck. An inspection, however, by the officer failed to reveal any evidence of such a scratch.

The victim was a man about 59 years of age and weighed 127 pounds. Defendant was 38 years old and weighed 150 pounds.

[1] The law is settled that a reviewing court will not reverse a judgment of conviction on the ground of insufficiency of the evidence unless upon the record it can be held that sufficient facts could not have been found by the trier of the facts to warrant the inference of guilt. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

Defendant takes the position that since there was no direct evidence to contradict his version of how the fight started and as to what occurred during the altercation, the trial court should have found him not guilty. True there was no eye witness to the fight.

But there were circumstances that inculpated defendant. He admitted hitting the victim three times with a piece of pipe. He was found standing over decedent's prostrate body with what was described as a club in his hand. The victim told the officer that defendant attacked him. Defendant had assumed a vituperative and belligerent attitude toward the victim earlier in the day. Following this incident and prior to the fatal fight, defendant was seen walking up and down the street in front of the house where the victim was and from which he (defendant) had been ejected because of his belligerent attitude toward Lord, carrying what appeared to be a baseball bat. Not without significance is the circumstance that defendant followed the route the victim had taken on his return journey to his own residence. Finally, there was testimony indicating the victim did not possess a knife.

[2] Defendant's credibility was seriously impaired in two important respects. The first relates to the ownership of the knife found on his person at the time of his arrest. He then told the officers that the knife was his. At the trial he claimed the knife belonged to the victim; that he took it away from him during the course of the fight and put it in his own pocket. The second relates to his complaint to the officers relative to a scratch on his neck that "bled a little" causing his shirt to have "blood on it." This he asserted was the result of Lord's attack upon him with the knife. But an examination by the officers failed to reveal any evidence of such a scratch. In evaluating defendant's testimony, the trial judge was also entitled to take into consideration his interest in the case.

[3] Defendant charges that Mattie Bursey was "obviously biased in favor of the victim" and unworthy of belief. Such an argument was proper before the trial court since it is the trial judge's responsibility to pass upon the credibility of the

witnesses and the weight to be given to their testimony. It is, however, a futile argument before a reviewing court.

[4] Defendant seems to take the position that by his testimony alone a reasonable doubt as to his guilt was created and that such doubt should have been resolved in his favor. His premise is completely without legal support. The truthfulness of his story first had to be accepted by the trial judge, which it was not. As said in *People v. Smith*, 35 Cal.App.2d 73, 76, 94 P.2d 633, 634, "it is a matter for the trial judge to be persuaded beyond a reasonable doubt and not this court."

[5] Defendant relies upon *People v. Estrada*, 60 Cal.App. 477, 213 P. 67. That case, however, is not here applicable. In the cited case it appeared that *the decedent* had been belligerent toward the defendant. No contrary evidence was produced. The evidence tended to show that the decedent attacked the defendant. There was no evidence to contradict such an inference. In the instant matter, the evidence tended to establish that *the defendant* assumed a belligerent attitude toward the deceased. True, defendant testified that Lord attacked him with a knife, but circumstances herein pointed out created a conflict in the evidence on that question and tended to discredit defendant's story. The trial judge's resolution of this conflict is controlling on appeal.

[6] The basic difficulty with defendant's argument is that he would have this court reevaluate the credibility of the witnesses, reweigh the evidence, and draw inferences contrary to those drawn by the court below. Under accepted legal principles, we are not permitted to do this. *People v. Gould*, 111 Cal.App.2d 1, 8, 243 P.2d 809.

[7] The judgment is affirmed.

McCOMB, Acting P. J., and ASHBURN, Justice pro tem., concur.

APPLICATION OF HOWARD

Cite as 289 P.2d 537

Cal. 537

136 Cal.App.2d 816

**APPLICATION of Jack HOWARD
For a Writ of Habeas Corpus.**District Court of Appeal, Third District,
California.

Nov. 8, 1955.

Proceeding on petition for writ of habeas corpus whereby petitioner seeks relief from order of Superior Court, Sonoma County, adjudging him to be in contempt for refusing to answer certain questions propounded to him. The District Court of Appeal, Peek, J., held that fact that parts of newspaper story, which merely related to information concerning speech made by union leader, were set out in quotation marks, did not disclose the source from which story was obtained and thus constitute a waiver of privilege of nondisclosure under statute providing any publisher, editor, reporter, or other person connected with or employed upon newspaper can not be adjudged in contempt by court, Legislature, or any administrative body, for refusing to disclose source of information secured for publication when published in newspaper.

Petitioner discharged from all restraint, and bail exonerated.

Witnesses  219(1)

Fact that parts of newspaper story, which merely related to information concerning speech made by union leader, were set out in quotation marks did not disclose source from which story was obtained and thus was not a waiver of privilege of nondisclosure under statute providing any publisher, editor, reporter, or other person connected with or employed on a newspaper can not be adjudged in contempt of court, Legislature, or any administrative body, for refusing to disclose source of information secured for publication when published in newspaper. West's Ann.Code Civ.Proc.   1881, subd. 6.

Marcel E. Cerf, Robinson & Leland, San Francisco, amicus curiae, for petitioner.

Joseph Maddux, Dist. Atty., Santa Rosa, for respondent.

Severson, McCallum & Davis, Nathan R. Berke, George Brunn, San Francisco, amicus curiae, for respondent.

PEEK, Justice.

By habeas corpus, petitioner seeks his release from an order of the Superior Court of Sonoma County adjudging him to be in contempt for refusing to answer certain questions propounded to him.

The controversy arises out of a labor dispute between certain employers engaged in processing apples in Sonoma County and the General Truck Drivers, Warehousemen and Helpers Union, Local 980, of the A. F. of L. The employers obtained a temporary restraining order and an order to show cause why a preliminary injunction should not be granted. At the hearing on the preliminary injunction petitioner was called as a witness for plaintiffs. He testified he was a reporter for a San Francisco newspaper; that he had been in Sebastopol on August 11 and 12; and that he had written a story about the labor dispute which was published on August 14 under his byline. The story referred to many of the individuals involved in the strike, one of whom was Peter Andrade, an officer of the Teamsters Union, who was quoted as follows in the article: "We'll observe the order," Andrade told the special meeting. 'But as individual American Citizens, anyone has the right to refuse to handle hot apples. And we're telling this to all union members in the West.'" Petitioner further testified he was acquainted with Andrade; that he had "covered the story" of the strike for his paper and that he had seen Andrade in the Sebastopol area. When he was asked by the employers' counsel if he had a conversation with Andrade on August 12, he stated to the court, "I'd like to seek some advice here if I may. It is my intention here to claim privilege of the law, Section 1881-6,

Cooper, White & Cooper, by John E. Schaeffer, San Francisco, for petitioner.

referring to disclosure of the source of a news story."

Considerable discussion then ensued between the court and counsel as to the propriety of the question. Plaintiffs' counsel contended that since the article contained a quotation of remarks attributed to Andrade, the source of Howard's information was thereby disclosed and hence he had waived the privilege. In order to give time for further study of the question and to enable the witness to obtain the advice of counsel, the court sustained petitioner's claim of privilege and continued his interrogation to the following day.

Upon reconvening, the court commented that the "article as written, purports to divulge the source of the information" and concluded that the privilege afforded under the applicable section "has been waived." On the previous day the court had stated that it appeared he would "have to assume" that petitioner "got the story" from the people whose names appeared in the story. And that "when you write a story and in that very story disclose the sources of information of the story, * * * you have waived any privilege that you might claim." The court then ordered the witness to answer the following question: "Mr. Howard, when you were in Sebastopol area as you have testified, did you have a conversation with Mr. Peter Andrade which became the subject of the article which you subsequently wrote and which is now in evidence as Plaintiff's Exhibit No. 7a and No. 7b?" To this question the witness answered, "I respectfully decline to testify under the provisions of the Code of Civil Procedure, Section 1881, subdivision 6."

The subsection referred to was added in 1935 and provides as follows:

"A publisher, editor, reporter, or other person connected with or employed upon a newspaper can not be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper."

It thus appears that in order for the statute to apply two elements are necessary.

First, that the information must have been procured for publication, and second that the information so received must have been published before the privilege arises. Therefore, in view of the record before the court, the sole question presented is whether or not the article, as published, automatically constituted a waiver of the privilege of nondisclosure. We believe it did not.

As written the story in question merely related information concerning a speech made by Andrade at a special union meeting. But nothing which was written by petitioner can be said to have disclosed the source of his information. It cannot be assumed from the use of quotation marks that the statement attributed to Andrade was made directly to the petitioner. As he notes, his information could have been secured in many ways; that is, he might have been at the meeting openly or otherwise; he might have talked to Andrade before or after the meeting; he might have learned of Andrade's speech from another person; he might have received his information from a printed press release; he might have listened to a recording of the speech; or the story might have been telephoned to his newspaper and re-written by someone else under his by-line. It is readily apparent from the above illustration that the literary form in which information secured for publication is cast does not necessarily disclose the source from which it is obtained. It follows then that in the absence of any showing other than the published news story, which for the reasons hereinbefore noted we hold to be indecisive, the petitioner did not waive the privilege contained in section 1881(6) of the Code of Civil Procedure.

Numerous additional contentions are made; however, in light of what we have heretofore said, any further comment by the court would be but dicta.

The petitioner is discharged from all restraint under the judgment of contempt, and bail is exonerated.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

136 Cal.App.2d 828

PEOPLE of the State of California,
Plaintiff and Appellant,
v.

Hiram MIMS, Defendant and Respondent.
Cr. 3145.

District Court of Appeal, First District,
Division 2, California.

Nov. 9, 1955.

Rehearing Denied Nov. 23, 1955.

Hearing Denied Dec. 8, 1955.

Prosecution for petty theft after a previous conviction of petty theft. The Superior Court, City and County of San Francisco, Orla St. Clair, J., granted defendant's motion to set aside information, and the People appealed. The District Court of Appeal, Dooling, J., held that defendant who failed to interpose his plea of double jeopardy in proper manner waived the defense and could be tried and convicted, and thus could not obtain release under statute providing for release on habeas corpus where party has been committed on a criminal charge without reasonable and probable cause.

Order reversed.

1. Criminal Law Ⓒ199

Where jeopardy has attached on a charge of an offense necessarily included in another, the jeopardy in the lesser is a bar to prosecution for the greater offense.

2. Criminal Law Ⓒ161

The right not to be placed twice in jeopardy for the same offense is constitutional. West's Ann.Const. art. 1, § 13.

3. Constitutional Law Ⓒ18

Where a provision of the earlier Constitution has been construed by the Supreme Court, it must be presumed that framers of present Constitution in readopting it intended it to have the same effect.

4. Criminal Law Ⓒ179

Defendant's plea of guilty to a charge of petty theft placed him in jeopardy within constitutional provision that no man may be placed twice in jeopardy for the same offense. West's Ann.Const. art. 1, § 13.

5. Criminal Law Ⓒ162

Statutory provision that, in case of a misdemeanor, trial court may, before pronouncing judgment, order that defendant may be made to answer for a higher offense arising out of same transaction was unconstitutional in its application to a defendant who pleaded guilty of petty theft and who was thereafter required to answer to a charge, arising from same transaction, of petty theft after a previous conviction of petty theft. Pen.Code, § 1429; West's Ann. Const. art. 1, § 13.

6. Criminal Law Ⓒ204

Defense of double jeopardy may be waived and is waived if defendant does not interpose the plea in manner provided by statute relating to place, form, and entry of plea. Pen.Code, § 1017.

7. Criminal Law Ⓒ204

A defense of double jeopardy is not jurisdictional, since it may be waived.

8. Criminal Law Ⓒ204

Habeas Corpus Ⓒ31

Defendant who failed to interpose his plea of double jeopardy in proper manner waived the defense and could be tried and convicted, and thus could not obtain release under statute providing for release on habeas corpus where party has been committed on a criminal charge without reasonable and probable cause. Pen.Code, § 1487, subd. 7.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momnoisse, Deputy Atty. Gen., for appellant.

Edward T. Mancuso, Public Defender, City and County of San Francisco, Abraham M. Dresow, Chief Deputy, San Francisco, for respondent.

DOOLING, Justice.

The People appeal from an order of the superior court granting respondent's motion to set aside an information charging him with a violation of Penal Code, section 666 (petty theft after a previous conviction of petty theft). The motion was made and

granted on the ground that respondent had been once in jeopardy.

Respondent was charged with petty theft, Penal Code, sec. 488, in the municipal court. He pleaded guilty on January 20, 1955; his plea was regularly entered and the municipal judge continued the case to January 27, 1955, for judgment. On January 21, 1955, the district attorney filed a complaint in the municipal court charging the violation of Penal Code, section 666. It is agreed that this complaint is based on the identical taking of property which was the basis of the charge of petty theft to which respondent had already pleaded guilty.

Upon motion of the district attorney the municipal court set aside respondent's plea of guilty to the charge of petty theft. Over respondent's objection that by reason of the entry of his plea of guilty to the petty theft charge he had been once in jeopardy the municipal court held a preliminary hearing on the complaint charging violation of Penal Code, section 666 and held respondent to answer.

On his arraignment in the superior court on the information charging this violation respondent moved to set aside the information under Penal Code, section 995 on the ground that he had been once in jeopardy. After being once denied this motion was later renewed and granted.

Appellant makes two points: 1. That the defense of once in jeopardy cannot be raised by a motion under Penal Code, section 995; 2. That jeopardy had not attached in this case upon the entry of respondent's plea to the charge of petty theft.

The attorney general asks us to decide the second question even though we agree with his argument on the first. This seems proper since the same question will recur in this very case at a later stage if we reverse the present order on the technical ground that a motion under Penal Code, section 995 is not the proper manner in which to present the defense of once in jeopardy. We therefore consider first the question whether jeopardy did attach on the entry of respondent's plea of guilty to the charge of petty theft.

[1] It is agreed that the charge of petty theft to which respondent pleaded guilty was an offense necessarily included in the later charge of violating Penal Code, section 666, and it is settled that where jeopardy has attached on a charge of an offense necessarily included in another the jeopardy in the lesser is a bar to a prosecution for the greater offense. *People v. Greer*, 30 Cal. 2d 589, 597, 184 P.2d 512; *People v. Krupa*, 64 Cal.App.2d 592, 598, 149 P.2d 416; *People v. Ny Sam Chung*, 94 Cal. 304, 29 P. 642.

The appellant relies heavily on Penal Code, section 1429 which provides, so far as relevant here, that: "In the case of a misdemeanor triable in any inferior court * * *. If such defendant pleads guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appear to the court that a higher offense has been committed * * * the court may order the defendant to be committed or admitted to bail, to answer any indictment * * * or any complaint which may be filed charging him with such higher offense." Appellant points out that this section is in the alternative ("before entering such plea or pronouncing judgment") and argues that it authorizes a holding to answer for the higher offense at any time before judgment even though a plea of guilty has been entered to the lesser.

[2] The right not to be placed twice in jeopardy for the same offense is constitutional. Cal.Const. Art. I, sec. 13. It follows that if jeopardy does in fact attach upon the regular entry of the plea of guilty that part of section 1429 which provides for a holding to answer for a higher offense after the entry of a plea of guilty to a lesser necessarily included offense must be held unconstitutional.

Both parties rely heavily upon *People v. Krupa*, supra, 64 Cal.App.2d 592, 149 P.2d 416. In *People v. Krupa* the defendant after pleading guilty to the lesser included offense was actually sentenced. Judgment having been pronounced on the plea of guilty in the *Krupa* case anything said by the court about the effect of a plea of

guilty before judgment is only dictum. The question was squarely presented however in *People v. Goldstein*, 32 Cal. 432. In that case after a plea of guilty had been entered but before judgment a second indictment was returned for the same offense. The court said at page 433:

"Where a defendant pleads guilty, and his plea is entered of record as provided in the Criminal Practice Act, (Sec. 300,) he stands convicted in the eye of the law as fully as he would have been by a verdict of guilty. He is convicted by his plea, and there is, therefore, no occasion for a trial, and nothing remains to be done except to pronounce judgment. On the question of former conviction there can be no distinction between a plea and a verdict of guilty, for both are followed by the same consequences.

"Nor is it necessary that a judgment should have been pronounced upon the conviction to make the plea of former conviction good."

[3, 4] The reasoning of this case appears to us to be unanswerable, but even if it were open to question, under a well settled principle of constitutional construction, we are foreclosed from reexamining it now. The right not to be placed twice in jeopardy for the same offense was contained in the California Constitution of 1849. Const. of 1849, Art. I, sec. 8. It was that constitutional provision which the Supreme Court construed in *People v. Goldstein*, supra. The same provision against being placed twice in jeopardy was readopted in the present Constitution. It is settled by a long line of authorities that where a provision of the earlier Constitution had been construed by the Supreme Court it must be presumed that the framers of the present Constitution in readopting it intended it to have the same effect. In *re Lavine*, 2 Cal. 2d 324, 331, 41 P.2d 161, 42 P.2d 311; *People v. District Court of Appeal*, 193 Cal. 19, 222 P. 353; *United Railroads v. Superior Court*, 170 Cal. 755, 763, 151 P. 129; *People v. Pacific Gas & Elec. Co.*, 168 Cal. 496, 499, 143 P. 727; *Morton v. Broderick*, 118 Cal. 474, 483, 50 P. 644; *McBean v. City of Fresno*, 112 Cal. 159, 168, 44 P. 358,

31 L.R.A. 794; *Ex parte Ahern*, 103 Cal. 412, 414, 37 P. 390; *People ex rel. Parsons v. Edwards*, 93 Cal. 153, 158, 28 P. 831; *Lord v. Dunster* 79 Cal. 477, 485, 21 P. 865; *Sharon v. Sharon*, 67 Cal. 185, 189, 7 P. 456, 635, 8 P. 709. We conclude that the regular entry of the plea of guilty placed respondent in jeopardy within the meaning of Article I, section 13 of our Constitution.

[5] This being so, that portion of Penal Code, section 1429 which reads "or pronouncing judgment" must be held unconstitutional as applied to the facts of this case where the plea of guilty to the necessarily included offense had been accepted by the municipal court and regularly entered in its minutes. A like question was considered in *People v. Hunckeler*, 48 Cal. 331. In that case the defendant had been placed on trial before a jury for manslaughter, and after witnesses had been examined the court without the defendant's consent dismissed the jury so that the defendant might be indicted for murder. On the subsequent murder charge the defendant pleaded once in jeopardy and the Supreme Court held that this plea was good. In dismissing the jury in the manslaughter proceeding the trial judge relied on a then section of the Penal Code, sec. 1112, which provided: "If it appears by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged * * * and may order the defendant to be committed or continued on, or admitted to bail to answer any indictment which may be found against him for the higher offense." The court disposed of this statute in a single sentence, 48 Cal. 334: "And when a person has been placed in actual jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject." Similarly it has been repeatedly held that a statute cannot constitutionally confer on the People the right to appeal in any criminal case in which jeopardy has actually attached to the defendant. (14 Cal.Jur.2d, Criminal Law, sec. 192, pp. 436-437 and cases collected in the notes.)

The manner in which the pleas of once in jeopardy and former conviction must be

made is provided in Penal Code, sections 1016 and 1017 and the cases hold that the plea must be entered in the manner provided by statute or it is waived. In *re* Harron, 191 Cal. 457, 467-468, 217 P. 728; In *re* Burns, 78 Cal.App.2d 294, 301, 177 P.2d 649; *People v. Allen*, 47 Cal.App.2d 735, 748, 118 P.2d 927; In *re* Perry, 94 Cal.App. 235, 237, 270 P. 996; 14 Cal.Jur.2d, Criminal Law, sec. 195, pp. 440-441. Penal Code, section 995 makes no provision for raising the question of once in jeopardy. Respondent contends that, since the addition of subdivision 2 to the grounds for attacking an information under section 995, i. e.: "That the defendant had been committed without reasonable or probable cause", the motion under that subdivision is as broad as an attack on an information by habeas corpus under the similar language of Penal Code, section 1487, subdivision 7.

[6-8] Counsel has cited no case, and we have found none, in which the court has held that the defense of once in jeopardy can be raised by habeas corpus under Penal Code, section 1487, subdivision 7. The reasoning of the decided cases indicates that this cannot be done. The defense, as we have seen, may be waived and is in fact waived if the defendant does not interpose the plea in the manner provided by section 1017. Since the defense may be waived it is not jurisdictional. In *re* Collins, 151 Cal. 340, 350, 90 P. 827, 91 P. 397; In *re* Burns, *supra*, 78 Cal.App.2d 294, 302, 177 P. 2d 649; *People v. Allen*, *supra*, 47 Cal.App. 2d 735, 748, 118 P.2d 927. Not being jurisdictional, unless the defense is specially pleaded, the defendant may be tried and convicted. It follows that if he may be convicted it cannot be said that there is not reasonable and probable cause for holding him to answer.

In cases such as *Coumas v. Superior Court*, 31 Cal.2d 682, 192 P.2d 449 and *Jackson v. Superior Court*, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422, allowing prohibition to prevent a second trial, and In *re* Berman, 104 Cal.App. 259, 286 P. 1043, allowing habeas corpus, the plea of once in jeopardy had been entered in the manner required by section 1017 before the writ was applied for. They are not authority

that the question can be raised in any fashion except by the special plea under that section of the Penal Code. The point, while extremely technical, seems sound.

The order is reversed without prejudice to the respondent presenting this defense by plea in the manner provided in section 1017 Penal Code.

NOURSE, P. J., and KAUFMAN, J., concur.



136 Cal.App.2d 715

Paul J. SCHEFKE, Petitioner,

v.

SUPERIOR COURT of The State of California, IN AND FOR The CITY AND COUNTY OF SAN FRANCISCO, Honorable Frank T. Deasy, Judge thereof, Honorable Martin Mongan, County Clerk of the City and County of San Francisco, and Mabel S. Brughelli and David Brughelli, Respondents.

No. 16841.

District Court of Appeal, First District,
Division 1, California.

Nov. 3, 1955.

Proceeding on a petition for writ of prohibition. The District Court of Appeal, Bray, J., held that servicing of motor vehicle in a service station enroute was such necessary incident to its operation that entry into and exit from service station would have to be considered as part of, and incidental to, operation of vehicle upon highway; and consequently nonresident automobile owner who backed his automobile into plaintiff on premises of automobile service station in California, was amenable to service under statute providing for substituted service on nonresident owner in action growing out of accident resulting from operation of motor vehicle upon highway in state.

Alternative writ discharged and petition denied.

1. Prohibition Ⓒ10(2)

Prohibition was a proper remedy to test jurisdiction of trial court over nonresident defendant served pursuant to statute providing for substituted service of process on nonresident owner in action growing out of accident resulting from operation of motor vehicle upon highway in state. Vehicle Code, § 404.

2. Automobiles Ⓒ235

Servicing of motor vehicle in a service station enroute was such necessary incident to its operation that entry into and exit from service station would have to be considered as part of, and incidental to, operation of vehicle upon highway; and consequently nonresident automobile owner, who backed his automobile into plaintiff on premises of automobile service station in California, was amenable to service under statute providing for substituted service on nonresident owner in action growing out of accident resulting from the operation of motor vehicle upon highway in state. Vehicle Code, § 402.

Healy & Walcom, San Francisco, for petitioners.

Ryan & Ryan, San Francisco, for respondent & real party in interest.

BRAY, Justice.

[1] In an action for damages for injuries alleged to have been received by plaintiff Mabel S. Brughelli against petitioner Paul J. Schefke, when petitioner, a resident of Oregon vacationing in California, backed his automobile into plaintiff on the premises of Standard Stations, Inc., at Lombard and Pierce Streets, San Francisco, petitioner was served as a nonresident pursuant to the provisions of section 404, Vehicle Code. He appeared specially to challenge the jurisdiction of the trial court. That court determined that the service was valid. Petitioner then filed this petition for writ of prohibition or certiorari or mandate.¹

1. Prohibition is a proper remedy to test the jurisdiction of the trial court under circumstances of this kind. McDonald v.

Question Presented.

[2] Where a nonresident's motor vehicle is on service station premises in this state to be serviced and there causes an accident, is such accident, under the provisions of section 404, Vehicle Code, one "resulting from the operation of any motor vehicle upon the highways of this State * * *"?

Law Applicable.

Section 404, Vehicle Code, provides: "The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle *upon the highways* of this State * * * is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle *upon the highways* of this State by himself or agent". (Emphasis added.)

The only case in this state considering the meaning of the words "operation * * * upon the highways" is McDonald v. Superior Court, 43 Cal.2d 621, 275 P.2d 464. There a resident of Oregon was engaged in California in the business of renting trucks and trailers. The plaintiff rented from him a truck to transport furniture to his home. He parked the truck partially on the street and partially on the sidewalk and proceeded to unload it. Due to a defective condition, he was injured when a rack on the truck broke. It was contended that unloading was not part of the operation of the vehicle. The court held that renting a truck for immediate use upon the highways constituted an "operation" of the truck, within the meaning of section 404, and that, under that section the "normal operation of a vehicle includes more than its movement over the highway", 43 Cal.2d at page 624, 275 P.2d at page 466, and included un-

Superior Court, 43 Cal.2d 621, 622, 275 P.2d 464.

loading. "Although the meaning of the word 'operation' in section 404 has not been litigated in this state, in other contexts, contrary to decisions in other states [citations], it has been interpreted to include more than the actual physical driving of a vehicle on the highway. [Citations.] The renting of a vehicle for immediate use clearly constitutes the initiation of its operation and, in the event the vehicle is defective, the creation of an unreasonable risk of harm to the lessee and third parties. The statute does not require that the accident occur during the time that the vehicle is being operated by the nonresident or his agent. It is enough that the accident results from such operation. When, as in this case, the accident would not have occurred but for the negligent renting of a defective vehicle, it clearly resulted from such renting. To hold that such renting does not constitute operation would defeat the legislative purpose of making nonresidents who use our highways in their business amenable to suits in this state. To interpret operation to include such renting is both consistent with the terms of the statute and subserves its purpose. We conclude therefore that petitioner's agents operated the truck within the meaning of the statute when they rented it for immediate use upon the highways of this state. [Citations.]

"Petitioner contends, however, that an accident occurring during unloading is not the type of accident intended to be covered by section 404. We cannot agree with this contention. It has frequently been recognized that the normal operation of a vehicle includes more than its movement over the highway. [Citations.] There is nothing in the statute that limits its operation to any particular types of accidents or collisions. By its express terms it is applicable to 'any action * * * growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent.'" 43 Cal.2d at pages 624-625, 275 P.2d at page 465.

In other contexts California has been liberal in its interpretation of the word "operation." Thus in *Sutton v. Tanger*, 115 Cal.App. 267, 1 P.2d 521, it was held

that the owner of a motor vehicle was "operating" it although not present, and the driving was by a person to whom the owner's permittee had temporarily entrusted it. In *Bosse v. Marye*, 80 Cal.App. 109, 250 P. 693, it was held that a minor was "operating" the automobile although it was being driven by another at the minor's request. In *Union Tank Line Co. v. Richardson*, 183 Cal 409, 191 P. 697, 699, it was held that a foreign corporation engaged in the acquiring of tank-cars and leasing them to shippers to use upon the railroads of this state, was "'operating upon railroads'" in California.

In *McGuire v. Parker*, D.C.Mo.1948, 78 F.Supp. 199, it was held that a person lending his car to minors was "operating" it within the meaning of a statute providing for service of summons on a nonresident operating a motor vehicle within the state.

This liberality of construction does not obtain in some other jurisdictions. Thus in *O'Tier v. Sell*, 1930, 252 N.Y. 400, 169 N.E. 624, it was held that an owner was not "operating" a motor vehicle when it was being driven by another even though with his permission. To the same effect, *Brown v. Cleveland Tractor Co.*, 1933, 265 Mich. 475, 251 N.W. 557.

Other jurisdictions have held as did the court in *McDonald v. Superior Court*, supra, 43 Cal.2d 621, 624, 275 P.2d 464, 466, that "the normal operation of a vehicle includes more than its movement over the highway." Thus in *Elfeld v. Burkham Auto Renting Co.*, 1949, 299 N.Y. 336, 87 N.E.2d 285, 289, in applying a statute making an owner liable for "negligence in the operation of * * * [a] motor vehicle" the court said referring to the above mentioned statute, 87 N.E.2d at page 290: "* * * it does not limit 'negligence in the operation' to the manner in which a car is driven but is broad enough to include an act of 'operation' such as the one here involved—putting a defective truck into operation on the highway."

In *Commonwealth v. Henry*, 1918, 229 Mass. 19, 118 N.E. 224, L.R.A.1918B, 827, it was held that an automobile left standing on a highway after dark without lights was "operated" within the meaning of a

statute prohibiting the operation of an automobile at night on public streets without certain lights. "The word 'operated' is not, as the defendant contends, limited to a state of motion produced by the mechanism of the car, but includes at least ordinary stops upon the highway, and such stops are to be regarded as fairly incidental to its operation." 118 N.E. at page 225. To the same effect, *Horton v. Benson*, Tex.Civ. App., 1924, 266 S.W. 213.

In *Stroud v. Board of Water Comm'rs*, 1916, 90 Conn. 412, 97 A. 336, it was held that an automobile left in a part of the highway opposite a hotel which was commonly used for parking automobiles was in "operation" under a statute denying recovery to the owner of an unregistered motor vehicle who has an accident "by reason of the operation of said motor vehicle in or upon the public highways * * *."

In *Chiarello v. Guerin Special Motor Freight*, 1952, 22 N.J.Super. 431, 92 A.2d 136, it was held that a truck parked entirely on the sidewalk was being "operated" within the terms of a non-resident service statute. The court quoted from a case decided in 1889 before the advent of motor vehicles: "In order to be a traveler, it is not necessary that one should be constantly moving, if he is a pedestrian, or that the vehicle he drives, or that in which he is conveying goods, if he is using one, shall be continuously in motion. It would certainly be impossible to use the highways conveniently for the ordinary purposes of business or social life, with teams or lighter carriages, if occasional stops were not permitted to enable those using them to load and unload teams, to receive and deliver goods, to enter shops and stores, and to make brief calls of business, or even of a special character." 92 A.2d at page 139. *Hand v. Frazer*, 1931, 139 Misc. 446, 248 N.Y.S. 557, held that a truck parked by a highway was being "operated" within the terms of its nonresident service statute. In *Brauer Machine & Supply Co. v. Parkhill Truck Co.*, 1943, 383 Ill. 569, 50 N.E.2d 836, 148 A.L.R. 1208 the court was considering whether the accident (the plaintiff was injured by the negligent unloading of a truck at a place off the highway) came within the purview of

the Illinois nonresident service statute as constituting "operation" of a motor vehicle on a highway of the state. In holding that unloading did not constitute operating the truck within the meaning of the statute, *Bryant Truck Lines v. Nance*, 1939, 199 Ark. 556, 134 S.W.2d 555, 556; *Ellis v. Georgia Marble Co.*, 1950, 191 Tenn. 229, 232 S.W.2d 45, 48; *Mulligan v. Jersey Truck Renters*, 1949, 196 Misc. 828, 95 N.Y.S.2d 232 are to the same effect, the court said that the fact that the truck was not on the highway was not important, that "If the injury or damage claimed results from the use and operation of a motor vehicle on the highway, then the place where the injury or damage to the person or property of another actually occurred would be wholly immaterial. It is only necessary that the causative force originate in the use or operation of the vehicle on the highway. * * * It makes no difference where the injury actually occurs if it may be attributed to the use of the highway and naturally flows therefrom." 50 N.E.2d at page 843.

Petitioner places great reliance upon the *Brauer* case, *supra*. It should be pointed out that in that case the court in addition to holding that the Illinois nonresident service statute did not apply where the accident occurred on private property, held that unloading a truck did not constitute "operation" of a motor vehicle. The *McDonald* case, *supra*, expressly referred to the *Brauer* case and held exactly to the contrary as to the latter matter, thus showing the considered opinion of our Supreme Court that our statute should be more broadly interpreted than did the Illinois court interpret its statute. Moreover, the *Brauer* case stated that it makes no difference where the injury actually occurs if it may be attributable to the use of the highway and naturally flows therefrom. While the court there did not have in mind a situation such as here, nevertheless the last mentioned principle would apply to it. The servicing of a car in a service station is a necessary concomitant of the operation of the car on the highway and results from it.

Where the nonresident service statute refers to accidents resulting from operation

of a motor vehicle upon the highways of the state, it generally has been held that such a statute does not apply to accidents occurring completely off the public highway. *Catalano v. Maddux*, 1940, 175 Misc. 24, 22 N.Y.S.2d 149, collision on the World's Fair grounds; *Camden v. Harris*, D.C.Ark. 1953, 109 F.Supp. 311, road in a United States military reservation; *Rilling v. Jones*, D.C.Md.1955, 130 F.Supp. 834, private driveway. However, in *Galloway v. Wyatt Metal & Boiler Works*, 1938, 189 La. 837, 181 So. 187, the court held a road owned by a corporation and never dedicated but used by the public was a highway of the state for purposes of the nonresident service statute, and in *Paduchik v. Mikoff*, 1953, 158 Ohio St. 533, 110 N.E.2d 562, 565, the court upheld service on a nonresident where the accident occurred on private farm property. It should be pointed out, though, that the Ohio statute does not use the phrase "operating a motor vehicle on the highways" of the state; it refers to a nonresident operating a motor vehicle "within the state". *Sipe v. Moyers*, 1945, 353 Pa. 75, 44 A.2d 263, 264, is to the same effect. The Pennsylvania statute was similar to the Ohio one.

There are also cases holding that an accident in a service station is not one occurring while operating a motor vehicle on a public highway. *Finn v. Schreiber*, D.C.N.Y.1940, 35 F.Supp. 638. There the nonresident drove his truck into a service station to have a flat tire changed. In the operation a lock rim of the spare tire was forced off due to a defective condition claimed to be known to the owner, injuring the plaintiff, the service station operator. To the same effect, *Haughey v. Mineola Garage*, 1940, 174 Misc. 332, 20 N.Y.S.2d 857, where the accident occurred in a garage; and *Walton v. Stephens*, D.C.Va., 1954, 119 F.Supp. 1, where the accident occurred in a service station.

It seems to us, however, that the question here does not depend upon an interpretation of what is or is not a highway,² but

is a question of whether or not the servicing of a motor vehicle in a service station en route is such a necessary incident to its operation that the entry into or exit from a service station must be considered as a part of and incidental to the operation of the vehicle upon the highways. As said in the McDonald case, *supra*, the normal operation of a vehicle includes more than its operation over the highway. It necessarily includes its obtaining the necessary fuel and servicing to operate it.

The purpose of this type of act should be considered. In *State ex rel. Gallagher v. District Court of Sixth Judicial Dist.*, 1941, 112 Mont. 253, 114 P.2d 1047, 1051, the court said concerning the Montana nonresident service statute which requires operation on "'any public way'" of that state, 114 P.2d at pages 1052-1053: "It seems clear to us that the object of the act is to further the safety of highway traffic within the state and afford a practicable remedy for damage arising from negligence on the highways, by providing for service of summons within the state where it would otherwise be impossible, or virtually so." In *McDonald v. Superior Court*, *supra*, 43 Cal.2d 621, at page 623, 275 P.2d 464, at page 465, the court said: "The obvious purpose of section 404 is to make amenable to suits in the courts of this state those nonresidents who may incur liability in the operation of motor vehicles upon the highways of this state. What constitutes operation within the meaning of the statute must be determined in the light of this objective."

In the light of this objective, is not the servicing of, and the obtaining of gasoline in, the car as incidental to its operation on the highway, as stopping to load and unload, to receive and deliver goods, to enable the driver to enter shops and stores, and to make brief business calls, as was stated in *Chiarello v. Guerin Special Motor Freight*, *supra*, 92 A.2d 136? Cannot the accident here be "attributed to the use of the highway". *Brauer Machine & Supply*

2. See, however, *Webster v. Zevin*, 77 Cal. App.2d 855, 176 P.2d 960, where the court held that section 402 of the Vehicle Code (imputing liability to owner,

where person operating motor vehicle does so with owner's permission) applied to accidents on private property as well as on the public highway.

Co. v. Parkhill Truck Co., supra, 50 N.E. 2d 836, 843? Without obtaining gasoline and being serviced occasionally the car could not be operated on the highway. The act of getting gasoline and service at a service station en route is as completely a part of the operation of the car as almost any other act in its operation. It certainly is as incidental, if not as integral, a part of its operation as was parking the car opposite the hotel in *Stroud v. Board of Water Comm'rs*, supra, 97 A. 336, even though that parking was on the highway itself.

The alternative writ is discharged and the petition denied.

PETERS, P. J., and FRED B. WOOD, J., concur.



136 Cal.App.2d 883

Ernest M. FRIESEN, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Berkeley Young Men's Christian Association, State Compensation Insurance Fund, and State of California (Subsequent Injuries Fund), Respondents.

Civ. 16789.

District Court of Appeal, First District,
Division 1, California.

Nov. 10, 1955.

Hearing Denied Dec. 28, 1955.

Proceeding on petition for writ of review by employee, college student who had graduated in February and had sought temporary work intending to take up graduate studies following fall, questioning correctness of Industrial Accident Commission's award of compensation. The District Court of Appeal, Fred B. Wood, J., held that where employee had earned varying amounts during several periods of employment of varying duration, computation of average weekly earnings for purposes of computation of compensation was governed by subdivision of statute applicable

where other specified methods of arriving at average weekly earnings could not reasonably and fairly be applied,

Award affirmed.

1. Workmen's Compensation §822

Where employee, college student who had graduated in February and had sought temporary work intending to take up graduate studies the following fall, had earned varying amounts during several periods of employment of varying duration, computation of average weekly earnings for purposes of computation of compensation was governed by subdivision of statute applicable where other specified methods of arriving at average weekly earnings could not reasonably and fairly be applied. Labor Code, §§ 4453 and subds. (a, d), 4653.

2. Workmen's Compensation §1619

In proceeding on petition for writ of review by employee, college student who had graduated in February and had sought temporary work intending to take up graduate studies following fall, questioning correctness of Industrial Accident Commission's compensation award, record did not disclose any errors in computation of average weekly earnings for purpose of computation of compensation. Labor Code, § 4453(d).

Ernest M. Friesen, in pro. per.

Everett A. Corten, Daniel C. Murphy, San Francisco, for Industrial Acc. Commission.

FRED B. WOOD, Justice.

The petitioning employee questions the correctness of the respondent commission's award to him of temporary total disability compensation in the amount of \$22.75 a week based upon a finding that the sum of \$36.84 reasonably represents his average weekly earnings at the time of the injury. He claims a higher average earning rate, one which would entitle him to the maximum rate allowed by section 4453 of the Labor Code.

Specifically, the petitioner claims that in ascertaining his average weekly earnings

the commission (1) should have used the formula prescribed by subdivision (a) instead of the method prescribed by subdivision (d) of section 4453 of the Labor Code; (2) incorrectly applied the method prescribed by subdivision (d); and (3) committed errors of computation in making the determination.

Petitioner had been a student at the University of California. Upon his graduation in February of 1953, he sought temporary work with the intention of taking up graduate studies in the fall of that year.

According to the referee's report upon which the commission's findings and award were based, there was evidence that petitioner earned from \$70 to \$80 in February, 1953; \$127.40 from April 11th through May 9th; \$61.85 a week, May 19th through June 9th; \$73.85 a week, June 10th through July 20th; summarized by the referee as follows: "In other words, for the period beginning February 1, through July 20, 1953 * * * a period of 170 days, the employee earned \$848.58 or an average of \$35¹ a week. The actual weekly wage of \$36.84¹ gives rise to a compensation rate of \$22.75¹ a week which I believe is a fair basis for determining the earning capacity of this employee considering his program of living at the time of the injury," adding that he deemed subdivision (d) of section 4453 applicable.

The referee later (in his report recommending denial of petition for reconsideration) amplified this statement: "* * * the employee contends that his earnings were maximum. He points out that at the time of the injury, he was still acquiring an education and was in college. Though he was graduated, he had continued his education and had obtained such jobs that he could while attending classes. He was injured while actually earning

maximum wages but the record was clear that this was a temporary job during vacation. As pointed out in the Report of Referee, I have taken various periods of employment since the employee left college in February, added them together and divided the same by the total number of days involved. In other words, his earnings over a period of time prior to the injury were averaged up.

"I believe that though the employee may have had the capacity to earn more money and also the willingness to earn more money, he lacked the opportunity to do so by taking himself, in effect, off the regular labor market. I think that the West case, 12 CCC 86, is applicable here."²

The "West case" is *West v. Industrial Accident Commission*, 79 Cal.App.2d 711, at page 727, 180 P.2d 972; hearing by Supreme Court denied. It holds that "earning capacity at the time of injury is the touchstone of average earnings in California", 79 Cal.App.2d at page 722, 180 P.2d at page 979, that earning capacity is composed of three factors: "(1) ability to work; (2) willingness to work; and (3) opportunity to work", 79 Cal.App.2d at page 722, 180 P.2d at page 979; that it is not fair or reasonable to ignore the element of discontinuity in an intermittent workman's employment, an award in such a case is sustainable "only if computed correctly under (d), the earning capacity subdivision", 79 Cal.App.2d at page 724, 180 P.2d at page 980; that earning capacity under that subdivision "cannot properly be determined by reference to the rate of pay alone * * *. Fundamentally, earning capacity is total earnings measured against the period of time within which those earnings were made. Whether the earning capacity rate is identical with the pay rate

1. \$22.75 represents 65% of the average weekly earnings of \$35, § 4653, Labor Code, which latter represents 95% of the average weekly earning capacity of \$36.84, § 4453, subd. d.

2. This lack of opportunity to work is reflected by the following excerpt from the petition herein:

"After leaving school on Feb. 18, 1953,

the applicant could not immediately find a position which would carry him through to September 1953, at which time he was to return to school, so he took odd jobs until he could find a position at which he could work until September. Prospective employers would not consider him for permanent positions because he was returning to school in the fall."

depends upon the steadiness of employment. Thus the particular wage rate an employee is receiving at the moment of injury may or may not be indicative of his actual earning capacity at that time", 79 Cal.App.2d at page 725, 180 P.2d at page 981; and that "earning history must be considered in arriving at earning capacity, and more often than not, it will be determinative." 79 Cal.App.2d at page 725, 180 P.2d at page 981.

These principles were reaffirmed in a temporary employment case in *Campbell v. Industrial Accident Commission*, 95 Cal. App.2d 570, 213 P.2d 395, which distinguished *California Compensation Ins. Co. v. Industrial Accident Commission*, 86 Cal. App.2d 861, 195 P.2d 880, as one in which it appeared that, although the employee worked intermittently in 1946, "in 1947 he was in excellent health, worked regularly and steadily and the court distinguished the case from that of the *West* case * * * for these reasons." At page 576 of 95 Cal.App.2d, at page 398 of 213 P.2d.

[1] In view of these precedents and the logic of the situation, we are persuaded that subdivision (d) of section 4453 governs in our case and was correctly applied.

[2] As to the asserted errors in computation, petitioner says, first, that the period of his availability for work was 151, not 170 days; i. e., that he graduated from the university on the 18th of February, 1953, hence it was error for the referee to take the 1st of February as the beginning date. However, we find in the record no evidence of the precise date of graduation. Petitioner testified that he finished his schooling "in" February. In view of that, we do not consider he is in a position to complain of the referee's taking the 1st of February for computation purposes. Moreover, the referee apparently did not use the full 170 days in making his computation. Had he done so he would, ac-

cording to our computation, have obtained a smaller sum than \$36.84 as the actual weekly wage rate.

Petitioner states that the referee mistakenly used the sum of \$127.40 instead of \$135.04, plus \$5.93 of retroactive pay, for his receipts as a cannery worker during April 11 to May 9, 1953. In his petition he says that "the W-2 form issued by the company to the applicant shows that the earnings for that period" were in the higher amount. However, the transcript of his testimony at the hearing before the referee indicates that he twice stated that the correct sum for that period was \$127.40.

In respect to the period May 19th through June 9th during which petitioner worked at the rate of \$8 per day, the referee computed the total upon the basis of a week of six working days. Petitioner says he worked seven days per week. While it is true that in one part of his testimony he said he was receiving \$8 per day seven days a week during that period, at another point he testified that he worked 19½ days during that period. The latter quite clearly tends to support the inference of a week of six working days. In any case, the referee gave the petitioner full credit for the \$156 which 19½ days would produce.

Finally, petitioner claims that the referee should have credited him with \$14 a week as the value of board and room, which the evidence shows was considered worth \$60 a month. The referee in converting the monthly into a weekly rate of pay took \$13.85 a week as the equivalent of \$60 a month. In view of the varying number of days in a month the referee's computation in this regard appears to us more precise and accurate than that of the petitioner.

In conclusion, we find no basis for disturbing the findings and award made by the commission. The award is affirmed.

PETERS, P. J., and BRAY, J., concur.
Hearing denied; CARTER, J., dissenting.

136 Cal.App.2d 887

Ethel Leona LEGG, Plaintiff, Respondent
and Cross-Appellant,

v.

**MUTUAL BENEFIT HEALTH AND ACCI-
DENT OF OMAHA, Defendant, Appel-
lant and Cross-Respondent,**

Leona Ethel LEGG, Plaintiff and Appellant,

v.

**MUTUAL BENEFIT HEALTH AND ACCI-
DENT OF OMAHA, an association, and
United Benefit Life Insurance of Omaha, a
company, Defendants and Respondents.**

Civ. 20687, 20952.

District Court of Appeal, Second District,
Division 2, California.

Nov. 10, 1955.

Rehearing Denied Nov. 30, 1955.

See 290 P.2d 87.

Hearing Denied Dec. 28, 1955.

Action to recover monthly disability benefits under policy issued to plaintiff by defendant. The jury returned a verdict in favor of plaintiff, and the Superior Court, Los Angeles County, Arthur Crum, James G. Whyte, JJ., entered judgment accordingly. Plaintiff moved for new trial, and defendant appealed from order granting the motion, and plaintiff appealed from the judgment, plaintiff also appealed from order denying her application for default judgment. The District Court of Appeal, Fox, J., held, *inter alia*, that where plaintiff, in whose favor jury had returned verdict for allegedly insufficient damages, moved for new trial upon various grounds, one being insufficiency of evidence, and court entered order granting motion "as to all issues", order included insufficiency of evidence as ground therefor.

Order granting new trial affirmed.

Appeal from judgment dismissed.

Order denying default judgment affirmed.

See also Cal.App., 289 P.2d 553.

1. New Trial ⇨75(1)

Though provision prescribing grounds for new trial does not expressly include the ground of inadequacy of damages, a new trial may be granted upon the ground of insufficiency of the evidence for the reason that the damages awarded are inadequate.

West's Ann.Code Civ.Proc. § 657 and subd. 5.

2. New Trial ⇨163(2)

Where the order granting new trial provides simply that a new trial is granted, the order is a general one, and does not include insufficiency of the evidence as ground for the order. West's Ann.Code Civ.Proc. § 657 and subd. 5.

3. New Trial ⇨163(2)

Where the order granting new trial goes beyond a mere general order, and uses any language that reasonably may be construed as including insufficiency of the evidence, the language will be interpreted as including that ground. West's Ann.Code Civ.Proc. § 657 and subd. 5.

4. New Trial ⇨163(2)

Where order grants new trial upon "all issues", order includes reference to insufficiency of evidence, within provision prescribing grounds for new trial. West's Ann.Code Civ.Proc. § 657 and subd. 5.

5. New Trial ⇨163(2)

Where plaintiff, in whose favor jury had returned verdict for allegedly insufficient damages, moved for new trial upon various grounds, one being insufficiency of evidence, and court entered order granting motion "as to all issues", order included insufficiency of evidence as grounds therefor within provision prescribing grounds for new trial. West's Ann.Code Civ.Proc. § 657 and subd. 5.

6. New Trial ⇨75(1)

In passing on motion for new trial on ground of inadequacy of damages, trial judge may re-weigh the evidence and exercise his independent judgment thereon, and if he concludes that the damages awarded do not adequately compensate for the injuries sustained he may grant a new trial. West's Ann.Code Civ.Proc. § 657.

7. New Trial ⇨157

Upon motion for new trial upon ground of inadequacy of damages, trial court should review evidence, not only with respect to issue of damages, but also with respect to issue of liability. West's Ann.Code Civ. Proc. § 657.

8. Appeal and Error ⇐977(3)

Since an order granting a motion for new trial rests in the sound discretion of the trial court, an appellate court will not interfere unless an abuse of discretion clearly appears.

9. New Trial ⇐75(4)

In action to recover monthly disability benefits under policy issued to plaintiff by defendant, where there was considerable testimony that plaintiff had been severely injured when boarding streetcar, and had been disabled for quite some time, and jury had returned verdict for plaintiff for \$100, trial court did not abuse its discretion in granting plaintiff new trial on ground of inadequacy of damages.

10. Appeal and Error ⇐843(2)

Where appellate court affirmed order granting plaintiff new trial on ground of inadequacy of damages, plaintiff's appeal from judgment which she had obtained in court below was moot.

11. Judgment ⇐106(3)

Where plaintiff had not requested entry of default judgment against defendants, who had not appeared in action until after expiration of ten days from service of summons, and plaintiff later filed amended complaint which was answered, plaintiff was not entitled to default judgment. West's Ann.Code Civ.Proc. § 585.

J. Edward Haley, Los Angeles, for Mutual Benefit, et al.

Leona Ethel Legg in pro. per.

FOX, Justice.

Defendant appealed from an order granting a motion for a new trial. Plaintiff thereupon appealed from the judgment. (There is another appeal by plaintiff which will be discussed later.)

Plaintiff brought this action to recover monthly disability benefits under a health and accident policy issued to her by defend-

ant on November 7, 1944. Plaintiff alleged that on February 6, 1947, while the policy was in force, she fell in attempting to board a streetcar, suffering injuries that resulted in her total disability which had continued for such period that she was entitled to the total monthly disability indemnity provided by the policy. The company admitted the issuance of the policy but denied plaintiff suffered disability as alleged by her, and, as an affirmative defense, alleged the policy lapsed on December 1, 1946, by reason of nonpayment of premium.

The jury returned a verdict in favor of plaintiff for \$100. In response to special interrogatories, the jury found that the policy was in force on February 6, 1947, and that plaintiff was wholly and continuously disabled by reason of the accident from February 6 to February 28, 1947.

Plaintiff made a motion for a new trial, upon a number of the grounds specified in section 657, Code of Civil Procedure, among them being the insufficiency of the evidence. The court granted the motion, the minute order reading as follows:

"Plaintiff's motion for a new trial heretofore submitted on February 10, 1954 is granted as to *all* issues * * *

There is substantial evidence that plaintiff's injuries were serious and disabled her for a much longer period than the approximate three weeks fixed by the jury. Defendant concedes the evidence is conflicting.

[1] Although section 657, Code of Civil Procedure, which states the grounds upon which a motion for a new trial may be granted, does not expressly include the ground of inadequacy of damages, the cases have established that "A new trial may be granted upon the ground of insufficiency of the evidence for the reason that the damages awarded are inadequate." *Harper v. Superior Air Parts, Inc.*, 124 Cal.App.2d 91, 92, 268 P.2d 115, 116; *Franklin v. Betten-court*, 16 Cal.App.2d 511, 514, 60 P.2d 1017.*

Defendant, however, points out that the order granting the new trial does not spe-

* A new trial may be granted for excessive damages without specifying insufficiency of the evidence as a ground for making the order. *Sinz v. Owens*, 33 Cal.2d 749,

760, 205 P.2d 3, 8 A.L.R.2d 757; *Lovett v. Dintzer*, 131 Cal.App.2d 165, 166, 280 P.2d 58; Code of Civil Procedure, sec. 657(5).

cifically mention insufficiency of the evidence to sustain the verdict as a ground upon which the new trial was granted; therefore, he argues, it must be conclusively presumed that the order was not based upon that ground, and as there was no other valid ground upon which it could be based, it must be reversed.

[2,3] It is well settled that when the order provides simply that a new trial is granted, such order is a general one and does not include insufficiency of the evidence. *Tasker v. Cochrane*, 94 Cal.App. 361, 271 P. 503. "The statute," however, "does not require that the order specify insufficiency of the evidence to sustain the verdict in any particular words or language. If the language used is susceptible of being interpreted as tantamount to granting a new trial on account of the insufficiency of the evidence to sustain the verdict, or if it may be inferred from the language used that such was the ground upon which the order was made, it is uniformly held to have been based upon that ground. Where the nature of the order itself necessarily implies that the trial court deemed it necessary to re-examine the facts, a statement in the order that the evidence is insufficient is not essential. When the order granting the motion goes beyond a mere general order (a new trial is granted) and uses any language that reasonably can be construed as including insufficiency of the evidence, the language will be interpreted as including that ground." *Piru Citrus Ass'n v. Williams*, 95 Cal.App.2d 911, 914-915, 214 P.2d 426, 428.

[4] The precise question here presented was passed upon in *Bayley v. Souza*, 42 Cal. App.2d 166, 170, 108 P.2d 725, 727. Hearing denied. The order in that case stated that the motion for a new trial was granted "on all issues." In construing that language, the court said: "These cases demonstrate that the order here involved, granting the new trial 'on all issues', is susceptible of the reasonable interpretation that the trial court intended by that language to include insufficiency of the evidence. What else can the expression 'on all issues' mean? It must mean either all issues presented by the pleadings, which would include the issues of negligence of appellant and contributory

negligence of respondent, and the sufficiency of the evidence to support the implied finding of the jury on these issues, or it must mean all issues presented by the motion for a new trial, one of which was the sufficiency of the evidence. In either event, under the cases cited, such order is not a general order, but must be interpreted as including a reference to insufficiency of the evidence within the meaning of sec. 657 of the Code of Civil Procedure." In *Lucerne Country Club v. Beal*, 21 Cal.App.2d 121, 125, 68 P.2d 408, 410, a new trial was granted "as to all issues made by the said cross-complaint of the said R. J. Palmer and the answer thereto." It was there held that the order, properly interpreted, included insufficiency of the evidence. See, also, *Piru Citrus Ass'n v. Williams*, *supra*, and digest of cases at page 915 of 95 Cal.App.2d at page 429 of 214 P.2d.

[5] Under these authorities, and particularly *Bayley v. Souza*, *supra*, since the order is not a general one, it must be interpreted as encompassing a reference to insufficiency of the evidence within the meaning of section 657, Code of Civil Procedure.

[6-9] When the order is considered from the viewpoint of the insufficiency of the evidence, it is clear it must be sustained for there was a considerable amount of testimony indicating that plaintiff was severely injured and that her disability continued for quite some time. In passing on such a motion "the trial judge is entitled to reweigh the evidence and exercise his independent judgment thereon and if he concludes that the damages awarded do not adequately compensate for the injuries sustained he may grant a new trial." *Harper v. Superior Air Parts, Inc.*, *supra*, 124 Cal.App.2d at page 94, 268 P.2d at page 117. It is also pointed out in the case last cited, 124 Cal.App.2d at page 92, 268 P.2d at page 116, that "Upon a motion for a new trial based upon the contention that damages are inadequate the trial court should review the evidence, not only with respect to the issue of damages but also with respect to the issue of liability."

Since an order granting a motion for a new trial rests in the sound discretion of the

trial court, an appellate court will not interfere unless an abuse of discretion clearly appears. *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 358, 170 P.2d 465. No abuse of discretion is indicated in this case.

[10] The affirmance of the order granting plaintiff a new trial renders her appeal from the judgment moot. That appeal will therefore be dismissed.

[11] Plaintiff's second appeal is from an order of July 19, 1954, denying her application for a default judgment against the defendants, viz., Mutual Benefit and Accident of Omaha and United Benefit Life Insurance Company of Omaha, on her original complaint herein which was filed on February 11, 1948. She filed an amended complaint on March 5, 1948, in which Mutual alone was named as a defendant, United having been dropped from the case. Mutual filed an answer to this amended complaint on March 15, 1948. (After the sixth amended and supplementary complaint and answer thereto were filed the case was tried in January, 1954, resulting in the judgment and order for a new trial herein reviewed.)

It is apparently plaintiff's theory, based on section 585, Code of Civil Procedure, that upon the expiration of ten days after service of summons on the defendants and their failure to appear in the action, that their default resulted automatically without any action on her part, and that upon the mere lapse of such period she was entitled to a default judgment. The section does not so provide. It contemplates a request or application for the entry of a default. No such request was made by plaintiff prior to the filing of her amended complaint. This new pleading superseded the original and furnished the sole basis of the cause of action. *Morhead v. Turner*, 41 Cal.App.2d 414, 418, 106 P.2d 969. The original complaint is dropped out of the case and ceases to have any effect as a pleading or *as a basis for a judgment*. *Tidwell v. Henricks*, 124 Cal.App.2d 64, 66, 268 P.2d 84. It therefore follows that the trial court ruled correctly.

The order granting a new trial is affirmed. The appeal from the judgment is dismissed. The order denying plaintiff's

motion for a default judgment against defendants on her original complaint is affirmed.

Each party will bear his own costs on these appeals.

McCOMB, Acting P. J., and ASHBURN, J. pro tem., concur.



136 Cal.App.2d 894

Leona Ethel LEGG, Plaintiff and Appellant,

v.

UNITED BENEFIT LIFE INSURANCE
COMPANY, Defendant and
Respondent.

Civ. 21116.

District Court of Appeal, Second District,
Division 2, California.

Nov. 10, 1955.

Hearing Denied Dec. 28, 1955.

Action to recover indemnity under a health and accident policy issued to plaintiff by defendant. Defendant moved to dismiss the action on the ground that it had not been brought to trial within the three year period prescribed. The Superior Court, Los Angeles County, J. F. Moroney, J., granted the motion and entered judgment of dismissal. The plaintiff appealed from the judgment and from the order denying motion to vacate judgment. The District Court of Appeal, Fox, J., held that where the remittitur following prior appeal had been filed with the clerk of lower court on June 5, 1951, and subsequently plaintiff had filed six amended and supplementary complaints, and plaintiff gave notice for early setting of trial on ground that period of limitation would otherwise expire, and case was so set and later continued due to congestion of calendar, case was properly dismissed in September, 1954, under code provision requiring trial within three years from date upon

which remittitur is filed by clerk of trial court.

Judgment and order affirmed.

See also Cal.App., 289 P.2d 550.

1. Appeal and Error ⇨1203(3)

The code section providing that when an appeal has been taken and judgment has been reversed and cause remanded for new trial, the action must be dismissed by the trial court unless brought to trial within three years from date on which remittitur is filed by the clerk of the trial court, is mandatory, and without exception. West's Ann.Code Civ.Proc. § 583.

2. Appeal and Error ⇨1203(3)

Under code provision requiring dismissal of an action which has not been brought to trial within three years from date on which remittitur is filed by the clerk of trial court, the time cannot be extended by filing of additional pleadings. West's Ann.Code Civ.Proc. § 583.

3. Appeal and Error ⇨1203(3)

The hearing of a demurrer is not a "trial" unless the ruling on the demurrer is a final determination of the rights of the parties, under code provision that when an appeal has been taken and judgment reversed and cause remanded for new trial, the action must be dismissed by the trial court unless brought to trial within three years from date on which remittitur is filed by the clerk of trial court. West's Ann.Code Civ.Proc. § 583.

4. Appeal and Error ⇨1203(3)

Fact that party asked for trial within prescribed period is immaterial, since case must be actually brought to trial within three year period under code provision declaring that where an appeal has been taken and judgment reversed with cause remanded for new trial, the action must be dismissed unless brought to trial within three years from date on which remittitur is filed by clerk of trial court. West's Ann.Code Civ.Proc. § 583.

5. Appeal and Error ⇨1203(3)

Where on appeal by plaintiff, judgment had been reversed for new trial and remittitur filed with clerk of lower court on

June 5th, 1951, and subsequently plaintiff filed six amended and supplementary complaints, and plaintiff gave notice for early setting of trial on ground that period of limitation would otherwise expire, and case was so set and later continued due to congestion of calendar, case was properly dismissed in September, 1954, under code provision requiring trial within three years from date on which remittitur is filed by clerk of trial court. West's Ann.Code Civ. Proc. § 583.

Leona Ethel Legg in pro. per.

J. Edward Haley, Los Angeles, for respondent.

FOX, Justice.

Plaintiff appeals from a judgment of dismissal on the ground that she did not bring her case to trial within three years after the filing of the remittitur following the reversal of a prior judgment. She also appeals from the order denying her motion to vacate the said judgment. The action of the trial court was based on that portion of section 583, Code of Civil Procedure, which reads as follows:

"When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial * * * the action *must* be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court." (Italics added.)

We have reached the conclusion that the decision of the trial court is correct.

Plaintiff filed this action on March 5, 1948. She sought to recover indemnity under a health and accident policy for injuries suffered by her in an accident which occurred on February 6, 1947, while she was attempting to board a streetcar. The case was tried before a jury resulting in a verdict for defendant. On appeal to this court, the judgment was reversed. See *Legg v. United Benefit Life Ins. Co.*, 103 Cal.App.2d 228, 229 P.2d 454. The remittitur was filed with the clerk of the court

below on June 5, 1951. Between this date and May, 1954, plaintiff filed amended and supplemental complaints, issue being joined on the sixth such pleading. During this latter month plaintiff gave notice of a motion for an early setting based on the ground that unless the trial was commenced prior to June 5, 1954, the case was likely to be dismissed for failure to bring it to trial within three years from the date the remittitur was filed. The motion for early setting was heard in Department 1 on May 28th, just five court days before the expiration of the statutory period. The motion was granted and the case was set for trial on September 8, 1954, the court stating, according to plaintiff's brief, that "in view of the crowded condition of the court calendar" this was "the earliest possible date available." On the latter date the case was continued to September 10th due to congestion of the calendar. Upon the matter being transferred to Judge Moroney, defendant made its motion to dismiss on the ground that the case had not been brought to trial within three years after the filing of the remittitur as required by section 583, Code of Civil Procedure. The court granted the motion. It is from the ensuing judgment that plaintiff appeals.

[1] It is of course established that the cause was not brought to trial within three years after the remittitur was filed. In dealing with the dismissal of an action for want of prosecution, section 583 makes dismissal discretionary where the plaintiff has failed for two years after the action is filed to bring it to trial. However, such period as the defendant was absent from the state or concealed therein under the circumstances enumerated in the statute is not a part of said two-year period. The mandatory provision of the section relative to dismissal where the action is not brought to trial within five years nevertheless contains exceptions where the parties have filed a stipulation in writing that the time may be extended, the defendant was absent from the state, or concealed therein under the specified circumstances. When a case has progressed to the point where it has been tried and a new trial granted and no appeal taken, the statute provides it shall

be dismissed unless brought to trial in three years, except when the parties have filed a stipulation that the time may be extended. But when a case has reached the point where it has not only been tried but an appeal has been taken and the judgment reversed, the code section provides that the action *must* be dismissed unless brought to trial within three years after the remittitur is filed. It will be noted that the portion of section 583 which is here applicable does not incorporate any of the exceptions found in the earlier portions of the section excusing delay in bringing an action to trial. The language used in the last sentence of section 583 is mandatory—the action *must* be dismissed—and there are no exceptions. As pointed out in *Neustadt v. Skernswell*, 99 Cal.App.2d 293, 295, 221 P.2d 694, 695, the language used "is clear and unambiguous and hence is not open to 'judicial interpretation.'" Actually the case last cited, a hearing having been denied, is decisive of the issue here presented. See, also, *Cameron v. Cameron*, 110 Cal. App.2d 258, 260, 242 P.2d 408; *Shutes v. Cheney*, 123 Cal.App.2d 256, 263, 266 P.2d 902.

[2] Plaintiff takes the position that only her original complaint and her first amended complaint come within the three-year limitation of section 583 and that her amended and supplemental complaints filed after the reversal of the judgment are governed by the five year limitation relative to a dismissal if the case initially is not brought to trial in that period. This is obviously not sound. Plaintiff's basic cause of action, regardless of subsequent amendments and supplemental allegations, was her right to recover on the health and accident policy by reason of injuries assertedly received by her while attempting to board a streetcar. There having been a trial, an appeal, and reversal of the judgment, the code section says in plain language that in such a situation the case must be dismissed unless brought to trial in three years after the remittitur is filed. *Neustadt v. Skernswell*, supra. The time cannot be extended by filing additional pleadings. *De Roode v. County of Placer*, 112 Cal.App.2d 859, 861, 247 P.2d 390; *Rosefield Packing Co.*

v. Superior Court, 4 Cal.2d 120, 124-125, 47 P.2d 716. If the period could be extended by filing amended or supplemental pleadings a party could keep the action alive indefinitely, thereby completely nullifying the purpose of the statute which is to prevent avoidable delay for too long a period of time. *De Mota v. Superior Court*, 130 Cal. App.2d 58, 62, 278 P.2d 537; *De Roode v. County of Placer*, supra.

[3] In an effort to escape the effect of section 583, plaintiff argues that the hearings and decisions on the demurrers filed to her fourth, fifth and sixth amended and supplemental complaints constituted a trial. None of these rulings resulted in a final determination of the action for defendant filed an answer to plaintiff's sixth amended and supplemental complaint and it was the issues as thus formed that were ready for trial. The rule is established that "the hearing of a demurrer is not a trial, within the meaning of Section 583, unless the ruling on the demurrer is a final determination of the rights of the parties." *Anderson v. City of San Diego*, 118 Cal.App.2d 726, 731, 258 P.2d 842, 844; *Berri v. Superior Court*, 43 Cal.2d 856, 858, 279 P.2d 8.

[4, 5] Relying on *Mazitelli v. Crane*, 35 Cal.App. 264, 169 P. 721, plaintiff takes the position that since she asked for a trial within the time prescribed by section 583 she has performed her duty and is not in default even though the case is not actually brought to trial within the required time and consequently it may not be dismissed because of such delay. The *Mazitelli* case, however, has been overruled. *Miller & Lux v. Superior Court*, 192 Cal. 333, 339, 219 P. 1006; *Holt v. Miller*, 214 Cal. 558, 6 P.2d 937, 79 A.L.R. 844. In the latter decision the court pointed out, 214 Cal. at page 561, 6 P.2d 937, that the authorities refute the proposition that the plaintiff has fully performed his duty when he caused the case to be set for trial and was in court ready to proceed. The statute is clear and specific in requiring the case to be "brought to trial"—not merely set for trial—within the three-year period after the remittitur is filed, and it does not contain any exceptions.

In view of the language in section 583 that applies to this particular situation, and

the decision in *Neustadt v. Skernsweil*, supra, the trial court was correct in dismissing the action.

The judgment and order are affirmed.

McCOMB, Acting P. J., and ASHBURN, J. pro tem, concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.



136 Cal.App.2d 839

Patrick J. CORCORAN, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, a municipal corporation, The Board of Civil Service Commissioners of said city, and Kay Bogen-dorfer, S. Willard Isaacs, Richard Bovard, Ransom Callicott, and Maurice Schulman, members of said Board; and The Board of Building and Safety Commissioners of said city, and Frank Hess, Vincent Palmer, John Ennls, Harry Friedman, and S. F. Hill, members of said Board, Defendants and Respondents.

Civ. 21005.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1955.

Action for reinstatement to position of boilers and pressure vessels inspector in classified civil service. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained demurrer to amended complaint on ground that plaintiff's action was barred by laches, and plaintiff appealed. The District Court of Appeal, McComb, J., held that where plaintiff waited 19 months from date on which he was discharged from position of boilers and pressure vessels inspector in classified civil service, and 16 months from date on which discharge was sustained by Civil Service Commission, in view of fact that amended complaint failed to set forth allegations ex-

causing the delay or explaining it, plaintiff's cause of action was barred by laches.

Judgment affirmed.

1. Officers ⇨76

Considerations of public policy require that public employee who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights.

2. Action ⇨63

The existence of laches must be determined in accordance with the facts of each case.

3. Action ⇨63

The application of doctrine of laches is not dependent upon a delay of sufficient duration to call into operation the statute of limitations.

4. Action ⇨63

Mere delay in bringing an action for a time less than the period of limitation does not amount to laches, as there must also be present the element that the delay has been to prejudice of the opposite party.

5. Municipal Corporations ⇨218(11)

Where plaintiff waited 19 months from date on which he was discharged from his position in classified civil service and 16 months from date on which discharge was sustained before instituting reinstatement action, and in addition amended complaint failed to explain or set forth allegations excusing a delay, plaintiff's action for reinstatement was barred by laches.

Cryer & Jones, George E. Cryer and R. Alston Jones, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and George William Adams, Deputy City Atty., Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment of dismissal rendered after the sustaining without leave to amend of defendants' demurrer to the first amended complaint, in which plaintiff challenged the

validity of an administrative order of defendant commission, removing petitioner from his position in the classified civil service in defendant city. It was alleged that the order was the result of excess of jurisdiction and an abuse of discretion. The complaint sought a peremptory writ of mandate commanding defendants to comply with plaintiff's demand, under section 112½ of the Charter of the City of Los Angeles, for reinstatement in his position.

Facts: The amended complaint alleged that on June 18, 1952, and for many years prior thereto, plaintiff held and occupied the position of Boilers and Pressure Vessels Inspector in the classified civil service of defendant city; that on said date defendant commission discharged plaintiff from his position for alleged misconduct in the performance of his duty; that plaintiff filed with defendant commission an application for a hearing which was granted, and thereafter held, and on January 30, 1953, defendant commission approved the recommendations of its examiner and entered its order discharging plaintiff from his position; on April 27, 1953, plaintiff filed a demand in writing with defendant commission for reinstatement in his position, in accordance with the provisions of section 112½ of the Charter of defendant city, and that said demand was denied.

The instant action was filed September 1, 1954. The trial court sustained the demurrer on the ground that the amended complaint failed to allege any facts showing a reason for the delay in instituting the action and therefore laches barred plaintiff's alleged cause of action.

This is the sole question necessary for us to determine:

Did the amended complaint show upon its face that plaintiff's cause of action was barred by laches?

Yes. The situation with respect to laches is essentially the same in this case as in the case of *Hicks v. City of Los Angeles*, 133 Cal.App.2d 214, 283 P.2d 1046 (hearing denied by the Supreme Court). Counsel for plaintiff in the present case was also counsel for plaintiff in the *Hicks* case and

contended there, as is contended here, that the doctrine of laches has no application where the plaintiff brings his action within the period of time accorded him by the statute of limitations. Counsel asserted that this court erred in its ruling with respect to laches. By denying a hearing, the Supreme Court approved the following statement in the Hicks case, 133 Cal.App.2d 219, 283 P.2d at page 1050:

[1] "Considerations of public policy require that an employee of a public body who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights." (Jones v. City of Los Angeles, 120 Cal.App.2d 858, 859, 861 [262 P.2d 37, 39]; Campbell v. City of Los Angeles, 47 Cal.App.2d 310, 315 [117 P.2d 901].) In Hayman v. City of Los Angeles, 17 Cal.App.2d 674 [62 P.2d 1047], where there was a delay of nine months in filing suit, during which time plaintiff had attempted to obtain reinstatement to his position by negotiation, the court stated (17 Cal.App.2d at page 680, 62 P.2d at page 1050): 'It is to be presumed that, where one has been dismissed from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for.' (See, also, to the same effect, Pacheco v. Clark, 44 Cal.App.2d 147, 151 [112 P.2d 67], and Newbury v. Civil Service Comm., 42 Cal. App.2d 258, 261 [108 P.2d 745].) In the Campbell case, supra, it is said 'Unless facts be alleged which constitute a sound excuse for a delay of 15 months, such delay in commencing the action is absolutely indefensible' and deprives 'petitioner of all rights to equitable consideration.' (47 Cal.App.2d at page 315, 117 P.2d at page 904.)"

[2] The existence of laches must be determined in accordance with the facts of each case. (Wolpert v. Gripton, 213 Cal. 474, 483, 2 P.2d 767.) In Neet v. Holmes, 25 Cal. 2d 447, at page 460, 154 P.2d 854, at page 861, in which plaintiff delayed for two years after giving notice of rescission before commencing action to rescind a mining lease on the ground of fraud, but well within the applicable three year period of limitations prescribed by section 338,

subdivision 4 of the Code of Civil Procedure, the court in affirming the trial court's determination that plaintiff was barred by laches said, that unlike the statute of limitations, laches does not require any specified period of delay, and "Courts of equity will refuse relief even where the statutory time of limitation has not run, if in addition to mere passive neglect there is a showing of facts amounting to acquiescence in the acts complained of, or other circumstances which, coupled with the delay, render the granting of relief inequitable."

[3] Again in Warfield v. Anglo & London Paris National Bank, 202 Cal. 345, at page 356, 260 P. 881, at page 885, our Supreme Court said: "The application of the doctrine of laches is not dependent upon a delay of sufficient duration to call into operation of the statute of limitations." (See also Toomey v. Toomey, 13 Cal.2d 317, 320, 89 P.2d 634.)

In United States ex rel. Arant v. Lane, 249 U.S. 367, at page 371, 39 S.Ct. 293, at page 294, 63 L.Ed. 650, where the relator waited 20 months before filing his petition for a writ of mandamus to compel his reinstatement to a position from which he had been discharged, the court said, referring to a writ of mandamus: "It is an extraordinary remedy which will not be allowed in cases of doubtful right * * * and it is generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches."

With respect to actions brought by discharged public officers and employees to obtain reinstatement, it has been uniformly held that they must act with the utmost diligence in asserting their rights. If delay occurs, prejudice is presumed. In United States ex rel. Arant v. Lane, supra, 249 U.S. at page 372, 39 S.Ct. at page 294, the court said: "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his con-

tention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service." (See also *Peruzzin v. Test*, 282 App.Div. 550, 125 N.Y.S.2d 353, 355; *Rotherham v. Grece*, 183 A. 291, 14 N.J. Misc. 164; *People ex rel. Oberhart v. Durkin*, 285 Ill.App. 156, 1 N.E.2d 882; *State ex rel. Martin v. Alford*, 203 La. 232, 13 So.2d 845.)

The decisions of the Supreme Court of this state which plaintiff cites in his opening brief do not support his assertion that the doctrine of laches has no application until the statutory period of limitations has run. In certain of the cases the Supreme Court held that under the facts presented there was no unreasonable delay and that actions brought within the period prescribed by the statute of limitations were therefore not barred by laches.

In *Estudillo v. Security Loan & Trust Co.*, 149 Cal. 556, 87 P. 19, the Supreme Court held that plaintiffs had moved promptly and hence they could not be charged with lack of diligence. It then observed that whereas the period of limitation for relief on the ground of fraud was three years from the discovery of the fraud, plaintiffs had commenced their action two years after its commission. The court then said, 149 Cal. at page 565, 87 P. at page 23:

"There has been no laches. The period of limitation for actions for relief on the ground of fraud is three years from the discovery of the fraud. This action was commenced less than two years after its commission. The cases cited by respondent in which the complaint has been held bad for failure to show how and when the fraud was discovered, and why it was not sooner discovered, were all cases in which the action was commenced more than the full period of limitation after the commission of the fraud. In such cases the doctrine of laches applies, but in a case like this the right to maintain the action is governed by the statute of limitations."

The court then proceeded to distinguish the cases cited by defendant to support its claim of laches, pointing out that those were all cases in which the action was com-

menced more than the full period after the commission of the fraud, and that in each of those cases the complaint had been held bad for failure to show how and when the fraud was discovered and why it was not sooner discovered.

In *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674, the Supreme Court said that the term "laches" as used in reported cases does not always have the same meaning. It is employed as the equivalent of "mere delay," sometimes of "unreasonable delay" and also of "acquiescence." It is therefore important to consider the context in connection with which the term "laches" has been used by a judge in order to ascertain in what sense it is employed. (69 Cal. at page 270, 10 P. at page 678.) In the *Lux* case the court concluded that the evidence did not prove consent or acquiescence and that "if the question were submitted to a jury upon that evidence a verdict of assent could not be upheld." (69 Cal. at page 288, 10 P. at page 690.) Of particular significance is the fact that the court pointed out that courts exercise their equity powers "independent of any statute of limitations" and that equity "will often treat the lapse of a less period as a presumptive bar, on the ground of discouraging stale claims or gross laches or unexplained acquiescence." (69 Cal. at page 269, 10 P. at page 677.)

[4] In *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243, the court observed that "mere delay in bringing an action for a time less than the period of limitation does not amounting to laches," adding that "there must be also present the element that the delay has been to the prejudice of the opposite party." (184 Cal. at page 242, 193 P. at page 250.) This principle has been fully recognized by the District Court of Appeal. In *Hayman v. City of Los Angeles*, 17 Cal.App.2d 674, at page 680, 62 P.2d 1047, at page 1050, the court says:

"* * * But the defense of laches involves much more than the element of delay. It is not the lapse of time so much as it is the consequences of the delay which goes to make up the defense of laches. Unless prejudice results from the delay the defense is not established, but, if prejudice

has resulted, the one whose prompt action would have forestalled it can void the responsibility only by showing that he sought his remedy promptly. It is to be presumed that, where one has been dismissed from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for." (See also *Kimberlin v. Los Angeles City High School District*, 115 Cal. App.2d 459, 463, 252 P.2d 344.)

In the instant case the delay of plaintiff in bringing his action was considerably longer than in the *Hayman* case [9 months], supra, or the *Kimberlin* case [12 months], supra, in *Donovan v. Board of Police Commissioners*, 32 Cal.App. 392, 163 P. 69 [15 months], or *Campbell v. City of Los Angeles*, 47 Cal.App.2d 310, 117 P.2d 901 [15 months] which is cited and quoted with approval in *Jones v. City of Los Angeles*, 120 Cal.App.2d 858, 861, 262 P.2d 37. The discharge of plaintiff herein was sustained by the civil service commission on January 30, 1953, and his demand for reinstatement was filed on April 27, 1953.

[5] In the absence of an allegation to the contrary, of which there is none in the present case, it must be assumed that the demand was denied promptly. The original complaint was filed September 1, 1954. It therefore appears that plaintiff waited 19 months from the date on which his discharge was sustained, and approximately sixteen months from the date on which his demand for reinstatement was denied before instituting this action. Under the authorities cited plaintiff's cause of action is barred by laches in view of the fact that his amended complaint is devoid of any allegations which would excuse or explain the delay. Therefore laches was a matter for the trial court to determine on demurrer from the face of the complaint. (*Neet v. Holmes*, 25 Cal.2d 447, 460, 154 P.2d 854; *Hicks v. City of Los Angeles*, 133 Cal.App. 2d 214, 283 P.2d 1046; *Jones v. City of Los Angeles*, 120 Cal.App.2d 858, 262 P.2d 37.)

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

136 Cal.App.2d 820

W. A. ROBISON, as Administrator of the Estate of George F. Barnett, deceased, substituted in the place and stead of George F. Barnett, deceased, Plaintiff, Cross-Defendant and Appellant,

v.

Herbert HANLEY and Gladys Hanley, Defendants, Cross-Complainants and Respondents.

Civ. 16480.

District Court of Appeal, First District, Division 1, California.

Nov. 9, 1955.

Cross-actions to quiet title. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., rendered the judgment challenged on appeal. The District Court of Appeal, Bray, J., held, inter alia, that where trustee for sale of property had, after discussing (with trustor-beneficiary) purchasing property for himself and reaching agreement as to price, assumed all of trustor's indebtedness, improved property and paid taxes thereon, doctrine of equitable estoppel would be applied to rebut trustor's contention that there had been no valid termination of trust for lack of written memorandum thereof.

Affirmed.

1. Estoppel $\Rightarrow$ 110

Necessity, if any, for pleading defense of equitable estoppel was waived when evidence upon which it was based was admitted without objection.

2. Frauds, Statute of $\Rightarrow$ 139(1)

Statute of frauds does not apply where oral agreement is fully executed. West's Ann.Civ.Code, § 1091.

3. Frauds, Statute of $\Rightarrow$ 144

Trusts $\Rightarrow$ 343

Where trustee for sale of property had, after discussing (with trustor-beneficiary) purchasing property for himself and reaching agreement as to price, assumed all of trustor's indebtedness, improved property and paid taxes thereon, doctrine of equitable estoppel would be applied to rebut

trustor's contention that there had been no valid termination of trust for lack of written memorandum thereof. West's Ann.Civ. Code, § 2280; West's Ann.Civ.Code Proc. § 1971.

4. Trusts ⇨198

Where trustor-beneficiary had full knowledge of all facts concerning transaction, trustee's sale of trust property to himself was not void. West's Ann.Civ. Code, § 2230, subd. 1.

5. Appeal and Error ⇨219(2)

Where appellant had made, in trial court, no request for more specific findings, his objection, on appeal, to findings made came too late.

6. Limitation of Actions ⇨103(2)

Repudiation of express trust is essential to commence running of limitations.

7. Limitation of Actions ⇨197(1)

In quiet title action, evidence, on issues as to laches and adverse possession, would not sustain trustor's contention that there had been no repudiation of trust until shortly before commencement of suit.

8. Appeal and Error ⇨760(1)

Rules on appeal 13 and 15(a) must be read together, and statement in briefs of any matter in record must be supported by appropriate reference to record. West's Ann.Rules on Appeal, rules 13, 15(a).

Phil F. Garvey, San Francisco, for appellant.

Herbert Chamberlin, San Francisco, for respondents.

BRAY, Justice.

Plaintiff's intestate¹ brought an action to quiet title to a house and lot in San Francisco. Defendants cross-complained to quiet their title to the property. From a judgment in defendants' favor, plaintiff appeals.

Questions Presented.

Sufficiency of the evidence. The evidence establishes that the merits and equities are all on the side of defendants. Plaintiff relies upon technical contentions that a certain trust was never terminated or repudiated.

Evidence.

Plaintiff denied much of defendants' testimony concerning the facts of the case. Plaintiff's testimony, however, was highly evasive, contradictory, unsatisfactory and disproved by written documents signed by him. In 1936 plaintiff owned a lot upon which he had built a home. He had rented the property to one Jankelson. It was encumbered by a mortgage, a deed of trust, a judgment lien and a tax lien, totaling almost \$8,000. A notice of default under the deed of trust had been given. Due to the illness of plaintiff's wife, they decided to move to Los Angeles. Defendant² was a licensed insurance broker and real estate salesman. Plaintiff told defendant that he was about to lose the property and wanted to "salvage something out of the wreckage." Plaintiff and his wife³ conveyed the property to defendant upon the understanding expressed in a letter to them dated July 27, 1936. This stated that the deed "is for the purpose of selling the above property to a third party; profits from any sale are to be divided equally between ourselves." The then tenant was to be allowed to remain 120 days "if necessary." The rental to be paid by him was not to be a part of the profits but was to go to plaintiff. In case a sale was not consummated "Deed is to be returned" to plaintiff. Defendant testified the asking price for the property was to be around \$8,000, plaintiff that he suggested a price of \$20,000 but did not actually put a price on it, that defendant was to submit offers when he got them. Defendant interested one Rusalen, who signed an agreement dated August 14, 1936, to buy the property for \$8,000. On August 29th this agreement was superseded by another agreement signed by Rusalen, for

1. The original plaintiff has since died and his administrator was substituted as plaintiff. Where plaintiff is mentioned herein, it refers to the original plaintiff.

2. Unless otherwise stated, "defendant" refers to defendant Herbert Hanley, as all the transactions were with him.

3. Plaintiff's wife died prior to suit.

the same purchase price but different terms. This agreement was in the form of the usual "Uniform Agreement of Sale" and contained an "Approval" signed by plaintiff. Plaintiff denied that he ever heard of Rusalen or of Rusalen's offer to buy, and claimed that he signed the approval in blank. Rusalen was unable to finance the purchase of the property and the sale fell through. After making efforts to find other buyers, defendant discussed with plaintiff purchasing the property for himself and a price of \$125 over the total amount of the encumbrances was agreed upon. At this time the amount of the encumbrances was \$8,165.72. Defendant assumed the payment thereof and gave plaintiff his promissory note⁴ dated December 14, 1936, for \$119.78, debiting plaintiff \$5.22 due defendant for an insurance premium on other property. In a short time, defendant executed new encumbrances, thereby releasing plaintiff from all obligations of the old. Plaintiff admitted that he knew that defendant moved into the house in December, 1936. Defendant paid him for a refrigerator in the house. From then on, plaintiff never received nor asked for an accounting of any kind from defendant. Defendant paid all taxes, all interest and principal of the indebtedness against the property, made repairs and improvements totaling between \$3,000 and \$4,000. May, 1945, defendant deeded the property to himself and wife as joint tenants. From 1936 until time of suit (August, 1952) defendant did plaintiff's insurance work on other property, sending him statements therefor, which plaintiff paid. It is not necessary to detail all the evidence corroborating defendant's testimony that plaintiff in 1936 sold the property to him. Plaintiff's only excuse for not making any claim to the property or to an accounting of what defendant was doing with it, is that he had lost defendant's letter of July 27, 1936, and did not find it until shortly before filing suit.

Termination of Trust.

4. Plaintiff denied receiving this note, yet he cashed defendant's check dated May 4, 1938, bearing the notation "balance due on note dated 12-14-36, \$9.60. This pay-

Plaintiff contends that the court's findings that the trust expressed in the last mentioned letter was terminated and repudiated are not supported by the evidence because (a) there was no written memorandum of the sale to defendant; (b) a trustee may not sell trust property to himself.

(a) No writing.

[1-3] Plaintiff contends that under sections 2280, Civil Code, and 1971, Code of Civil Procedure, a trust may be terminated only by a writing. Section 2280 provides: "* * * every voluntary trust shall be revocable by the trustor by writing filed with the trustee." Section 1971, Code of Civil Procedure, provides: "No estate or interest in real property, other than for leases for a term not exceeding one year, nor *any trust* or power over or concerning it, or in any manner relating thereto, can be created, granted, *assigned, surrendered, or declared*, otherwise than by *operation of law, or a conveyance or other instrument in writing*, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." (Emphasis added.)

That a trust may be terminated, surrendered or relinquished by an oral agreement of trustor and beneficiary is discussed in *Johnson v. Altman*, 96 Cal.App.2d 467, 215 P.2d 768, and *Nicolds v. Storch*, 67 Cal.App. 2d 8, 153 P.2d 561. In the latter case the court said in 67 Cal.App.2d at page 15, 153 P.2d at page 564: "In a note in 106 A.L.R. 1315, it is also said that while there is some conflict in the cases the majority of courts hold to the principle that an oral contract to surrender, rescind, or abandon the beneficial interest arising under a resulting trust is not rendered ineffective or unenforceable by the statute of frauds. Cases in which this view was taken are there cited." However, in neither case was the question directly decided because of the applicability of the doctrine of equitable estoppel to the

ment, \$5. Balance due, \$4.60. Balance due on refrigerator account, \$35. This payment, \$5. Balance due, \$30."

facts presented. In the Johnson case the court said, referring to the facts of the case, quoting from 106 A.L.R. 1318, 96 Cal.App. 2d at page 470, 215 P.2d at page 770: "Whatever may be the nature of the trust relation, all courts agree that where there has been some performance by the trustee in accordance with the oral contract, or where his position has been changed as a result of it, the surrender is effective irrespective of the requirements of the Statute of Frauds." In the Nicolds case the court referred to the above note in 106 A.L.R. 1318⁵ and stated in 67 Cal.App.2d at page 17, 153 P.2d at page 566: "These findings bring plaintiff within the rule that a trust may be extinguished by a parol surrender by the *cestui que trust* in any case in which the trustee so acts in reliance upon the surrender as to make it inequitable for the *cestui* to assert his interest, and the rule that performance of an oral agreement within the statute of frauds takes the case out of the statute."

1 Witkin's Summary of California Law, 6th ed., p. 57, states: "Where the defendant by his words or conduct represents that he proposes to stand by the oral contract, and the plaintiff, in reliance thereon, changes his position, the defendant will be *estopped* to set up the bar of the statute."

In our case we deem it unnecessary to determine this question⁶ for here the facts cry out loudly for the application of the doctrine of equitable estoppel. While the defense of equitable estoppel was not pleaded, the evidence upon which it was based was admitted without objection and therefore the necessity for pleading it, if such

necessity existed, was waived. See Foster v. Fisher, 44 Cal.App.2d 33, 37, 111 P.2d 935. It would be unconscionable here to deprive defendant of the property which the court found he purchased from plaintiff and upon which he assumed all of plaintiff's indebtedness, had improved it and paid the taxes thereon, merely because of a technical application of the statute of frauds. It should be pointed out also that the statute of frauds, Civil Code, § 1091, does not apply where the oral agreement is fully executed. See 23 Cal.Jur.2d 399, which states: "An oral contract which has been fully executed is not affected by the provisions of the statute of frauds. In such a situation the contract is not assailable, either by the parties to the agreement or by a third person, on the ground that it is not evidenced by a writing. The rule applies even when full performance has been rendered by only one of the parties. It is sometimes justified on the ground of estoppel."

(b) *Trustee may not sell trust property to himself.*

[4] Citing the general rule set forth in section 2229, Civil Code, in section 170, Restatement of Trusts, p. 431, and in certain cases, to the effect that a trustee may not deal with trust property for his own profit, plaintiff contends that the sale to defendant was absolutely void. Plaintiff overlooks the exception to that rule set forth in section 2230, Civil Code: "Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

5. This note is supplemented in 173 A.L.R. 282.

6. See, however, 89 C.J.S., Trusts, § 95, p. 938: "A trust may be extinguished by a parol surrender by the beneficiary in any case in which the trustee so acts in reliance on the surrender as to make it inequitable for the beneficiary to assert his interest." See also Nicolds v. Storch, supra, 67 Cal.App.2d 8, at page 17, 153 P.2d 561, at page 566, where the court considered the case of Millard v. Hathaway, 27 Cal. 119, cited by plaintiff, which contains dicta that a release by the payor under a resulting trust must be in

writing: "It is said in 12 Cal.Jur., pp. 926, 927, that a fully executed parol contract cannot be affected by the statute of frauds, and cannot be assailed either by the parties or by third persons on the ground that it is not in writing; that the rule is the same where full performance is by one of the parties only; and that the rule is sometimes placed on the ground of estoppel." These discussions refer to resulting and constructive trusts. In our case we have an express one, and the rule concerning repudiation of an express trust may be different from that dealing with the other types of trusts.

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so; * * *." After quoting that section, the court in *Malinow v. Dorenbaum*, 51 Cal.App.2d 645, at page 652, 125 P.2d 554, at page 558, said: "Although appellant challenges the applicability of this section of the code to the case at bar, we believe that it does apply here. As has been seen, appellant acquiesced and actively aided decedent in her claims adverse to his interest and it is clear that he did so with full knowledge of all the facts which might affect his decision. [Citation.] Moreover, it is well settled that where a beneficiary has consented to a course of conduct by the trustee, a rule permitting the cestui to attack the transaction later on would, as the court said in *Colton v. Stanford*, 82 Cal. 351, 378, 23 P. 16, 21, 'convert a rule intended to prevent fraud into one creating an incentive to, and a cover of, fraud.'" All the elements required by section 2230, subd. 1, Civil Code, appear in our case.

Specific Findings.

[5] Plaintiff in addition to challenging the findings on the issues heretofore discussed, contends there is no evidence to support certain other findings. The court found true the allegations in defendants' answer and cross-complaint that the purchase price was "about \$8300." The exact price came to \$8,290.72. Obviously, this amount was "about \$8300." Moreover, the record fails to show that plaintiff requested a more specific finding. His objection, now made upon appeal, comes too late. *Goss v. Fanoe*, 114 Cal.App.2d 819, 824, 251 P.2d 337. The same is true of his contention that the finding of adverse possession for more than 15 years is ambiguous.

[6,7] The court found that plaintiff's claim was barred by practically all the statutes of limitation, by laches and adverse possession. Plaintiff's contention that the evidence does not support such findings is

based upon (1) the matters hereinbefore discussed, and which we have determined adversely to him, and (2) the contention that there was no repudiation of the trust until shortly before commencement of suit when defendant refused to comply with plaintiff's request to transfer the property to him. As to these defenses, there can be no question that the law is well settled that where, as here, there was an express trust created, the time required to start the running or beginning of each of them does not start until there is an express repudiation of the trust communicated to the trustor. Here the evidence clearly shows such a repudiation as far back as December, 1936. See *Smith v. Sheffey*, 113 Cal.App.2d 741, 744, 248 P.2d 959, to the effect that a finding of laches is supported by evidence of acts of dominion exercised over the land; and *Eisenmenger v. Eisenmenger*, 59 Cal. App.2d 536, 139 P.2d 63, discussing repudiation of a trust agreement and the starting of the period of limitation and of adverse possession.

The court found that both defendants were the owners of the property since December 12, 1936. Plaintiff contends there is no evidence that Mrs. Hanley's ownership started that day, as her name did not appear of record until Herbert deeded the property to her and himself as joint tenants, in 1945. As the defendants were married in 1936 when Herbert purchased the property, presumably it became community property and Mrs. Hanley's interest would attach. Her record interest, however, appeared in 1945, so, if there is any error in the finding it is a completely immaterial one.

[8] We deem it necessary to point out that plaintiff in his opening brief violated Rule 15(a), Rules on Appeal, which requires, in part, "The statement of any matter in the record shall be supported by appropriate reference to the record." In over three and a half pages of "Summary of material facts" there is not one reference to the record. Were it not for the assistance given the court in defendants' brief, it would have been a considerable task for this court to relate plaintiff's summary with the record. Plaintiff contends

that as there is no express requirement in Rule 13 that there be references to the record he is only required to do so "in the separate points required in the argument." Rules 13 and 15(a) must be read together. That the statement in the briefs of any matter in the record must be supported by an appropriate reference to the record is well established. See *Bruce v. Bruce*, 121 Cal. App.2d 661, 664, 263 P.2d 895; *Johnson v. Klein*, 127 Cal.App.2d 577, 578, 274 P.2d 209. This court could, and probably should, have required plaintiff to provide the missing references.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



137 Cal.App.2d 21

Michael MURPHY and Mary H. S. Murphy,
Plaintiffs and Respondents,
v.

O. A. KELLY, Betty Lee Morales, and Helen Clark, Individually, and O. A. Kelly, Betty Lee Morales and Helen Clark, as Trustees for Eden Foundation, Ltd., and Eden Foundation, Ltd., a co-partnership, composed of O. A. Kelly, Betty Lee Morales and Helen Clark, Defendants and Appellants.

Civ. 21091.

District Court of Appeal, Second District,
Division 2, California.

Nov. 16, 1955.

Action for recovery of personal property. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered summary judgment for plaintiffs and defendants appealed. The District Court of Appeal, Fox, J., held, inter alia, that affidavits raised substantial fact issue as to whether plaintiffs might have mitigated their damages by availing themselves of an opportunity to procure immediate possession of a portion of property at an earlier

stage in proceedings, precluding summary judgment for damages for detention of property.

Judgment reversed.

1. Appeal and Error ⇨949

Question on appeal from summary judgment was whether trial court had abused its discretion. West's Ann.Rules on Appeal, rule 15(a).

2. Judgment ⇨185.2(1)

Propriety of granting or denying a motion for summary judgment is determined by sufficiency of affidavits, rather than whether formal pleadings raise issues. West's Ann.Code Civ.Proc. § 437c.

3. Judgment ⇨185.1(3, 4)

In action to recover personal property which was held by owners of house in which plaintiffs had been living, statements in defendants' affidavit, offered in opposition to motion for summary judgment, that plaintiffs had defaulted on a contract to purchase house, that defendants held under a deed, and that defendants had obtained a judgment for rent were either hearsay or mere conclusions of law and were incompetent for consideration on motion. West's Ann.Code Civ.Proc. § 437c.

4. Landlord and Tenant ⇨9

Where there was no reservation of rent fixed in contract, persons who entered into possession of land under executory contract did not thereby become tenants of vendors, nor were they tenants of vendors' successor in interest.

5. Landlord and Tenant ⇨14

Where there was no landlord-tenant relationship between owners of land and occupants thereof, no such relationship was created by fact that owners served a notice to pay rent or quit.

6. Landlord and Tenant ⇨242

Where there was no landlord-tenant relationship between owners of house and occupants thereof, owners did not obtain a possessory lien on occupants' personal property for failure to pay rent. West's Ann.Civ.Code, § 1861a.

7. Landlord and Tenant ⇨7

No landlord-tenant relationship springs from a situation in which there are rival claimants, one holding adversely to the other.

8. Replevin ⇨1

An action for recovery of personal property is a mixed action, being in rem so far as specific recovery of chattels is concerned, and in personam so far as damages are sought.

9. Judgment ⇨185.2(3)

If a plaintiff is to prevail on his motion for summary judgment, his supporting affidavits must state facts covering every element necessary to sustain a judgment in his favor.

10. Judgment ⇨185.2(6)

Affidavits of party moving for summary judgment must be strictly construed.

11. Judgment ⇨185.3(17)

In action for recovery of personal property, failure of plaintiffs' affidavits to set out value of property in dispute at any time at which its value could be properly measured precluded rendition of summary judgment for value of property. West's Ann.Code Civ.Proc. § 437c.

12. Damages ⇨62(1)

A plaintiff cannot be compensated for damages which he might have prevented by reasonable efforts or expenditures.

13. Judgment ⇨185.3(17)

In action to recover personal property, affidavits raised substantial fact issue as to whether plaintiffs might have mitigated their damages by availing themselves of an opportunity to procure immediate possession of a portion of property at an earlier stage in proceedings, precluding summary judgment for damages for detention of property. West's Ann.Code Civ.Proc. § 437c.

14. Judgment ⇨194

Where, in action for recovery of personal property, summary judgment was properly rendered for recovery of property, but summary judgment for damages for detention and alternative judgment for value of property were improperly ren-

dered, plaintiffs, should they elect to proceed to trial of remaining portions of cause, must await ultimate outcome of trial of such issues before rendition of final judgment. West's Ann.Code Civ. Proc. § 437c.

Willedd Andrews, Los Angeles, for appellants.

Michael Lavelle, Los Angeles, for respondents.

FOX, Justice.

Defendants appeal from a summary judgment in an action for the recovery of possession of personal property.

Plaintiffs, who are husband and wife, filed a "Complaint in Replevin," naming as defendants O. A. Kelly, Betty Lee Morales and Helen Clark individually and as trustees for Eden Foundation, Ltd. Eden was also named as a defendant and described as a copartnership composed of the individual defendants. The Complaint alleged that plaintiffs were the owners, and entitled to the possession, of certain personal property, each item of which is recited by its description and individual value; that defendants took tortious possession of that property; that they have refused to accede to a demand to surrender possession to plaintiffs; and that they have continued to retain possession of the property, damaging plaintiffs in the sum of \$10 per day. Plaintiffs prayed judgment for possession of the property, or for its aggregate value of \$5,777.50 in case delivery could not be effected, and for damages for its detention.

An answer was filed by all the named defendants, admitting that plaintiffs were entitled to possession of several designated items of personal property but denying every other material allegation in the complaint. By way of affirmative defense, defendants alleged that on June 28, 1954, defendant Eden Foundation, Ltd. (hereinafter called Eden) owned real property on which was located a residence unlawfully occupied by plaintiffs; that on that date, Eden served on plaintiffs a notice to pay rent of \$100 per week within three days or

quit the premises; that plaintiffs paid no rental from June 28 to August 15, 1954, and owed Eden the sum of \$600 for this period; that Eden is holding all of plaintiffs' personal property not exempt from execution; that upon a demand made by Michael Lavelle, plaintiff's attorney, Eden offered to restore possession of the personal property listed in defendants' answer, but Mr. Lavelle demanded return of all or none of said property of plaintiffs in the possession of Eden; and that any damage suffered by plaintiffs has been caused by their refusal to accept possession of the personal property offered them and not by any conduct of Eden or its agents. In another affirmative defense, it is alleged that Eden is the owner of a judgment for the sum of \$101 against plaintiffs obtained in the Small Claims Court of Malibu Judicial District. No copy of the judgment was appended to the answer.

Thereafter, plaintiffs moved for a summary judgment on the ground that defendants had no meritorious defense. In support thereof affidavits were filed by plaintiff Michael Murphy and his attorney, Lavelle. So far as is here germane, Murphy's affidavit recites that on June 3, 1953, he and his wife took possession of a parcel of real property improved with a six-room dwelling (hereinafter referred to as the Topanga property) as vendees under a contract of sale with the owners thereof, S. H. and Marguerite Barton; that plaintiffs had complied with all terms of the contract except payment of the balance of the purchase price, which was to be paid when the Bartons delivered to them a grant deed; and that the Bartons had refused without right to deliver such deed. The affidavit then alleges that defendants subsequently informed plaintiffs they were negotiating with the Bartons for the sale of the property, at which time plaintiffs disclosed their contract with the Bartons, whereupon defendants stated that in their opinion said agreement gave plaintiffs no right or interest in the Topanga property. The affidavit further states that on June 28, 1954, defendants informed plaintiffs they had purchased the Topanga property from the Bartons and served upon them

the Notice to Pay Rent or Quit previously described; that plaintiffs replied they would not relinquish possession because of their prior rights and would not recognize defendants as their landlord; that plaintiffs and their children occupied the house until August 1, 1954, when they were forced to vacate because of certain described acts of harassment and intimidation by defendants. Murphy then avers that during their occupancy of the Topanga house, plaintiffs furnished it with the personal property described in their complaint, of which they are the sole owners; that on August 1, 1954, plaintiffs attempted to remove this personal property when defendants compelled them to vacate by the use of force and threats to do bodily harm to affiant, but defendants would not permit its removal, stating they had a landlord's lien thereon and that they had secured a judgment for \$100 in the Malibu Small Claims Court.

The Lavelle affidavit identifies affiant as attorney for plaintiffs in the within action as well as in the Malibu action and avers that an appeal has been taken from the judgment in the latter action and a cash bond in the sum of \$125 filed to stay execution. The affidavit recites that after written demand for return of the personal property was made, defendant Betty Lee Morales and affiant had a telephone conversation; that this occurred after the defendants were notified of the filing of the stay bond; that in the course of the conversation, affiant advised Mrs. Morales that plaintiffs' property was being wrongfully withheld; that Mrs. Morales asserted that defendants claimed a lien on the property because plaintiffs were indebted to them for rentals and because of the \$100 judgment received in the Small Claims Court; and that defendants were willing to release such portion of the personal property as was exempt from execution if plaintiffs would file their claim of exemption. Lavelle avers that he has checked with the clerk of the Malibu Small Claims Court and the constable and has been informed that while an execution has issued upon the aforementioned judgment, no levy thereunder has been made.

In opposition to plaintiffs' motion, two affidavits executed by defendant Betty Lee Morales, a trustee and chairman of the board of directors of Eden, were filed. In substance, affiant declared that plaintiffs did not perform all the terms and conditions of the contract of sale of the Topanga property entered into with the Bartons and that the escrow set up to consummate the transaction was cancelled because of their default; that thereafter plaintiffs' offer to purchase said property for cash was rejected by the Bartons; that plaintiffs assured affiant several times between March 7 and June 28, 1954, that they would vacate the house in which they were residing within about a two weeks' period; that Mrs. Barton executed to Eden a deed dated June 25, 1954, vesting title to the Topanga property in Eden; that after receiving their notice to pay rent or quit plaintiffs failed to pay rent and that Eden obtained a judgment for \$100 in the Malibu Small Claims Court for rent arrears. After denying the acts of harassment charged in Murphy's affidavit and after describing certain violent acts allegedly committed by plaintiffs, affiant states that Eden has "offered in their answer, to deliver all personal property referred to in plaintiffs' complaint exempt from execution * * *" In her second counteraffidavit, Mrs. Morales avers that she informed Mr. Lavelle that Eden was filing five additional complaints for weekly rent, each praying for the sum of \$100; that she informed Lavelle that Eden was willing to release any personal property exempt from execution and would release all the property if a bond in the sum of \$600 were posted; that Lavelle refused to accept anything less than all the property detained without posting any bond. She further states that Eden did not levy an execution on the small claims judgment because plaintiffs have appealed therefrom and the matter is pending.

Upon this showing, the court entered summary judgment in plaintiffs' favor. The judgment decreed that plaintiffs were entitled to regain possession of the property in question, together with damages in the sum of \$1,640 for its detention, and

costs. Pursuant to the requirement of section 667 of the Code of Civil Procedure, an alternative judgment was also rendered awarding plaintiffs the sum of \$5,777.50, the alleged value of the property, in the event redelivery of the property could not be had.

[1] Defendants' brief scarcely comports with the requirements of rule 15(a), Rules on Appeal, 36 Cal.2d 1, 15. Except for the topical index and the table of authorities in its preface, the body of the brief contains no headings or captions under which are separately presented a statement of the case and a concise statement of the propositions of law involved. While such inadequate compliance with the rules is not to be condoned, we will nonetheless proceed to consider the single problem here involved, namely, whether or not the trial court abused its discretion in granting the summary judgment. *Best v. Burch*, 132 Cal.App.2d 859, 283 P.2d 262; *Kelly v. Liddicoat*, 35 Cal.App.2d 559, 560, 96 P.2d 186; *Bank of America, etc. v. Oil Well S. Co.*, 12 Cal.App.2d 265, 270, 55 P.2d 885.

Defendants contend that their answer and the Morales affidavits presented triable issues of fact and that it was therefore error to grant the motion for summary judgment.

[2] The propriety of granting or denying a motion for summary judgment under section 437c of the Code of Civil Procedure is determined by the sufficiency of the affidavits that have been filed. *Coyne v. Krempels*, 36 Cal.2d 257, 261, 223 P.2d 244; *Kimber v. Jones*, 122 Cal. App.2d 914, 918, 265 P.2d 922; *Cone v. Union Oil Co.*, 129 Cal.App.2d 558, 562, 277 P.2d 464. In *Coyne v. Krempels*, supra [36 Cal.2d 257, 223 P.2d 246], the Supreme Court held that a summary judgment for a plaintiff is proper where "the affidavits in support of his motion state facts that, if proved would be sufficient to sustain judgment in his favor, and defendant does not 'by affidavit or affidavits * * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.'" In

referring to the contents of the affidavits of a defendant in opposition to the motion, the third paragraph of section 437c provides, in its material portion, that such "affidavit or affidavits * * * shall be made by the * * * defendant, or by any person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action (or to a portion thereof) * * *. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. * * *" As this court has pointed out in several recent cases, while the pleadings serve to define the issues, the showing made in the affidavits is crucial, since there is often no genuine issue of fact although one may be raised by the formal pleadings; the affidavits permit the court to pierce the allegations of the pleadings to ascertain whether a genuine cause of action exists or whether the defense interposed is more apparent than real. *Low v. Woodward Oil Co.*, 133 Cal.App.2d 116, 283 P.2d 720; *Maltby v. Shook*, 131 Cal.App.2d 349, 355, 280 P.2d 541; *Cone v. Union Oil Co.*, supra, 129 Cal.App.2d at pages 562-563, 277 P.2d 464.

[3] It is clear from the Murphy affidavit that the personalty now held by defendants, whose recovery is the object of this action, is the property of the plaintiffs and that plaintiffs would be entitled to its immediate possession except as defendants might establish a lawful basis for its continued detention. It was therefore incumbent upon defendants, in their affidavits, to establish by facts within the personal knowledge of affiants, and to which facts the affiants could competently testify, that they had "a good and substantial defense" to the action or any portion thereof. Defendants sought to make such a showing by indicating that Eden was owner of the Topanga property, that a landlord-tenant relationship existed between Eden and plaintiffs and that plaintiffs' property was being withheld pursuant either to a judg-

ment or possessory lien. The Morales affidavits, however, fall far short of meeting the requirements of section 437c. She avers that the contract of sale of the Topanga property between plaintiffs and the Bartons was cancelled in December, 1953, because of plaintiffs' default. There is no affidavit from the Bartons to this effect, or from the escrow holder, or from any other party to that transaction. Mrs. Morales was a stranger to that contract. Her statement is no more than a mere conclusion of law, an expression of her personal opinion to which she could not competently testify. *Maltby v. Shook*, supra; *Krupp v. Mullen*, 120 Cal.App.2d 53, 57, 260 P.2d 629. Her affidavit also states that Eden is the owner of the Topanga property by virtue of a deed from the Bartons vesting title in Eden. However, neither the deed nor an authenticated copy thereof, from which affiant deduces that title to the property is vested in Eden, was attached to the affidavit. Under such circumstances, her statement of the legal effect of this document is a mere conclusion of law. *Low v. Woodward Oil Co.*, 133 Cal.App.2d 116, 283 P.2d 720; *Cowan Oil & R. Co. v. Miley P. Corp.*, 112 Cal. App. Supp. 773, 780, 295 P. 504; *Weichman v. Vetri*, 100 Cal.App.2d 177, 179, 223 P.2d 288, and there being no reason shown to excuse production either of the original deed or an authenticated copy, she could not give competent testimony even to the contents of said documents. *Low v. Woodward Oil Co.*, supra; *Gardenswartz v. Equitable etc. Soc.*, 23 Cal.App.2d Supp., 745, 750, 68 P.2d 322. Similarly, the references in her affidavit to a judgment purportedly entered in the Small Claims Court in Malibu are incompetent as pure hearsay, since no certified copy of the judgment was appended to the affidavit. *Low v. Woodward Oil Co.*, supra, and cases there cited.

[4-7] However, even if it be assumed that plaintiffs defaulted in their contract for the purchase of the Topanga property and that Eden acquired title thereto by virtue of its deed from the Bartons on June 28, 1954, and that plaintiffs' occupancy of the realty thereafter was tortious,

defendants' affidavits fail completely to show any justification for the detention of plaintiffs' personal property located on the premises. No facts are alleged which give defendants any color of lien upon such personalty, possessory or otherwise. No attachment was run and admittedly no execution was levied pursuant to the small claims judgment. Any right of defendants to assert a landlord's lien for unpaid rent upon the personal property here in question under section 1861a of the Civil Code would depend on plaintiffs' status as a *tenant* of defendants at the time of the detention of the property. But the undisputed facts clearly negative a landlord-tenant relationship. It is admitted that plaintiffs secured possession of the Topanga property under a contract of purchase entered into with defendants' predecessor in interest. It is well established that one who enters into possession of land under an executory contract to purchase does not thereby become the tenant of the vendor, where there is no reservation of rent fixed in the contract. *Pomeroy v. Bell*, 118 Cal. 635, 637, 50 P. 683; *Belger v. Sanchez*, 137 Cal. 614, 618, 70 P. 738. Plaintiffs' occupancy thereafter was under rights claimed as vendee by virtue of their transaction with the Bartons. The fact that defendants served a notice to pay rent or quit upon plaintiffs did not create a landlord-tenant relationship where none had previously existed where, as here, plaintiffs refused to assent to the relationship. *Pacific States Corporation v. Arnold*, 23 Cal.App. 672, 675, 139 P. 239. Assuming that as owners of the property defendants could successfully maintain an action to recover the premises from plaintiffs as defaulting vendees of defendants' predecessor in interest. *Pomeroy v. Bell*, *supra*, and that they might recover for the reasonable value of plaintiffs' use and occupancy of the property after June 28, 1954, *Herond v. Bonsall*, 60 Cal.App.2d 152, 155, 140 P.2d 121, there was no such landlord-tenant relationship as would confer upon defendants the possessory lien on plaintiffs' personal property authorized by Civil Code section 1861a. Plaintiffs were simply rival claimants hold-

ing adversely to defendants; no landlord-tenant relationship springs from such a situation. *Pico v. Phelan*, 77 Cal. 86, 19 P. 186. It being manifest that no basis for any lien existed in defendants and it clearly appearing from the affidavits that defendants were withholding plaintiffs' personal property without legal sanction, the summary judgment ordering its return to plaintiffs was proper.

[8-11] However, the court erred in summarily granting the alternative judgment for the value of the property and in awarding damages for its detention. An action for the recovery of personal property is what has been termed a mixed action, being partly in rem and partly in personam. So far as the specific recovery of the chattels is concerned, the action is in rem; it is in personam so far as damages are sought. *Claudius v. Aguirre*, 89 Cal. 501, 26 P. 1077. While the title to, and right of immediate possession of, the property are the matters primarily to be determined therein. *Stockton Morris Plan v. Mariposa County*, 123 Cal.App.2d 509, 511, 267 P.2d 47, the allegation of value serves a two-fold purpose: (1) to enable plaintiffs' damage to be assessed should restoration of the property be impossible, and (2) to fix the amount of the undertaking if the auxiliary remedy of Claim and Delivery provided for by sections 509 to 520 of the Code of Civil Procedure is invoked. In their complaint, plaintiffs alleged the value of the property to be \$5,777.50. Defendants' answer brought this in issue by their denial. Where an alternative judgment for the value of personal property is rendered in a replevin action against the possibility that delivery in kind cannot be had, there appears to be some divergence as to whether such value should be ascertained as of the date of its wrongful detention or as of the date of the trial. (10 Cal.Jur.2d sec. 65.) However, in the case at bar, plaintiffs' affidavits are completely devoid of any evidentiary facts stating the value of the property at either of such times. All that appears on the subject is a mere reference to the complaint in Murphy's affidavit, which is incorporated by reference

in its entirety therein. We need not dwell here on the unsatisfactory nature of this technique as a means of complying with the requirements of section 437c, since it not only makes difficult the task of preparing a counteraffidavit and invites a mere re-incorporation therein of the answer on file, but seems out of harmony with that section, which demands that evidentiary facts be set out with particularity. *Low v. Woodward Oil Co.*, supra, while pleadings are concerned with ultimate facts. Be that as it may, however, a reading of complaint shows that it contains nothing other than a bald allegation as to the value of the property, not directed to any particular time. For aught that appears, such value may be the value of the property when it was new, or at some time other than that of (1) its wrongful seizure or (2) the date the matter is heard. It is fundamental that if a plaintiff is to prevail on his motion for summary judgment, his supporting affidavits must state facts covering every element necessary to sustain a judgment in his favor. *Kimber v. Jones*, supra; *Hardy v. Hardy*, 23 Cal.2d 244, 245-247, 143 P.2d 701. It is also axiomatic that the affidavits of the moving party must be strictly construed. *Kimber v. Jones*, supra; *Travelers Indemnity Co. v. McIntosh*, 112 Cal.App.2d 177, 182, 245 P.2d 1065. Plaintiffs' affidavits being fatally deficient in setting out the value of the property in dispute at any time at which its value could be properly measured, the summary judgment against defendants for the value of the property cannot stand.

[12, 13] The court also erred in summarily awarding plaintiffs the sum of \$1,640 as damages for the detention of the property at the rate of \$10 per day from August 15, 1954, to the date of the hearing. Defendants' answer denied such damage and alleged an offer to return various items of property. Mr. Lavelle's affidavit conceded that defendants, on or about August 21, 1954, "were willing to return such portion of said personal property as was exempt from execution if plaintiffs herein would file their claim of exemption therefor." Mrs. Morales' affidavit stated she informed Lavelle on the above occa-

sion that Eden was willing "to release all the personal property exempt from execution and * * * Lavelle stated to affiant * * * that he refused to accept the offer and he would not take any of it unless he could have all of it * * *". If these facts in Mrs. Morales' affidavit showing an unconditional offer to surrender numerous items and its refusal by plaintiffs' attorney are true, then it might be found there was no wrongful detention as to a part of the property. In any event, these controverted issues present a triable question of fact as to whether plaintiffs might have mitigated their damages by accepting defendants' offer. It is fundamental that the plaintiff cannot be compensated for damages which he might have prevented by reasonable efforts or expenditures. *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 844, 147 P.2d 558; *Schultz v. Town of Lakeport*, 5 Cal.2d 377, 382-383, 54 P.2d 1110, 55 P.2d 485, 108 A.L.R. 1168; *California Cotton Co-op. Ass'n v. Byrne*, 58 Cal.App.2d 340, 345, 136 P.2d 359. An issue of fact being disclosed as to whether, under the particular circumstances of the case, plaintiffs might have mitigated their damages by availing themselves of an opportunity to procure immediate possession of a portion of their property at any earlier stage in the proceedings, it was error not to relegate for trial the matter of damages sought for detention of the property.

[14] The final paragraph of section 437c authorizes a partial summary judgment where it appears that defendant has no defense to a part of plaintiffs' claim. Plaintiffs herein are entitled to a partial summary judgment for the recovery of the personal property here in dispute. Since the alternative judgment for \$5,777.-50 and the award of damages for detention were improperly rendered because of the existence of triable issues of fact, plaintiffs' claim as to these items should be severed and the action may proceed as to these remaining claims if plaintiffs be so advised. If plaintiffs evince a desire to prosecute the disputed portions of its separable claim, no judgment may "be entered prior to the termination of such

action but the judgment in such action shall, in addition to any matters determined in such action, award to plaintiff * * * his claim so established by the proceedings herein provided for." Code Civ.Proc., sec. 437c. Thus, although plaintiffs are entitled to summary judgment for the recovery of their personal property, should they elect to proceed to trial of the remaining portions of their cause of action the statute controlling summary judgment procedure commands that final judgment must await the ultimate outcome of the trial of those issues.

The judgment is reversed with directions to take further proceedings in accord with the views herein expressed. Each side to bear its own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.



136 Cal.App.2d 763

D. R. MILLER, Plaintiff, Appellant and Cross-Respondent,

v.

Stanley J. BROWN, Defendant, Respondent and Cross-Appellant.

Civ. 16436.

District Court of Appeal, First District,
Division 1, California.

Nov. 8, 1955.

Rehearing Denied Dec. 8, 1955.

Hearing Denied Dec. 28, 1955.

Action by owner against builder to recover amount by which price of building house exceeded contract price, wherein builder cross-complained for amount claimed still due him for construction of the house. The Superior Court, Santa Clara County, Leonard R. Avilla, J., entered judgment denying relief to owner and granting builder \$700 on cross-complaint, whereupon owner appealed and builder cross-appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to show

that owner had executed oral agreement approving increased cost of the building, and also held that where building contract expressly provided that total fees of builder should not exceed \$2100, and there was no evidence of any parol or executed agreement modifying this term of contract, builder was entitled to recover only \$700 on cross-complaint, having already received \$1400.

Judgment affirmed.

1. Appeal and Error ⇨931(1)

Where evidence on basic issues is highly conflicting, District Court of Appeal is bound to resolve all conflicts in favor of that evidence which supports the judgment.

2. Evidence ⇨461(1)

Contract that provided compensation for builder would be 10 per cent of total cost of construction and would not exceed \$2,100, thus indicating that fee to be paid builder was not part of total cost of construction and that contained guarantee that total cost should not exceed \$28,000 was sufficiently ambiguous to permit introduction of parol testimony to explain intent of parties.

3. Payment ⇨89(5)

In action by owner against builder to recover amount by which price of building house exceeded contract price, wherein builder testified that parties understood and agreed builder's fee was not to be considered part of \$28,000 guaranty contract price, evidence was sufficient to sustain finding that cost of house did not exceed \$28,000.

4. Appeal and Error ⇨293

A party cannot object for the first time on appeal to defects in findings, such as that the challenged finding is in reality a conclusion, or that the findings are not sufficiently explicit, or are in conflict, unless he has first raised the point on motion for new trial.

5. Appeal and Error ⇨302(5)

Charge "that the decision is against the law", made upon motion for new trial, was too general to raise issue that findings were not sufficiently specific for appeal purposes.

6. Appeal and Error ⇨713(2)

District Court of Appeal could not consider points not contained in the record and thus would not consider issue allegedly raised on oral arguments on motion for new trial.

7. Appeal and Error ⇨219(2)

Failure to find on an essential issue may be raised for first time on appeal.

8. Appeal and Error ⇨931(8)

Where there was some uncertainty in the findings and not a failure to find on an essential issue, any uncertainty present was construed so as to support the judgment.

9. Appeal and Error ⇨1071(1)

Where an alleged error results from omissions in the finding which, if corrected, would nevertheless have been adverse to appellant, such error will not warrant reversal.

10. Contracts ⇨247

Principal and Agent ⇨173(3)

In action by owner against builder to recover amount by which price of building house exceeded contract price, evidence was sufficient to show that written contract specifying \$28,000 as agreed cost was orally modified so as to increase cost of building, and such modification was ratified by owner.

11. Contracts ⇨238(2)

An executed oral agreement could alter an agreement in writing, even though the original contract provided that all changes must be approved in writing because the executed oral agreement may alter, or modify that provision of the contract as well as other portions. West's Ann.Civ.Code, § 1698.

12. Appeal and Error ⇨991

In action by owner against builder to recover amount by which price of building house exceeded contract price, wherein there was a conflict in evidence as to whether certain oral modifications to original contract were in existence on date set for building and therefore part of contract, such question was one of fact for trial court.

13. Payment ⇨89(5)

In action by owner against builder to recover amount by which building price of

house exceeded agreed contract price, an itemized list of costs of construction of the house, not contained in contract itself, was admissible in evidence to show what was referred to in written agreement, and was not a separate contract or agreement. West's Ann.Civ.Code, § 1647.

14. Evidence ⇨448

Where the terms of written contract are ambiguous or uncertain, parol evidence is admissible not to vary the terms of the written contract but to explain them. West's Ann.Civ.Code, § 1625; West's Ann. Code Civ.Proc. § 1856.

15. Contracts ⇨175(3)

Fact that certain plans and specifications were filed with building inspector, did not establish with certainty that such plans and specifications so filed were those referred to in the written contract, where there was no showing such plans were intended by the party to be controlling.

16. Witnesses ⇨275(6)

In action by owner against builder to recover amount by which price of building house exceeded contract price, restriction of cross-examination of builder so as to exclude questions concerning four other jobs as to which builder had exceeded contract price, was proper.

17. Contracts ⇨232(2)

Where building price was set at \$28,000, builder was not entitled to certain sums paid for withholding taxes, unemployment taxes, unemployment insurance and workmen's compensation, and for repairs of cement slab, which could not be classed as extras included in building contract.

18. Contracts ⇨231(1)

Where building contract provided that "it is agreed that total fees of builder shall not exceed sum of \$2,100," and there was no evidence of any parol agreement executed modifying this term of contract, builder was entitled to only \$700 on cross-complaint, having been paid. \$1,400.

Bohnett, Hill, Cottrell & Bohnett, San Jose, for plaintiff.

W. Gordon Eustice, Los Altos, for defendant.

PETERS, Presiding Justice.

Stanley J. Brown, a builder, contracted to build a house for D. R. Miller, at a fixed price, plus extras. After the house was constructed it cost considerably more than the contract price. The parties disagreed over what items should be listed as extras. Miller paid most of the bills and brought this action against Brown to recover \$9,416.78, that being the amount that Miller claims that the price of the house exceeded the contract price. Brown answered and cross-complained for \$1,698.58, the amount he claimed was still due him. The trial court entered its judgment denying any relief to Miller on his complaint, and granted Brown \$700 on his cross-complaint. Miller appeals from the judgment insofar as it is adverse to him, and Brown cross-appeals from the portion of the judgment limiting his recovery to \$700.

[1] Basically, most of the problems on these two appeals are factual. The evidence on the basic issue is highly conflicting. We are, of course, bound to resolve all conflicts in favor of that evidence that supports the judgment. That evidence is as follows:

Sometime prior to the 29th of August, 1952, Miller and Brown entered into an undated written "Building Agreement." There are several important provisions of that agreement which should be quoted. They are:

"1. The Builder, acting as an agent for the owner shall purchase all materials and supervise the performance of all required masonry, [sic] iron work, rough and finish carpentry, plastering, dry wall materials, painting, glass and glazing, roofing, and rough grading, for the one story residence to be constructed [for D. R. Miller] * * *. In accordance with plans and specifications and made a part hereof * * *.

"4. Owner shall pay the labor and material bills for the construction of the above described residence in the following manner: By depositing of money to take care

of costs in a joint bank account as needed during process of construction; both Owner and Builder to check and okay bills before payment; Builder to write checks for same on joint account * * *

"5. The Owner agrees that the Builder shall receive for his services the sum of 10% of the total cost of construction * * *

"6. It is further agreed that the Owner and Builder shall cooperate to keep the cost of construction down and that any benefit derived from same shall be credited to the Owner. Any changes or deviations from the plans and specifications shall be in writing and signed for by both Owner and Builder. * * *

"9. It is agreed that the total fees of the builder shall not exceed the sum of \$2,100.00 although 10% of the cost may be in excess of this amount.

"10. The builder guarantees the owner that the total cost shall not exceed \$28,000.-00. provided that there are no changes in the plans as agreed upon."

It will be noted that this agreement requires that the house shall be constructed "In accordance with plans and specifications" that are "made a part hereof." One of the major controversies on these appeals is what was meant by that phrase. Prior to the signing of the contract, Brown had received preliminary plans from Mr. Woodruff, the draftsman. These preliminary plans, among other things, (Ex. H) called for a basement, an oil heating system, plaster walls, hardwood floors and exterior brick veneer. They were used by Brown to secure estimates from subcontractors. On the basis of these estimates Brown submitted an estimate to Miller of \$28,354.30 (Ex. 11). Miller was of the opinion that this was more expensive than he desired, and he and Brown agreed to certain changes. Based on these changes Brown submitted a document entitled: "Cost of Construction of Residence for Mr. and Mrs. D. R. Miller." (Ex. B.) The costs here submitted totalled \$26,400.55. Brown testified that this cost list was the basis for the undated agreement above quoted, and Miller admitted that this was so. Brown claims

that the changes then agreed upon provided for omitting the basement, substituting a gas furnace for the oil furnace, using basement heating, and using $\frac{3}{4}$ " plank flooring for Bruce flooring. He also testified that at the time Exhibit B was agreed upon there were no other plans and specifications in existence. Construction on the building started August 29, 1952.

Woodruff, the draftsman, testified that he completed the original plans by July 31, 1952, and that on August 26th, at Brown's request, he altered the original plans so as to swing the bedroom wing around towards the patio. This change is embodied in Exhibit 4. These altered plans, he testified, he finished on August 30, 1952, and then delivered them to Brown. Brown disputed this evidence. He testified that it was not until August 30, 1952, after construction began, that he received the plans embodied in Exhibit 3, and that he did not receive the revised plans swinging the bedroom around (Ex. 4) until September 2, 1952. He was definite that the bedroom revision was not agreed upon until after the undated agreement above quoted (Ex. 1) had been signed. This conflict was for the trial court.

Admittedly, on September 8, 1952, Brown filed a request for a building permit and included in the request Exhibit 3 even though by that date the bedroom revision embodied in Exhibit 4 had been agreed upon. Brown stated, however, that he did this because the plans for the bedroom revision were then incomplete, and had incomplete plans been filed, the permit would have been denied.

Thus, Brown's testimony is that when the undated agreement (Ex. 1) referred to "plans and specifications" it meant the original plans plus the oral modifications made to reduce costs as shown by Exhibit B. Miller disputes this evidence. He claims that Exhibits 2 and 3 are the "plans and specifications" referred to in the undated agreement embodied in Exhibit 1, and that the only alterations to those was the swinging of the bedroom wing so as to create an "L" shaped house instead of the originally designed straight line shape.

When the house was completed its total cost had amounted to \$37,602.78. Toward the end of construction a dispute arose between the parties over what were proper extras. At that time Miller admittedly approved extras amounting to about \$3,800. At the trial, however, Miller contended that he approved extras in that amount only in the spirit of compromise, and that the correct figure for the extras was about \$2,400. The parties were unable to settle the dispute by negotiation. Miller paid all but a very few of the outstanding bills, claiming he did so only because he wanted to prevent mechanic's liens from being filed, and then brought this action for \$9,416.78, the amount he claims is the difference between what he paid for the house and the contract cost, plus admitted extras and less certain claimed savings. Brown answered, and cross-complained for the amount of several bills he paid, for \$700 remaining due for his services under the contract, and for 10 per cent of the value of the extras. The total amount prayed for in the cross-complaint was \$1,698.58.

Miller is a real estate broker. The check book from which bills were paid was in his possession and he had all the canceled checks. Obviously, he knew the amount that he deposited in this account and knew how much had been paid from it. Moreover, a full accounting between the parties was had each month as to each bill that was paid. As late as July 8, 1953, Miller knew that he had already deposited \$35,000 in the building account, and also knew that Brown was still writing checks on the account. During construction Miller lived near the new house, visited the site several times a week, supervised much of the work and talked with many of the subcontractors. There is no dispute over the fact that the house was constructed exactly as agreed upon.

At the trial, the basic dispute involved the charges over and above the agreed upon \$28,000, the question being whether these items were "extras" or covered by the contract. The solution to this problem obviously depends upon the determination of what was included in the contract. Ac-

cording to Brown, all of the following were extras:

1. *Excavating and grading*: The estimate for this item was \$180. The total cost was \$666.75. Brown claims that the difference was an extra because the \$180 was a mere allowance and not a fixed bid. This is indicated, so he urges, by the word "Est." following the item in the contract. He contends that the extra cost exceeded the estimate or allowance because of the change in the bedroom wing plans which required more excavating of the hill back of the house than was required by the original contract. It should be mentioned that this and the other "extras" claimed by Brown are listed in Defendant's Exhibits A and C, and that these two exhibits are marked "O.K.," apparently by Miller. Miller admitted that this item was proper.

2. *The driveway*: An allowance of \$100 was made for this item. The actual cost was \$811.16, which admittedly included some enlargement from the final plans. The actual plans for the driveway first appear as part of Plaintiff's Exhibit 3.

3. *The septic tank*: Here was an additional \$58 to that provided in the original contract. This was caused by Miller ordering a garbage disposal unit which required a larger tank. Admittedly, Miller did not expressly order this extra. Brown testified that after the disposal unit was ordered he had to go ahead with a larger tank without first securing Miller's approval.

4. *Painting*: The actual cost exceeded the bid of \$1,550 by \$600. The painter claimed this additional sum as an extra because of the extra painting required by the changes set forth in Exhibit 4 and other changes. Brown at first contested paying this extra sum, but Miller, by letter, ordered the sum paid. Both litigants signed the check.

5. *Electric work*: Brown testified that two electric heaters were added, totaling \$100. This is "O.K.'d" by Miller on Exhibits A and C. Brown testified that Miller ordered as an extra underground electrical service which cost \$344.76. Although the specifications and plans do not show

the underground service, Miller claims that this equipment was agreed upon at the time the agreement was signed. Brown denied that this was so. Brown also testified that Miller went over the electrical wiring and O.K.'d with the subcontractor additional fixtures and outlets, adding \$198.30 to the cost, and then added mercury switches, increasing the cost by \$53.68. Miller approved the \$198.30 item. None of the challenged items appears on the plans and specifications.

6. *Finished hardware*: The cost of this exceeded the original allowance of \$200 by \$104.68. Miller had selected the hardware and had O.K.'d this item.

7. *Marble hearth*: Miller approved a change to replace the brick hearth called for by the plans and specifications with marble. This added \$217 to the cost.

8. *Mirrors*: The specifications include mirrors and the original plans show mirrors. Brown contends that the plans do not "call" for mirrors, but merely indicated their location. He urges that the specifications were not part of the contract, and points out that the original agreement was based on Exhibit B which did not include mirrors. Brown urges that the mirrors were to be furnished by Miller, just like the refrigerator, washing machine and dishwasher, which were also shown on the plans, but which admittedly were to be furnished by Miller. Miller picked the mirrors out. They cost \$163.39.

9. *Screen*: This admittedly was an extra.

10. *Formica*: The original plans, Exhibit H, did not indicate whether certain cabinets were to be formica or tile. Brown contends that that item was intentionally omitted because the Millers were undecided. Miller contends that it was in Exhibit 2, was understood to be part of the contract, and was not an extra. The amount involved is \$315.

11. *Common labor*: The parties dispute the amount of \$504.29, the amount the actual cost of this item exceeded the original estimate. Brown testified that this cost was incurred because of the change in the bedroom wing, the digging of trenches for the

underground wiring, the extending of the patios, and the labor cost of moving lumber and bricks which Miller wanted saved.

12. *Carpenter labor*: Here the extra cost was \$2,388.79. Part of this was caused by the bedroom change, which increased the size of the establishment. Brown admitted that it was difficult to trace this item. Miller admitted that additional carpenter work was caused by changing the shape of the building, and admitted that he had ordered certain changes in the bathroom windows, and additional moulding and valances, and certain changes in the flooring. Miller conceded that half the claimed extra cost for this item was justified, while Brown testified that the additional carpenter work actually exceeded the amount he was claiming.

13. *Lumber*: The change in the bedrooms added \$195.19 to the lumber cost. This item was approved by Miller on Exhibits A and C.

14. *Millwork*: The cabinet maker testified as to \$786.36 being the cost of extras which he itemized. These included birch panelling in the den, and many other items which he stated were directly ordered by Miller, or were caused by the change made in the floor plans.

15. *Tile*: The tile man testified to changes in the tile work ordered by Miller totaling \$466.60. This item was O.K.'d by Miller on Exhibits A and C.

16. *Plumbing*: This extra of \$184.57 resulted because Miller substituted colored fixtures for white ones. Miller concedes the validity of this charge. Incidentally, it is the only extra directly authorized in writing.

17. *Sheet metal*: Here there was an extra charge of \$235.25. This was caused by the addition of the furnace room, and by the adding of metal gutters by Miller. These items were approved by Miller in Exhibits A and C.

The total of all the claimed extras is \$8,097.50, of which Miller admits but about \$2,400.

In addition to the "extras," the parties discuss several deletions, for which Mil-

ler claims a credit. These relate to changes in the basement, omission of the fuel tank, change in the panelling in the den, change in the veneer from the patio to the terrace, change in the flooring, etc. Whether these were deletions from the signed contract for which a credit should be allowed depends upon when they were made. Brown consistently testified that most of these changes were made before the contract was executed as part of the attempt to reduce the cost of the house and so were made before the contract was executed. He also testified that when the signed agreement referred to "plans and specifications" it referred to Exhibit H as orally modified, and that Exhibits 2, 3 and 4 were not then in existence.

Brown has been paid \$1,400 as compensation under the contract, which sum he urges should not be included in the \$28,000 because his compensation was not a part of "Costs of Construction" as set forth in Exhibit B and was never intended as part of the guaranteed cost.

In a memorandum decision the trial court stated that "the terms of the original contract for construction were modified by numerous oral agreements, express or implied, which tho not in writing as required by the original contract are nevertheless binding because fully executed and accepted. Plaintiff owner was at all times fully aware of these modifications or by his conduct ratified them when he did become aware."

Its findings are consistent with these views. The court found that the "total construction costs of said residence exceeded the agreed price of \$28,000 but that said additional amounts were caused by changes, deviations, and additions to the plans requested by plaintiff and cross-defendants and for which defendant and cross-complainant is not responsible." It also found that "the changes, deviations, and additions to the original plans for the house requested by plaintiff and cross-defendants constituted a [sic] alteration or modification of said written agreement of August 28, 1952, being executed oral agreements of modification requested * * * by plaintiff and * * * performed by defendant."

Based on these ultimate facts the trial court denied any relief to Miller on the cause of action set forth in his complaint, and awarded Brown \$700 on the cause of action set forth in his cross-complaint, and entered its judgment accordingly. Each party appeals from those portions of the judgment adverse to him.

[2,3] The first contention of Miller is that as a matter of simple arithmetic the cost of the house, less extras, exceeded \$28,000, and, therefore, a judgment in some amount should have been entered in his favor. If the \$8,283.83 in extras be deducted from the admitted cost of \$37,602.78, the resulting figure is \$29,318.95, which, of course, does exceed the \$28,000 contract price. But included in the \$29,318.95 computation is the \$1,400 paid to Brown as part of his compensation for supervising construction. The contract provides that the compensation of Brown shall be a percentage "of the total cost of construction," and not to exceed \$2,100, so that obviously the fee to be paid Brown was not a part of the "total cost of construction." The guarantee that the "total cost" should not exceed \$28,000 is therefore sufficiently ambiguous to permit the introduction of parol testimony to explain the intent of the parties. Brown testified that the parties understood and agreed that his fee was not to be considered a part of the \$28,000 guaranty. Thus, the trial court was justified in its determination that the "total cost" of the building did not exceed \$28,000. This makes it unnecessary to consider other contentions of the parties on this point.

[4-6] Miller next objects to the fact that the trial court did not expressly find what documents constituted the contract, and contends that this was error, citing *Haight v. Tryon*, 112 Cal. 4, 44 P. 318. Insofar as this contention is based on the concept that the trial court should have made more specific findings, it is without merit. The *Haight* case recognizes that a party cannot object for the first time on appeal to defects in the findings, such as that the challenged finding is in reality a conclusion, or that the findings are not sufficiently explicit, or are in conflict, unless he has first raised the point on a motion

for a new trial. See *Goss v. Fanoie*, 114 Cal.App.2d 819, 251 P.2d 337, see cases collected 3 Cal.Jur.2d p. 648, § 163. Miller does argue that he did urge the point in his motion for a new trial by the charge "that the decision is against the law," and also contends that he raised the point in his oral argument on the motion for a new trial. Obviously, the quoted allegation, without elaboration, is much too general to raise the issue that the findings were not sufficiently specific. It is equally clear, since the oral argument on the motion for a new trial was not transcribed and is not in the record, that we are limited to the record and cannot now consider points not contained in the record.

[7-9] Miller asserts, however, that this was more than a failure to make the findings more specific, and that the failure here amounted to a failure to find on an essential issue. This may, of course, be raised for the first time on appeal. *Mackay v. Whitaker*, 116 Cal.App.2d 504, 253 P.2d 1021; *Fireman's Fund Ins. Co. v. Romero*, 128 Cal.App.2d 331, 275 P.2d 83. But an examination of the findings discloses that, at most, there was some uncertainty in the findings and not a failure to find on an essential issue. It is well settled that "any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it." *Warren v. Hopkins*, 110 Cal. 506, 512, 42 P. 986, 988. And "Where an alleged error results from omissions in a finding which, if corrected, would nevertheless have been adverse to the appellant, the error will not warrant a reversal." *Matlin v. Crescent Commercial Corp.*, 93 Cal.App.2d 8, 12, 207 P.2d 873, 875.

The rule of these cases is here applicable. The basic finding here was that "changes, deviations, and additions to the original plans * * * constituted a [sic] alteration or modification of said written agreement of August 28, 1952." Thus, we have a finding that there was a written agreement of August 28, 1952, and that there were alterations and modifications of it consisting of executed changes to the original plans. These findings seem to us to be sufficiently explicit, but even if they

were vague or uncertain this should have been brought to the attention of the trial court in a proper manner, which was not done.

[10] The basic contention of Miller is that the findings are unsupported by sufficient evidence. He contends that there was no evidence of ratification by Miller of the increased cost, and claims that the sole basis of the court's decision is the fact that Miller paid for the increased charges. These contentions are unsound.

The facts have already been set forth at some length. If conflicts be resolved in favor of Brown, as they must, the record shows that Exhibit H was used by Brown to secure preliminary estimates; that these were presented to Miller, who found them to be too high; that thereupon Miller and Brown went over the plans substituting various items for those set forth in Exhibit H. From Exhibit H, as orally modified, a new cost of construction estimate—Exhibit B—was drawn up. This was the basis of the written agreement. Thus, the written contract embodied in Exhibit 1, when it referred to "plans and specifications", referred to Exhibit H as orally modified.

[11] Subsequent to the execution of Exhibit 1, complete plans—Exhibits 2 and 3—were drafted. Then Miller, as owner, changed the basic plans by moving the bedroom wing. This increased many of the estimated costs of construction. Thereafter, Miller ordered more millwork, birch walls for the den, select birch for the cabinets, additional valances, moldings, a fancy mantel, etc., all of which are listed in Exhibit 6. Then Miller changed the type of tile agreed upon and increased its amount, added a furnace room, a metal gutter around the house, and added a garbage disposal which necessitated a larger septic tank. Then Miller ordered Brown to pay the painters an additional amount which the painters were claiming and Brown was contesting. He ordered numerous changes in the electrical specifications such as two electric heaters, mercury switches and underground service, changed the hearth, ordered a screen,

changed the location and size of windows. The record shows that extras were ordered and approved by Miller in the amount of \$8,097.50. Under the law this amounted to a modification of the written contract. Miller places great reliance on the provision of the contract which provides that alterations must be in writing, and points out here that he only approved one alteration in writing. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that all changes must be approved in writing. This is so because the executed oral agreement may alter or modify that provision of the contract as well as other portions. *Heple v. Kluge*, 114 Cal. App.2d 473, 250 P.2d 694; *Nuttman v. Chais*, 101 Cal.App.2d 476, 225 P.2d 660; *D. L. Godbey & Sons Const. Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 946.

[12] Miller's basic claim seems to be that, according to his interpretation of the evidence, many of the so-called executed oral modifications were in fact part of the original contract. This contention is predicated on his belief that Exhibits 2, 3 and 4 constituted the "plans and specifications" referred to in the written contract. If this were true then, of course, the judgment would have to be reversed. But this evidence is contradicted by substantial evidence offered by Brown to the effect that these exhibits were not in existence on August 28, 1952, and so did not form part of the contract. The trial court believed Brown. This was, of course, a fact question for the trial court. *Luitweiler Pumping Engine Co. v. Ukiah etc., Co.*, 16 Cal. App. 198, 116 P. 707, 712; *Fiddymont v. Johnson*, 18 Cal.App. 339, 123 P. 342; *Thomson v. Leak*, 135 Cal.App. 544, 27 P.2d 795; *Morrison v. Willhoit*, 62 Cal. App.2d 830, 145 P.2d 707.

[13,14] Miller contends that it was error to admit into evidence over his objection Exhibit B, which is an itemized list of the cost of construction of the Miller house. The trial court first excluded this exhibit, but later reversed this decision, and admitted the exhibit. The last ruling was undoubtedly correct. The con-

tract to construct the house is embodied in Exhibit 1. This contract does not contain the plans and specifications, but refers to plans and specifications as being part of the contract. Exhibit B is an itemized list of the costs of construction which admittedly was the basis of the agreement. Exhibit B was not a separate contract or agreement, but was introduced to show what was referred to in the written agreement. This was proper under section 1647 of the Civil Code which provides that "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." The parol evidence rule, § 1856 of the Code Civ. Proc., § 1625, Civ.Code, has no application. Where the terms of a written contract are ambiguous or uncertain, parol evidence is admissible, not to vary the terms of the written contract, but to explain them. *Bartel v. Associated Dental Supply Co.*, 114 Cal.App. 2d 750, 251 P.2d 16; *Barham v. Barham*, 33 Cal.2d 416, 202 P.2d 289; *Schmidt v. Macco Construction Co.*, 119 Cal.App.2d 717, 260 P. 2d 230. Certainly the reference in the written contract to the "plans and specifications" was uncertain. From that agreement it is impossible to determine what is meant by "plans and specifications." Parol evidence was clearly admissible to show that Exhibits 2, 3 and 4 were not then in existence, so could not be the documents to which reference had been made. Parol evidence was also clearly admissible to show that the "plans and specifications" referred to were those contained in Exhibit H. But since these plans were themselves obviously incomplete, parol evidence was admissible to show the agreed upon parol modifications and extensions of these plans and specifications. This is what Exhibit B purports to portray. It constitutes part of Brown's proof of what he contends were the actual plans and specifications referred to in the written contract.

[15] Miller next urges that because certain plans and specifications were filed with the building inspector, they, and they alone, must be considered as the "plans and specifications" referred to in the written contract, citing *Heple v. Kluge*, 114 Cal.App. 2d 473, 250 P.2d 694. But that case invol-

ved a situation where it was conclusively established that the plans submitted to the building authorities were the plans intended by the parties to be the basis of their contract. Thus, the holding in that case is not that the plans submitted to the building authorities were controlling, but is that those plans were the plans intended by the parties to be controlling. That is not this case.

[16] The last contention of Miller is that in one respect the trial court unduly restricted cross-examination of Brown. Brown had testified on direct that he had performed other jobs in the area as part of his proof as to his qualifications. On cross-examination Miller tried to bring out that on four of these other jobs Brown had gone over the contract price. The court sustained, and properly so, objections to these questions. Had the questions been permitted, evidence as to all the facts and circumstances surrounding those four cases would have been admissible, and those four cases would have had to be tried along with this one. Such collateral issues were properly excluded.

[17] The cross-appeal of Brown is equally without merit. Brown urges that the trial court improperly refused to find that he was entitled to certain sums paid for withholding taxes, for unemployment taxes, for unemployment insurance and workmen's compensation, and for repairs of a cement slab. These cannot be classed as extras. In fact, Brown admits that these charges "are not even in the category of extras." This being so, if they were added to the cost of construction, such cost would exceed the \$28,000 contract price. Obviously, these charges could not be allowed Brown without violating the terms of the contract.

[18] Brown also claims that there were \$8,097.50 extras authorized by Miller above the \$28,000 agreed price, and that he should be paid 10 per cent of the cost of these extras, or \$809.75. This involves a construction of the contract. It provides that: "It is agreed that the total fees of the builder shall not exceed the sum of \$2100.00 [less than 10 per cent of \$28,000] although 10% of the cost may be in excess

of this amount." There was no evidence of any parole executed agreement modifying this term of the contract. The trial court was correct, therefore, in its holding that Brown, who had been paid \$1400, could only recover \$700 on his cross-complaint.

Thus, the appeals of both Miller and Brown are without merit.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



136 Cal.App.2d 778

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

BILL GOLDSTEIN, Defendant and
Appellant.

Cr. 5402.

District Court of Appeal, Second District,
Division 2, California.

Nov. 8, 1955.

Prosecution for grand theft and for conspiracy to commit grand theft from an insurance company by means of a fake accident scheme. Defendant and several others were indicted and tried, and defendant and another were convicted in Superior Court, Los Angeles County, Burdette J. Daniels, J. Defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held that evidence was sufficient to corroborate the testimony of an accomplice and sustained the verdict.

Order granting probation and order denying motion for new trial affirmed; attempted appeal from verdict dismissed.

1. Criminal Law §1159(2)

Test on appeal is not whether guilt is established beyond reasonable doubt but whether there is substantial evidence to support conclusion of the trier of fact.

2. Criminal Law §1144(13), 1159(6)

Reviewing court on appeal must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support the verdict, and if circumstances reasonably justify the verdict, opinion of reviewing court that those circumstances might also reasonably be reconciled with defendant's innocence will not warrant interference with jury's determination.

3. Criminal Law §412(1)

It is true in a criminal case as in civil actions that a statement against interest made by a party constitutes original and independent evidence of the facts so stated.

4. Conspiracy §43(12)

It was not essential to conviction for conspiracy to commit grand theft from insurance company by fake accident scheme to prove that details of fake accident were planned in advance or that each participant in conspiracy knew identity of others.

5. Criminal Law §511(2)

Evidence required to corroborate testimony of an accomplice need not do more than substantially tend to connect defendant with the commission of the offense in such manner as to satisfy jury that accomplice is telling the truth, and it is unnecessary that testimony of accomplice as to corpus delicti be corroborated.

6. Criminal Law §511(7)

Corroboration required with respect to testimony of an accomplice may be furnished by defendant's own words or conduct.

7. Criminal Law §507(1)

In prosecution of several defendants for grand theft and conspiracy to commit grand theft, defendant who was acquitted could not be classified as an accomplice and her testimony was competent corroboration, as to another defendant who was convicted, of testimony of an accomplice.

8. Criminal Law §511(4)

In prosecution for grand theft and conspiracy to commit grand theft, defendant's failure to testify, though such failure did

not in itself constitute sufficient corroboration of testimony of accomplice, was nevertheless persuasive and lent weight to evidence presented by prosecution upon matters which were presumptively within defendant's knowledge and which if untruly stated would normally be denied by him.

9. Criminal Law ⇨511(1)

In prosecution for grand theft and conspiracy to commit grand theft, evidence corroborative of testimony of accomplice was sufficient to sustain conviction as to defendant concerned on appeal.

10. Criminal Law ⇨1130(2)

Appeal brief which cited transcript pages and asserted that error there appeared was insufficient to comply with applicable rule, and it was duty of defendant not only to point out alleged error but to show exactly wherein court's action was erroneous.

11. Criminal Law ⇨680(1)

Order of proof, especially in a conspiracy, rests in discretion of the trial judge.

12. Criminal Law ⇨414

In prosecution for grand theft and for conspiracy to commit grand theft, evidence was sufficient adequately to establish corpus delicti, from standpoint of admissibility of testimony as to conversations.

13. Criminal Law ⇨406(2), 418(2)

In prosecution for grand theft and for conspiracy to commit grand theft, police officer's accusation addressed to defendant that defendant knew a named person, who was also named as a conspirator, and defendant's denial, followed by subsequent admission that he knew such person, were admissible.

14. Criminal Law ⇨412(1), 432

In prosecution for grand theft and for conspiracy to commit grand theft, from insurance company by fake accident scheme, exhibits consisting of checks received in settlement from insurance company, defendant's business card and defendant's statement given to adjuster were properly received in evidence.

15. Criminal Law ⇨1023(10)

Where probation was granted and proceedings suspended there was no judgment to be appealed from, and this was true notwithstanding requirement that defendant pay fine and make certain restitution as conditions of probation.

16. Criminal Law ⇨1023(12)

Where probation has been granted and no judgment entered, an appeal which purports to be taken from the judgment may be treated as an appeal from the probation order. Pen.Code, § 1237.

17. Criminal Law ⇨1023(10)

No appeal lay from verdict in criminal case, and attempted appeal therefrom would be dismissed.

Jess Whitehill, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

ASHBURN, Justice pro tem.

Defendant Bill Goldstein was indicted for grand theft and conspiracy to commit grand theft. Also indicted and tried with him were Jay Rich and his wife, Betty Rich. Goldstein and Jay Rich were convicted. Betty Rich was acquitted. Defendant Goldstein made a motion for new trial which was denied. Probation was granted him and other proceedings in the case were suspended. He appeals from the order denying new trial and from the "verdict and final judgment." His is the only appeal with which we are now concerned. One Hyman Kean was also named as a conspirator, but was not indicted and became the prosecution's chief witness.

The substance of the charge was that Kean and one Mark Price were engaged in the perpetration of fake automobile accidents and collecting fraudulent claims from insurance companies based thereon; that Kean arranged with the defendants Rich to participate in such a fraud; that defendant Goldstein joined the conspiracy; that a prearranged collision was had between Goldstein's truck, driven by him, and Rich's automobile which he was operating;

that fraudulent claims for damages were presented by the Riches and the Keans to Goldstein's insurer, National Automobile and Casualty Insurance Company; that they resulted in payments by the insurance company of amounts totaling \$2,750, part of which went to the defendant Goldstein.

[1,2] Appellant's primary claim is that the evidence is insufficient to warrant a finding of conspiracy and in the absence thereof there could be no finding of the consummation of the grand theft. The rule which must guide us in examining this contention is stated in *People v. Daugherty*, 40 Cal.2d 876, 885, 256 P.2d 911, 916, as follows: "The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt. '* * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury.'" See also *People v. Gutierrez*, 35 Cal.2d 721, 727, 221 P.2d 22; *People v. Hatton*, 114 Cal.App. 2d 195, 196, 249 P.2d 901. We therefore adopt in our statement of facts that evidence which tends to support the judgment, rather than any conflicting testimony which was designed to prevent such a result. The following statement is based principally upon the testimony of Hyman Kean.

Kean, who had known Goldstein and Rich for years, went with Mark Price on or about July 27, 1953, to see the Riches, asked Jay Rich to go in on an accident which would be set up and said the money that was to be derived therefrom would be split three ways. Price told him he would have another party hit a car and the Riches would be participants in the accident; that Mr. and Mrs. Rich would occupy the automobile that would be hit and they were to be injured. Reference was made to the insurance company and the splitting of the

moneys received. Kean was to get a commission for introducing the Riches to Price. On or about August 14th there was another conversation between the same persons wherein it was said that after the accident the person that was to be hit would go to the hospital; that that would look better and if there was another party involved that would bring in more money. Price again indicated that Mr. Rich was to go to the hospital and Mrs. Rich was to take a part in the accident. The exact manner in which it was to be brought about was not stated in detail. Rich, the husband, said that if it was all right, if Kean thought it safe, he would take part in it, and he was assured that Price had made many cases before, that he had been at it for many years and had never had any trouble.

Shortly before August 15th, Kean and Price called at Goldstein's market to see him, but he was out. Soon thereafter Kean went alone to see Goldstein, who was busy waiting on customers in his market (at Fairfax and Oakwood in the city of Los Angeles), but nevertheless carried on a running conversation. Kean asked if he had insurance on his car. Defendant replied in the affirmative. He was then asked if he would go in on an accident with Kean and he made no definite reply, just listened. It was explained to him that there would be three persons included in the accident, that in order to get money he, Goldstein, would have to hit a car and if there were three people involved that the money would be split three ways. Asked if he had a car or a truck, defendant said he had both, and Kean suggested that the truck would be preferred. Shortly thereafter, Kean and Goldstein had another conversation at the market, and the latter was asked if he would come in on an accident. He said: "What is it; how would it take place?" and was told that several people would be involved and he would get one-third of the money. While the details of the proposed accident were not spelled out, Kean said he would have a party in the car and Goldstein would arrive from the back and hit the car lightly, not to hurt anybody. Goldstein made no audible commitment, but when asked if he would go in

on the venture he nodded his head up and down, in an affirmative manner.

[3] Shortly before the time arrived for perpetrating the collision Price, who had been managing the enterprise up to that date, got into an argument with Mrs. Kean, who ordered him out of her home, and thereafter Mr. Kean took over the conduct of the venture. On the evening of August 19th the Riches went to the Kean residence and Mr. Rich was told by Kean about the argument with Price; also that he, Kean, had somebody other than Price's party in mind and would call him; that he knew a fellow that he had talked to a few days before who had nodded his head. He asked Rich if he would go through with the accident that night and was told that it was all right with Rich if it was all right with Kean and if he could get the proper party to do the hitting. Then Kean suggested to his wife that they go do some shopping. He had previously learned from defendant's brother, Joe Goldstein, that defendant customarily closed the market about 9:00 o'clock on alternate evenings and then drove south on Fairfax to Venice Boulevard on his way home. Kean on this occasion suggested that they go to Fairfax to shop and told Rich he would do the shopping while they were sitting in the car and he would call "this party" about the accident. Rich agreed. The four of them, Kean, Rich and the two wives, then drove in Rich's Oldsmobile to a place on Fairfax Avenue which was between Olympic Boulevard and Pico Street, and parked the car on the west side of the street facing south. This was opposite the Bagel Delicatessen and Restaurant, which was on the east side of the street. Kean then crossed the street, went into the Bagel, made a telephone call, using the number of Goldstein's market; when someone answered he asked to talk to Bill Goldstein, was told to hold the wire a minute; then Goldstein answered the call, Kean recognized his voice and said: "This is Hy. I am down at Pico and Fairfax." Also: "Bill, I am down here on Fairfax between—right across from the Bagel Delicatessen Restaurant and I want you to come down and I will be over there and, well, I am there right now, and I want you

to come down there soon." And, "give me a clopp" which, according to the witness, was a Yiddish expression meaning "hit me." Goldstein said "Okay" and the fact that he understood the word "clopp" is evidenced by his prompt compliance with the request. In about 10 minutes Kean, who had come out of the restaurant and was in front of it on the east sidewalk, saw Goldstein's truck, which he recognized, coming southerly on Fairfax at a rate of about 20 to 25 miles an hour. Rich was at the wheel of the Oldsmobile parked at the west curb. When Kean saw the truck approaching he gave Rich a signal of some kind, Rich pulled out from the curb into the path of the truck which hit his car in the left rear and according to Goldstein's later statement caused it to travel toward the west curb, ending up with the front end on the sidewalk. Kean testified that he had no recollection of having given a signal to Goldstein, although he definitely did give one to Rich. In a statement later given by Goldstein to the adjuster for the insurance company he said that as he approached the point of the collision he looked to the east briefly, then turned his head and found the Rich car directly in front of him. It is true in a criminal case as in civil actions that a statement against interest made by a party constitutes original and independent evidence of the facts so stated. *People v. McGoldrick*, 107 Cal.App.2d 171, 174, 236 P.2d 597; 19 Cal.Jur.2d § 397, p. 136. It is fairly inferable that Goldstein saw the signal given to Rich, but regardless of that he knew what he was to do, he hit the intended car and at the place desired by Kean. Immediately after the impact Kean crossed the street and Goldstein got out of the truck and went to the Rich car. Mr. Rich was slumped down with his head over to the side near the door, groaning, moaning and seemed to be in pain. His wife testified that "he grabbed for his head and started to groan. * * * I didn't know where he had been hit or what had hit him. * * * His hands went up for his head and then he slumped over the wheel." Goldstein inquired if anyone was badly hurt, gave Kean his card, said he hoped everything was all right and drove away. No one called the police. Mr. Rich was taken first to the

Kean house, then to his own home and then to the hospital. While at his own home Rich said to Kean: "Am I doing good as an actor?" and Kean said "Yes." Again, "How did I do? * * * You done very well." Rich was known to Kean to be an entertainer and actor by trade, and that was probably one reason he was selected as the principal victim of the alleged accident.

Claims for damages on the part of Mrs. Kean and the two Riches were placed in the hands of a firm of attorneys who, after making appropriate representations to the agents of the insurance company, effected a settlement resulting in the issuance of three insurance company checks. One for \$375 was payable to Hyman Kean, Sally Kean and the firm of attorneys. They received it from Price, endorsed it and were given \$250 cash in exchange. Another \$375 check was payable to Jay Rich, Betty Rich and the attorneys, and the third one for \$2,000 was payable to Jay Rich and the attorneys. A few days after issuance of the checks Kean contacted Goldstein and, according to his original testimony, gave Goldstein \$300 in a sealed envelope which he had obtained from Price, the same person who had delivered the \$375 check and then the \$250 to him. It later developed that the envelope was still sealed when delivered to defendant and hence Kean did not personally know that it contained \$300. Incidentally, Goldstein never denied the receipt of the envelope or the specified amount of money.

Prior to the receipt of these checks, and on or about August 20th, Goldstein had reported the accident to his insurance agent, Max Green. He told him there was no liability and so Green sent him a report blank and told him to fill it in and deliver it to the insurance company. Later, defendant gave a statement to James W. Wylde, who was adjuster for the said company, and he therein said that while he was driving south on Fairfax "he happened to glance over at a building on the other side of the street for what purpose he couldn't recall, but he did, and when he glanced back to the street there was a car right in front of him and he put his foot on the brakes but he couldn't

slam on the brakes and the front of his car hit the front of this other car knocking it up over the curbing." Also that there were two men and two ladies in the other car; gave the names to the adjuster and said he did not know any of the parties; that one man seemed to be injured but that the people in the car said they would not need an ambulance, they would take care of him themselves. Although defendant had told his broker that there was no liability it is apparent that this statement was couched in such terms as to give rise to an inference of liability, and, there being no other witnesses, it was calculated to leave the insurance company in a position where it could do nothing but settle any claims.

When defendant was arrested, Officer Kilpatrick asked him "regarding an accident with Mr. Kean" and defendant replied, "Kean who is Kean—never heard of him." About 10 or 15 minutes later the following colloquy occurred: "Well, now, let's not kid each other about Mr. Kean. I know that you know him. You have known him for a long time; in fact, you are a friend of his, and he said, 'Well, yes, I do know him.'"

[4] Appellant's argument of insufficiency of the evidence presents the familiar discussion of reliability of witnesses and reasonableness of inferences drawn by the jury. Much stress is laid upon the fact that the details of the accident were not orally mapped out in advance and the participants did not know each other or know the identity of the other actors. This bears only upon the weight of the evidence, not its competency or sufficiency. "The gist of the crime under section 182 [Pen.Code] is the unlawful agreement between the conspirators to commit an offense prohibited by the statute accompanied by an overt act in pursuance thereof. An express agreement need not be proved. The agreement may be inferred from the declarations, acts and conduct of the alleged conspirators. * * * 'If in any manner the conspirators tacitly come to a mutual understanding to commit a crime, it is sufficient to constitute a conspiracy. [Citing cases.] It may result from the actions of the defendants in carrying out a common purpose to achieve

an unlawful end. [Citing cases.] * * *

People v. Daener, 96 Cal.App.2d 827, 831, 216 P.2d 511, 514.

* * * [I]t is * * * settled that 'One who joins a conspiracy after its formation is liable as a conspirator just as are those who originated it' (11 Am.Jur. 548; 15 C.J.S., Conspiracy, § 36, p. 1060; *Marino v. United States*, 9 Cir., 91 F.2d 691, 696, 113 A.L.R. 975), 'nor is it necessary that each conspirator should have seen the others, or have knowledge as to who all the members of the conspiracy are' (15 C.J.S., Conspiracy, § 40, p. 1063; 11 Am.Jur. 548)." *Anderson v. Superior Court*, 78 Cal. App.2d 22, 23, 177 P.2d 315, 316. The Supreme Court said in *People v. Buffum*, 40 Cal.2d 709, 725, 256 P.2d 317, 326: "It is, of course, unnecessary that each conspirator see the others or know who all the members of the conspiracy are. [Citing cases.] It is likewise unnecessary that each conspirator participate in the overt acts. [Citing cases.]"

Appellant further argues by way of claim of inadequate evidence that the testimony of the accomplice Kean was not corroborated to the extent required by law. Counsel relies upon the rule stated and applied in *People v. Morton*, 139 Cal. 719, 724, 73 P. 609, and *People v. Reingold*, 87 Cal.App.2d 382, 392, 197 P.2d 175, which are to the effect that the corroborating evidence must of itself tend directly and immediately to connect the defendant with the offense charged against him, and is not sufficient if it requires interpretation and direction from the accomplice's testimony to give it value.

[5] Although *People v. Griffin*, 98 Cal. App.2d 1, 27, 219 P.2d 519 (hearing in Supreme Court denied), cast some doubt upon the exclusiveness and universality of the Morton test, the Supreme Court has reiterated that rule in the recent case of *People v. MacEwing*, 45 Cal.2d 218, 288 P.2d 257, 260, where it is said: "The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth. * * *

"The decisions applying section 1111, relating to accomplices, hold that the corroborative evidence required by that provision must be considered without the aid of the testimony which is to be corroborated and that it is not sufficient if it requires the interpretation and direction of such testimony in order to give it value. * * *

Referring to §§ 1111 and 1108, Penal Code: "In our opinion both statutes must be construed to mean that corroboration is not adequate if it requires aid from the testimony of the person to be corroborated in order to connect the defendant with the commission of the offense charged." But this does not require the corroboration to do more than substantially tend to connect the defendant with the commission of the offense in such manner as to satisfy the jury that the accomplice is telling the truth. It does not require the testimony of the accomplice as to the corpus delicti, e. g. existence of the conspiracy, to be corroborated.

People v. Trujillo, 32 Cal.2d 105, 110, 194 P.2d 681, 684: "Such corroboration must create more than a suspicion of guilt, but is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration'. [Citing cases.] It is sufficient when the evidence offered as corroborative tends to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies. If his testimony could be completely proven by other evidence, there would be no occasion to offer him as a witness. *People v. Negra* [208 Cal. 64, 280 P. 354], supra; *People v. Yeager* [194 Cal. 452, 229 P. 40], supra. For the same reason, it is not necessary that the independent evidence be sufficient to establish the defendants' guilt. The prosecution is not required to single out an isolated fact which in itself, unrelated to other proven facts, is considered to be sufficient corroboration. It is the combined and cumulative weight of the evidence furnished by non-accomplice witnesses which supplies the test." See also *People v. Allen*, 104 Cal.App.2d 402,

413, 231 P.2d 896; *People v. Temple*, 102 Cal.App.2d 270, 277, 227 P.2d 500.

People v. Henderson, 34 Cal.2d 340, 346, 209 P.2d 785, 788, says: "When as in the present record it is discovered that there is testimony aside from that of the accomplice which tends to connect the defendant with the commission of the crime, the function of the appellate court is performed."

In *People v. Gallardo*, 41 Cal.2d 57, 62, 257 P.2d 29, 32, an abortion case, the court said: "Corroboration is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the woman is telling the truth.*" The footnote says: "*Some of the cases state that the evidence must be 'inculpatory,' but this is used merely as another way of stating that it must tend to connect the defendant with the crime. [Citing cases.]" At page 63 of 41 Cal.2d, at page 33 of 257 P.2d, the court further says: "It must create more than a suspicion, but it may be sufficient even though slight and entitled to but little consideration when standing by itself.†" And the footnote to that page is this: "†Although it has been said that corroboration is not sufficient where the circumstances are consistent with the innocence of the accused [citing cases], the more recent decisions have held that whether the corroborating evidence is as compatible with innocence as it is with guilt is a question of weight for the trier of fact [citing cases]." *People v. McNamara*, 103 Cal.App.2d 729, 740, 230 P.2d 411, 417, a conspiracy case, says: "As we held before, the jury could reasonably find that the possession of the check protector and the circumstances relating thereto linked appellant sufficiently to the forgeries; the actual agreement, combination, may then be proved by the testimony of the accomplices." To the same effect see *People v. Estes*, 99 Cal.App.2d 745, 747, 222 P.2d 454; *People v. Farrell*, 133 Cal.App.2d 427, 284 P.2d 29.

[6] The corroboration may, of course, be furnished by defendant's own words or conduct. *People v. Griffin*, supra, 98 Cal. App.2d 1, 25, 219 P.2d 519; *People v. Tin-*

nin, 136 Cal.App. 301, 305, 28 P.2d 951; *People v. King*, 40 Cal.App.2d 137, 141, 104 P.2d 521; *People v. Willmuth*, 77 Cal. App.2d 605, 612, 176 P.2d 102.

[7] Mrs. Rich testified that Kean was across the street at the time of the accident. She, having been acquitted, cannot be classified as an accomplice, *People v. Lawson*, 114 Cal.App.2d 217, 220, 249 P.2d 850, and her testimony is competent corroboration of the Kean story in this respect. That defendant's truck struck the car of the Riches is established by his own report to the broker and his statement to the adjuster for the insurance company. His initial report of no liability, followed by a statement to the adjuster containing facts indicating negligence, is indicative of an existing intention and effort on his part to build a false claim in favor of the Kears and the Riches. Indeed he gave Kean's name to the adjuster as one who was involved in the accident; said that there were two men and two women in the automobile which was struck. Also that he did not know any of the "other parties," which phrase, fairly interpreted, includes Kean. Of course defendant was acquainted with him (as he later admitted to the police), and his denial of the fact fairly raises the inference that he was assisting in establishing a claim in Kean's behalf. When he said there were two men and two women in the car, he must have known differently, and was apparently making an effort to include Kean, the fourth person, as one who could make a claim against his insurer. The fact that he may also have told Mr. Wylde, the adjuster, that there were two men and one woman in the car does not improve his situation any because that again places Kean in a place which he did not occupy. Evidence of consciousness of guilt is found in defendant's original denial to the police that he knew Kean or had ever heard of him, followed by the confession of such acquaintance.

[8] Lastly, the defendant did not himself testify. While this fact alone does not fill any hiatus in the proof of the prosecution and does not constitute the corroboration required by the statute, it is nevertheless persuasive, lending weight to evidence presented by the prosecution upon matters

presumptively within defendant's knowledge, and which if untruly stated would normally be denied by him. *People v. Ashley*, 42 Cal.2d 246, 268-269, 267 P.2d 271; *People v. Cox*, 102 Cal.App.2d 285, 287, 227 P.2d 290. In *People v. Adamson*, 27 Cal.2d 478, 489-490, 165 P.2d 3, 9, the Supreme Court summarized the matter thus: "The failure of the accused to testify becomes significant because of the presence of evidence that he might 'explain or * * * deny by his testimony' (Art. I, § 13, Cal. Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. *State v. Grebe* [17 Kan. 458], *supra*; *Mooney v. Davis*, *supra*, 75 Mich. [188] at page 193, 42 N.W. 802; see Code Civ.Proc. §§ 1963(5), (6), 2061(6), (7). No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his 'power' (Code Civ.Proc. § 2061 (6)) to explain or deny such evidence. [Citing cases.] * * * The jury, however, is concerned with the scope and nature of the consideration that it may give defendant's failure to explain or deny incriminating evidence, and in the present case should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." And in *People v. Ashley*, 42 Cal.2d 246, 268, 267 P.2d 271, 285: "A defendant's failure to take the stand 'to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the in-

ferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." *People v. Adamson*, 27 Cal.2d 478, 489, 165 P.2d 3, 9. * * * In criminal cases, after the prosecution has made a prima facie case, the failure of the defendant to testify is not affirmative evidence of any fact, and any inference that can, in the circumstances, be justly drawn therefrom is persuasive rather than probative, lending weight to the evidence presented by the prosecution." The testimony of the witness Kean related many matters which, if true, were within the knowledge of appellant, and if not true, normally would have been denied by him.

[9] The corroboration was sufficient. There is no merit in the claim of insufficiency of the evidence to support the verdict.

[10-12] Appellant claims error in denial of his motion to strike certain testimony, but the brief does not comply with the applicable rule. 4 Cal.Jur.2d § 480, p. 311. Counsel contents himself with setting forth certain transcript references, some 12 in number, and claims that error appears therein. It is his duty not only to point out the alleged error, but to show exactly wherein the court's action is erroneous. Mere citation of the transcript pages and assertion that error there appears is insufficient. However, in this instance counsel affirmatively discloses the lack of merit in his contention for he says: "Each of the objections which were voiced by counsel was based upon the fact that said conversations were hearsay as to the appellant inasmuch as the *corpus delicti* had not been proved." Of course the order of proof, especially in a conspiracy case, rests in the discretion of the trial judge, and the *corpus delicti*, as above shown, was adequately established in this instance.

[13] Counsel next contends that there was error in receiving testimony of Officer Kilpatrick concerning defendant's denial of acquaintance with Kean, followed by an admission that he knew him. The argument is that this evidence was but part of an accusatory statement which was flatly denied by the defendant and therefore the en-

tire statement was inadmissible. But it appears that the trial judge carefully excluded all of the accusatory statement except the question as to whether he knew Kean, and the later assertion that he was not telling the truth about that, with which assertion defendant agreed. The general proposition that when an accusatory statement is offered in evidence and it appears that the same is denied by the defendant the entire statement is inadmissible, is stated in *People v. Simmons*, 28 Cal.2d 699, 712, 172 P.2d 18, but the corollary to that rule is found in *People v. Megladdery*, 40 Cal.App.2d 748, 785, 106 P.2d 84, 103: "But where the conduct of the accused in the face of the accusation is of evidentiary importance, such as where false and evasive replies are made together with a denial, the conduct of the accused is admissible as showing a consciousness of guilt and the accusation is admissible to explain that conduct." *People v. Brown*, 71 Cal.App.2d 669, 674, 163 P.2d 85, 88: "An accusation and a denial of guilt of an alleged offense are not admissible, but a denial followed by an admission of special facts or circumstances tending to prove guilt is relevant. For instance, an accused may deny the commission of a criminal offense but subsequently acknowledge that he was at the scene of the crime. The latter statement would be admissible * * *." To the same effect, see *People v. Morgan*, 87 Cal.App.2d 674, 681, 197 P.2d 413; *People v. Moran*, 144 Cal. 48, 60, 77 P. 777; *People v. Scott*, 84 Cal.App. 642, 649, 258 P. 638; *People v. Wright*, 94 Cal.App.2d 70, 80, 210 P.2d 263.

[14] Counsel for appellant also asserts that there was error in receiving exhibits consisting of the three checks, defendant's business card and defendant's statement given the adjuster. This contention is again built upon the assumption that no corpus delicti had been proved, and counsel concedes that "the validity of this objection must turn upon the argument heretofore advanced in support of appellant's contention that the verdict was insufficient as a matter of law." There was no error in the receipt of these documents in evidence.

[15,16] Probation having been granted and the proceedings thereupon suspended,

there was in fact no judgment, and this is true notwithstanding the requirement that defendant pay a fine and make certain restitution as conditions of probation. *People v. Wallach*, 8 Cal.App.2d 129, 133, 47 P.2d 1071; *In re Marquez*, 3 Cal.2d 625, 627, 45 P.2d 342. An appeal may now be taken from a probation order, Pen.Code, § 1237, and it is established that where probation has been granted and no judgment entered an appeal which purports to be taken from the judgment may be treated as an appeal from the probation order. *People v. McShane*, 126 Cal.App.2d Supp. 845, 272 P.2d 571; *People v. Camargo*, 130 Cal.App.2d 543, 545, 279 P.2d 194. We have discussed all the points made in support of the appeal and as above shown find that they are not well taken.

[17] The attempted appeal from the verdict is dismissed, as no such appeal lies.

The order granting probation and the order denying motion for new trial are affirmed.

MCCOMB, Acting P. J., and FOX, J., concur.



**Harold McCARTHY, Plaintiff, Appellant
and Respondent,***

v.

**Thomas Seymour TALLY, Defendant,
Appellant and Respondent.**

Civ. 5041, 5042.

**District Court of Appeal, Fourth District,
California.**

Nov. 14, 1955.

Rehearings Denied Dec. 14, 1955.

Hearing Granted Jan. 5, 1956.

Actions between lessor and lessee were consolidated for trial. The Superior Court of San Bernardino County, R. Bruce Findlay, J., rendered judgments challenged by cross-appeals. The District Court of Appeal, Mussell, J., held that the evidence
* Opinion vacated 297 P.2d 981.

justified denying lessee's claim for damages based upon allegedly false statements made by lessor to induce execution of lease and held that the lessor had properly been denied the liquidated damages stipulated in the lease.

Affirmed.

1. Fraud $\S$ 58(2, 4)

In lessee's action against lessor for damages based upon contention that execution of lease had been induced by lessor's material misrepresentations respecting amount of income from leased property and condition of premises, evidence sustained finding that statement with regard to condition of premises had been true and that there had been no reliance by lessee upon lessor's representations.

2. Appeal and Error $\S$ 931(1), 989, 1010(1)

On appeal, reviewing court (1) will view evidence in light most favorable to respondent, (2) will not weigh evidence, (3) will indulge all intendments and reasonable inferences which favor sustaining findings of trier of fact, and (4) will not disturb finding of trier of fact if there is substantial evidence in record in support thereof.

3. Damages $\S$ 163(3)

Presumption that liquidated damages represents amount which will compensate for breach of contract may be rebutted by proof that no detriment resulted. West's Ann.Civ.Code, $\S$ 1671.

4. Landlord and Tenant $\S$ 134(6)

Evidence, on issue as to lessor's right to liquidated damages stipulated in lease providing for continuance of operation of hotel and recreation resort then being operated on premises by lessor, sustained finding that there had been no damage to or loss of good will, and that the lessor had not been damaged in any sum whatever by lessee's breaches of covenants other than those for payment of rental and taxes.

5. Appeal and Error $\S$ 1071(6)

Where probative and ultimate facts found properly and completely dispose of material issues and support judgment, failure to find on other issues and immaterial

inconsistencies in findings do not constitute reversible error.

6. Appeal and Error $\S$ 870(4)

No appeal having been taken from order appointing receiver in consolidated actions between lessor and lessee, and such order having become final, appointment of receiver could not be reviewed on appeal from judgment.

Combs & Hoose, Beverly Hills, for plaintiff and appellant.

Wilson & Wilson, San Bernardino, for defendant and appellant.

MUSSELL, Justice.

On July 17, 1944, T. L. Tally and Thomas Seymour Tally, as lessors, and plaintiff Harold McCarthy and his wife, Barbara, as lessees, executed an agreement in writing by which the Tallys leased to the McCarthy's certain real and personal property in the San Bernardino mountains, known as the "Glenn Ranch". The lease was for a term of ten years, at an annual rental of \$10,000 and provided for the continuance of the operation of a hotel and recreation resort then being operated on the premises by the lessors.

The lessees entered into possession on August 1, 1944, and operated the business and paid the rent to October 31, 1950. On or about November 28, 1950, McCarthy was served by Tally with a notice to pay rent or vacate the premises and on or about December 1, 1950, McCarthy served Thomas Seymour Tally with a notice that he, McCarthy, had vacated and surrendered the property referred to in the notice of November 28th and that he was delivering possession to Tally. McCarthy moved most of his property from the premises and on January 4, 1951, a receiver was appointed to take charge of the business and the ranch.

On October 26, 1948, plaintiff McCarthy (who had acquired the interest of his co-lessee wife upon her death) instituted an action (our number 4th Civil 5041) against the defendant Thomas Seymour Tally (who had acquired the interest of his co-lessor father, T. L. Tally, upon the death of the

latter) by which McCarthy sought (1) A declaratory judgment interpreting some of the provisions of the lease; and (2) A judgment for \$100,000 as damages based upon the contention that certain false statements had been made by the lessor to induce the execution of the lease by the lessees.

On January 4, 1951, Tally commenced an action (our number 4th Civil 5042) against McCarthy seeking therein (1) A judgment terminating the lease and the right of McCarthy thereunder; (2) A judgment that he was entitled to possession of the premises and requiring McCarthy and his sublessees to vacate and deliver up possession; (3) The appointment of a receiver pendente lite; and (4) A judgment against McCarthy for damages on account of non-payment of rent and taxes, liquidated damages in the sum of \$10,000 and general damages. Both actions were consolidated for trial and separate findings and judgments were entered in each case.

In the first action (number 5041) the trial court rendered judgment that plaintiff have and recover nothing from the defendant except that plaintiff have and recover judgment against the defendant for the return of \$10,000 deposited by plaintiff in the Citizens National Bank of Riverside (this sum was deposited by plaintiff under the liquidated damage provisions of the lease, paragraph 28). Plaintiff McCarthy appealed from the portion of the judgment that he recover nothing in his action for fraud and Tally appealed from that part of the judgment providing for the return of the said \$10,000 deposit to plaintiff.

In the second action (number 5042) the trial court rendered judgment that the lease was terminated December 5, 1950; that McCarthy abandoned the property on December 5, 1950; that Tally has been entitled to the possession of the premises since that date; that McCarthy is entitled to remove certain personal property from the premises; that plaintiff Tally recover judgment against the defendant for \$1,414.14 on account of unpaid rental and taxes and the further sum of \$2,000 as attorney fees; that plaintiff is not entitled

to recover any sum as liquidated damages; that the cross-complainant McCarthy is not entitled to recover judgment against plaintiff except the right to recover certain personal property; that plaintiff is entitled to recover costs and charges of the receiver; and that McCarthy is entitled to an offset in the amount of \$821.32. McCarthy appealed from the whole of this judgment and Tally appealed from the part thereof which provides that he is not entitled to any sum as liquidated damages.

[1,2] In his appeal in the first action McCarthy contends that Tally made material representations respecting the amount of income from the lease property and the "good going condition of the premises"; that these representations were false, were acted upon by McCarthy and were knowingly made by Tally with the intent to induce McCarthy to enter into the lease involved.

There is a sharp conflict in the evidence respecting the statements made by Tally. McCarthy and witness C. C. Vogl testified that Tally told McCarthy prior to the execution of the lease that the ranch earned \$27,000 net the previous year. In his complaint McCarthy alleged that Tally and his wife represented that in the preceding years the ranch had produced an average of \$27,000 net income per year. This allegation and the asserted statements were denied and Tally testified that he made no such statements; that the only statement he made in this connection was "The fact that the year in which they were taking it over, it would possibly do that much, as compared with the previous year, because as the season started it was showing such an increase over the previous year that we expected it to better \$27,000"; that the maximum income he ever made on the ranch was about \$22,000 the previous year.

In connection with the alleged representations regarding the condition of the leased premises, McCarthy testified that defendant Tally and his wife represented that "the property was in excellent condition", "the property was in good condition", "everything was in such good condition", "it is in good condition", and "the property was in wonderful condition". Defendant

Tally testified that he informed the lessees that the ranch was "in good operating condition" and there is substantial evidence that at the time of the negotiations which culminated in the signing of the lease the resort had enjoyed its most successful year, a condition which prevailed after the lessees took possession on August 1, 1944. On that date the ranch was in full operation, the place was full of guests and reservations had been made for August and September of that year. The ranch property had been operated for many years and several of the buildings were very old, as McCarthy well knew. The personal property had been used in the operation of the business. Under the circumstances shown by the record there is substantial evidence to support the trial court's finding that the lessors stated that the property was in "good operating condition" and that such statement was true.

Plaintiff's allegations that he relied upon the statements of defendant, believing them to be true, and acting upon them, accepted and undertook the lease and its terms and obligations, were denied and the court found them to be untrue. This finding is also supported by substantial evidence. The lease contains the following provision: "That said lessees have inspected parcels 1, 2 and 3, and know and accept the same in their present condition." While, as contended by plaintiff, evidence of fraud may be received and considered notwithstanding provisions in the contract where the material facts are accessible to the vendor only, *Rothstein v. Janss Investment Corp.*, 45 Cal.App.2d 64, 113 P.2d 465, the statement in the lease is an admission that plaintiff inspected the property and the evidence shows that Tally refused to sign a lease containing a clause that McCarthy relied on his statements only and insisted that McCarthy visit and inspect the property.

McCarthy testified that he and his wife did inspect the property and were familiar with it; that he visited the ranch four or five times in 1943 and that his wife visited it at least once a week during that year; that he might have visited the ranch twice in 1944 and his wife might have been there quite often. There is evidence in the rec-

ord that when the parties were having the lease drawn up in an attorney's office, McCarthy asked Tally if everything was in good condition and Tally replied that they were running the place as it had been run the previous year and that so far as he knew, it was in good condition; that the attorney then suggested to McCarthy that if there was any doubt in his mind about the condition of the premises being such as he desired the condition to be, that he should go and look the place over, if he had not already done so, and determine for himself whether he was willing to accept the premises as they were and this McCarthy said he would do. The record also shows that McCarthy took possession on August 1, 1944, and operated the business until October 26, 1948, before filing his action. Where, as here, the findings relative to the statements made by Tally are supported by substantial evidence, they are conclusive on appeal and it is not our province to analyze conflicts in the evidence. As is said in *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557, 561:

"As has so frequently been said, it is the general rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intentions and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof."

[3, 4] Appellant Tally contends that the provision in the lease for liquidated damages is valid as a matter of law and that the court erred in rendering judgment that McCarthy was entitled to the return of the sum of \$10,000 deposited by him under paragraph 28 of the lease. That paragraph and the one following, are as follows:

"(28) That it is and will be impracticable and extremely difficult to fix the actual damages to said Parcel Four in the event of termination of this lease by the lessors for cause, or by reason of abandonment of the demised property by the lessees, and that the sum of

\$10,000.00 shall be and said sum is hereby fixed as the amount of the liquidated damages in the event of such termination or such abandonment; that said lessees have this day executed to the lessors a demand note for \$10,000.00 secured by a deed of trust upon real property in Riverside County, California, to evidence and secure the payment of such liquidated damages; that said lessees may at any time deposit with the lessors the sum of \$10,000.00 in lieu of said note and deed of trust;

"That in the event said lessors successfully prosecute proceedings to terminate this lease for cause, the Court may, in addition to actual damages by reason of loss with respect of Parcels One, Two and Three, award to said lessors liquidated damages in the sum of \$10,000.00 by reason of loss with respect to Parcel Four;

"That in the event said lessees abandon and give up possession of said demised property to the lessors, said lessees shall be liable to the lessors for actual damages by reason of loss with respect to Parcels One, Two and Three, plus liquidated damages in the sum of \$10,000.00 by reason of loss with respect to Parcel Four;

"That in the event of such termination or such abandonment, the liquidated damages aforesaid shall be paid to the lessors from said deposit or from the proceeds derived from a sale under said Deed of Trust; that the payment of actual and liquidated damages, as aforesaid, shall fully satisfy all obligations of lessees under and by virtue of the provisions hereof."

"(29) That default shall not be deemed to have occurred with respect to any of the terms, covenants and conditions herein set forth, other than the payment of the aforesaid installments of rental, unless the lessees, within ten days after written notice of the nature of the asserted breach, shall have failed to cure such breach."

It is evident from the reading of these provisions of the lease that the liquidated

damage clause of the lease relates to parcel four, which is described in the instrument as follows: "The said business and the goodwill thereof, and the right to the use of the trade name of Glenn Ranch." In this connection the court found, in action number 5042, "That there was no evidence establishing any damage to or loss of good will", and on the basis of this finding, it was adjudged that plaintiff Tally is not entitled to recover any sum as liquidated damages. The record shows there was no evidence establishing any damage to or loss of good will, and as is said in *Kelly v. McDonald*, 98 Cal.App. 121, 125, 276 P. 404, 406:

"While the term 'liquidated damages' does imply that the parties have ascertained and agreed upon a sum which they assume will adequately compensate for a breach of the contract, this does not necessarily mean that the amount specified must be paid whether damages result from the breach or not. The very term of 'damages' contemplates an injury sustained or detriment resulting from the breach of a contract or the nonperformance of a duty. As the court says in *Starr v. Lee*, supra: 'We find authorities holding that recovery cannot be had when the evidence shows that no damage at all resulted from the breach.' The exception to the general rule to the effect that the predetermined amount of damages for the breach of an obligation is void, as that exception is expressed in section 1671 of the Civil Code does not purport to declare that an amount of liquidated damages agreed upon shall be *conclusively* presumed to be the exact figure which will adequately compensate for the breach of contract. This section merely asserts that it is 'presumed to be the amount of damages sustained.' This presumption may be rebutted by proof that no detriment whatever resulted from the breach."

The evidence shows that on or about November 29, 1950, Tally served a written notice and demand on McCarthy that he pay the rent on the premises or vacate,

surrender up and deliver possession to Tally, and on December 1, 1950, McCarthy notified Tally in writing that he had vacated the premises in accordance with said notice of November 29, 1950. It appears from the notice served by Tally that he was terminating the lease solely for nonpayment of rent and not for other defaults in the performance of the lease agreement. In *Rez v. Summers*, 34 Cal. App. 527, 529, 168 P. 156, it is held that when a tenant fails to pay rent as provided in the lease, the amount of damage is not extremely difficult to fix, and it is not impracticable to fix the amount of such damage. In 15 Cal.Jur.2d, Damages, sec. 217, it is said that "Since there is no presumption that the amount of damages which may result from a tenant's breach of a covenant to pay rent is impossible or extremely difficult to fix, a provision for payment of liquidated damages in the event of such a breach is void." In *Olson v. Biola Co-op. Raisin Growers Ass'n*, 33 Cal.2d 664, 668, 204 P.2d 10, 12, 12 A.L.R. 2d 112, the rule is stated that:

"* * * a contract which undertakes to fix the amount of damages in anticipation of a breach of an obligation is void to that extent, Civil Code, sec. 1670, except 'when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.' Civil Code, sec. 1671. Accordingly, it is held that a party relying on a liquidated damage clause in a contract must plead and prove the facts validating his right to recover such predetermined amount."

In *Rice v. Schmid*, 18 Cal.2d 382, 385, 115 P.2d 498, 499, 138 A.L.R. 589, it is held that:

"It is a question of fact in each instance whether the nature of the case is such that it would be impracticable or extremely difficult to fix the actual damage."

In the instant case the court found, in action number 5042, "That by reason of the breaches by said defendant McCarthy of his covenants in said lease, other than payment of rental and taxes, as set forth in paragraphs IX and X of said first cause of action, the plaintiff was not damaged in any sum whatever. We cannot hold as a matter of law that this finding is unsupported by the record."

[5] Appellant McCarthy argues that there were numerous inconsistencies in the findings and that most of them are not supported by the evidence. However, where as here, the probative and ultimate facts found properly and completely dispose of the material issues and support the judgments, the failure to find on the other issues and immaterial inconsistencies in the findings do not constitute reversible error. *Chester R. Pyle Co. v. Fossler*, 200 Cal. 204, 209, 252 P. 599.

[6] Appellant McCarthy argues that the receiver was wrongfully appointed and that the trial court wrongfully determined costs and charges of said receiver in action number 5042. The record shows that the receiver was appointed January 4, 1951, and that no appeal was taken from the order of his appointment and it became final. Under the circumstances shown by the record the order appointing the receiver may not be reviewed on appeal from the judgment. *Weygandt v. Larson*, 130 Cal.App. 304, 310, 19 P.2d 852; 22 Cal.Jur. 476, Sec. 61.

In view of what we have here said it is unnecessary to pass upon other points raised in the appeals.

The judgments are affirmed. Each party to bear his own costs on appeal.

BARNARD, P. J., and GRIFFIN, J.,
concur.

137 Cal.App.2d 5

Fred McNEILL and Ronald McNeill, a minor,
by and through his guardian ad litem Fred
McNeill, Plaintiffs and Respondents,

v.

A. TEICHERT & SON, Inc., a corporation,
the City of Sacramento, a Municipal Cor-
poration, Fred Klaus, City Engineer and
Superintendent of Streets, and J. Sestono-
vich, Defendants,

A. Teichert & Son, Inc., a corporation, and
the City of Sacramento, a Municipal Corpo-
ration, Appellants.

Civ. 8551.

District Court of Appeal, Third District,
California.

Nov. 15, 1955.

Hearing Denied Jan. 5, 1956.

Father of 6½ year old boy and the boy
brought action against city and contractor,
which installed storm sewers in city street,
for injuries sustained by boy in fall into
excavation. The Superior Court of Sacra-
mento County, J. O. Moncur, J., entered
judgment adverse to city and contractor,
and they appealed. The District Court of
Appeal, Van Dyke, P. J., held that it was
for jury to determine whether or not condi-
tion of street was a proximate cause of
boy's injuries.

Judgment affirmed.

1. Municipal Corporations ⇨821(19)

In action against city and contractor,
which installed storm sewers in city street,
for injuries sustained by 6½ year old boy in
fall into excavation, question whether con-
dition of street was a proximate cause of
boy's injuries was for jury.

2. Municipal Corporations ⇨816(9)

In action against city and contractor,
which installed storm sewers in city street,
for injuries sustained by 6½ year old boy in
fall into excavation, city ordinance provid-
ing that any person by whom, or under
whose direction, or by whose authority as
principal, or as contractor or employer, any
portion of a public street, sidewalk, or alley
may be made dangerous, shall erect a good
substantial barrier or walk, was admissible
against contractor under general issue of
negligence raised by pleading.

3. Evidence ⇨32

Courts do not take judicial notice of
city ordinances.

4. Municipal Corporations ⇨817(1, 2)

In action against city and contractor,
which installed storm sewers in city street,
for injuries sustained by 6½ year old boy in
fall into excavation, in order to recover
against city, it was not necessary to prove
general negligence, but was only necessary
to prove dangerous or defective condition
of street, knowledge thereof, express or
implied, on part of city and its responsible
employees, opportunity after knowledge to
repair, and failure to repair, and that condi-
tion of street proximately caused boy's in-
juries.

5. Appeal and Error ⇨1047(1)

In action against city and contractor,
which installed storm sewers in city street,
for injuries sustained by 6½ year old boy in
fall into excavation, wherein jury was ex-
pressly told that before jury could bring in
a verdict against city, requirements of the
public liability act would have to be square-
ly met, admission in evidence of city ordi-
nance providing that any person by whom,
or under whose direction, or by whose au-
thority as principal, or as contractor or
employee, any portion of a public street,
sidewalk, or alley may be made dangerous,
shall erect a good substantial barrier or
walk was not reversible error as to city be-
cause of failure to instruct jury as to limit-
ed purposes for which ordinance was admis-
sible against city.

6. Municipal Corporations ⇨819(3)

In action against city and contractor,
which installed storm sewers in city street,
for injuries sustained by 6½ year old boy in
fall into excavation, evidence was sufficient
to justify finding by jury that contractor
violated city ordinance providing that any
person by whom, or under whose direction,
or by whose authority as principal, or as
contractor, or employer, any portion of a
public street, sidewalk, or alley may be made
dangerous, shall erect a good substantial
barrier or walk.

7. Appeal and Error ⇨1064(1)

In action against city and contractor,
which installed storm sewers in city street,

for injuries sustained by 6½ year old boy in fall into excavation, instruction that though there were two defendants it did not follow from that fact alone that if one was liable, both were liable, and that instructions given governed the case as to each defendant, to same effect as if he were the only defendant in the action, and regardless of whether reference was made to defendant or defendants in the singular or plural form, was not prejudicially erroneous, on ground that it told the jury that each and every instruction given was applicable to both defendants.

8. Trial ⇨295(1)

All instructions given should be harmonized, if that may reasonably be done.

9. Municipal Corporations ⇨822(1)

In action against city and contractor, which installed storm sewers in city street, for injuries sustained by 6½ year old boy in fall into excavation, instruction that if city's superintendent of streets negligently failed to require contractor to perform its contract in accordance with plans and specifications and with requirement of city ordinance in evidence requiring placing of barriers, and if, as a proximate result of such superintendent's negligence in failing to require such performance by corporation, boy was injured, verdict of jury should be against city, was erroneous, since city's liability could not be predicated on any negligent conduct of superintendent in failing in performance of any assumed duty to compel contractor to remedy dangerous condition of street.

10. Municipal Corporations ⇨822(1)

In action against city and contractor, which installed storm sewers in city street, for injuries sustained by 6½ year old boy in fall into excavation, instruction that it was duty of city superintendent of streets to require contractor to comply with the terms of its contract and that digging of ditch by contractor was done under direction of superintendent, was erroneous, since city's liability could not be predicated on any negligent conduct of superintendent in failing in performance of any assumed duty to compel corporation to remedy dangerous condition of street.

11. Appeal and Error ⇨1064(1)

In action against city and contractor, which installed storm sewers in city street, for injuries sustained by 6½ year old boy in fall into excavation, giving of erroneous instructions that if city's superintendent of streets negligently failed to require contractor to perform its contract in accordance with plans and specifications and with requirement of city ordinance requiring placing of barriers, and if, as a proximate result of superintendent's negligence and carelessness in failing to require such performance by contractor, boy was injured, verdict should be against city, and that it was duty of superintendent to require contractor to comply with terms of contract, and that digging of ditch by contractor was done under direction of superintendent, was not prejudicial error under circumstances.

Desmond, McLaughlin & Russell, Sacramento, for A. Teichert.

William A. Sitton, Sacramento, for City of Sacramento.

Richard J. Lawrence, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

The City of Sacramento, herein called the "city", and A. Teichert & Son, Inc., herein called the "corporation", appeal from a money judgment entered against both upon a jury verdict in a personal injury action.

The accident which gave rise to the litigation occurred in a residential tract in the City of Sacramento known as "Tallac Village". The corporation had been installing storm sewers in the area under a contract awarded to it by the city. In order to lay the necessary pipes, the corporation had dug a ditch 9 feet deep and 3½ feet in width down the center of 25th Avenue from 59th Street for approximately one-half mile. About one month before the accident the pipes had been laid and the ditch backfilled with dirt except for a portion about 25 feet in length in which pipes could not then be laid due to an accumulation of water at that point. Work was halted and the excavation was left unfilled. That condition had existed for about one month before the

accident, and during that time no barriers had been erected and maintained about the open ditch save that there was placed at one end of the excavation a sign reading, "Road Closed"; and there was an embankment composed of the dirt that had been taken from the excavation and piled on the side. Pipes lay along one side of the pile of dirt. The corporation, while it had been engaged in construction work in the area, had requested teachers of adjacent schools and parents living in the area to caution school children of the dangers existing at its construction sites. Plaintiff and respondent Ronald McNeill, who was then 6½ years of age, had been so warned. Prior to the time of the accident, to which there were no eyewitnesses, he had not been near the open segment of ditch, which was two or three blocks distant from his home. However, on the afternoon of the day of the accident, after returning from school and changing his clothes, he was attracted by the pile of dirt and rode his bicycle down to the site. He testified as follows: "I just saw all the dirt down there and I thought I would ride down, and I rode down there and got scared and fell in." He further said: "I just looked in, and then I tried to get away, and then I fell in." Ronald's father, for himself and as guardian ad litem for his child, brought this action to recover damages for the personal injuries sustained by Ronald and for the recovery of medical and hospital expenses incurred on his behalf. The complaint contained two counts, one against the city and the other against the corporation. Against the city, the plaintiffs alleged that it was a municipal corporation and as such charged with the duty of keeping streets within its borders in safe and suitable condition for use by the public; that Ronald had fallen into the excavation above described at a time when there were no barriers or warning signs placed near it to warn of the condition of the street which it is alleged was at that time dangerous and defective. It was charged that the city and its superintendent of streets had notice and knowledge of the condition and the consequent dangers therefrom in time to remedy said conditions prior to Ronald's fall and that the condition had been left uncorrected. It was alleged that

the injuries to Ronald were proximately caused by the dangerous condition of the street. The count against the city also contained allegations that the corporation, as a contractor, had been installing storm sewers pursuant to a contract with the city; that a city inspector had been charged with the duty to inspect the work daily; that the contractor was bound by its contract to provide, during the course of its work, and to maintain, in proper location, all necessary signs, barriers, guards, etc., to protect the public; and that the street superintendent and the inspector had been negligent in failing to require the contractor to do so. By a second count a cause of action was stated against the corporation. It was alleged that its acts in leaving open the excavation had been negligent and that this negligence had proximately caused the injuries to Ronald, for which this action was brought.

There was evidence that although cross barriers had been maintained during the progress of the work so that the public could not travel upon the street where the excavation existed, these barriers had been removed when the work was halted and the uncompleted segment of ditch left open; that during the time it was left open, prior to the accident, the public used the street and school children traversed it to and from school. The answers of defendants raised the general issue and pleaded the affirmative defense of contributory negligence on the part of Ronald. The jury returned a verdict of \$5,000 for general damages and \$515.25 for medical expenses incurred. There is no claim that the verdict is excessive.

[1] Appellants contend that, although the contributory negligence of Ronald was, in view of his tender age, a question of fact for the jury, nevertheless his conduct as a matter of law was the sole cause of the accident and that, therefore, they are not liable for the injuries he suffered. This contention cannot be sustained. On the question of proximate cause, it was for the jury to determine whether or not the condition of the street was a proximate cause of Ronald's injuries. The jury could have reasoned that if barriers had been placed

along the side of the ditch they might have so impressed the young child that he would not have gone near to and fallen into the excavation. *Hines v. Milosivich*, 68 Cal. App.2d 520, 522, 157 P.2d 45. The trial court did not err in submitting the issue of proximate cause to the jury.

Both appellants contend that the court erred in admitting in evidence a city ordinance which was in force and effect at the time of the accident and which reads as follows:

"Any person by whom, or under whose direction, or by whose authority as principal, or as contractor or employer, any portion of a public street, sidewalk, or alley may be made dangerous, shall erect, and so long as the danger may continue, maintain, around or over the place so made dangerous, a good substantial barrier, or walk which said barrier or walk shall be constructed in such a manner that it shall meet with the approval of the Building Inspector."

[2] We will treat first of the contention of the corporation that the ordinance was inadmissible in proof of plaintiffs' cause of action against it. This contention cannot be sustained. Appellant argues that the ordinance had not been pleaded and that it had objected to its introduction upon that basis; that the court overruled the objection, expressing the opinion that it appeared to the court it was not necessary to plead the ordinance because it was admissible under the general issue of negligence raised by the pleading. In so ruling the court was correct. We quote the following from *Jackson v. Hardy*, 70 Cal.App.2d 6, 12, 160 P.2d 161, 164:

"Answering appellants' contention that general negligence was not charged in the complaint, we point out that under our system of pleading, it is unnecessary to plead or refer to a statute relied upon as creating a duty, where the action is one predicated upon the negligence of the defendant and not one to enforce a liability or penalty imposed by statute."

We also refer to *Martin v. Shea*, 182 Cal. 130, 137, 187 P. 23, 26, where, in quoting

from the case of *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 669, 98 P. 1063, the court said:

"The ordinance hereinbefore referred to was not alleged in the complaint, plaintiff simply alleging negligence in the manner we have specified. It is urged that it was necessary to plead the ordinance in order to make it available as evidence and that the trial court therefore erred in admitting it over the objections of defendant. The precise question thus presented appears never to have been decided by this court, but it appears to us that, upon elementary principles, it was admissible without having been pleaded. *The cause of action here alleged was not a violation of the ordinance, but the negligence of the defendant, and the ordinance was simply evidence offered to show such negligence.* Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action."

[3] As the corporate appellant says, courts do not take judicial notice of ordinances and for that reason, we add, it was proper for the respondents to introduce the ordinance in evidence in proving that the standard of care thereby fixed had been violated, all as a part of proving the alleged negligent conduct of said defendant.

[4, 5] The appellant city also contends that it was error for the court to introduce the ordinance as against it and relies upon such cases as *Owen v. City of Los Angeles*, 82 Cal.App.2d 933, at page 942, 187 P.2d 860, and *Wilkerson v. City of El Monte*, 17 Cal.App.2d 615, at page 624, 62 P.2d 790. As we read the count against the city in plaintiffs' complaint, although it does contain some allegations of negligent conduct on the part of the city, yet it specifically bases the prayer for recovery upon the public liability statute which it alleges the city was subject to. To recover against the city it was not necessary to prove general negligence, it was only necessary to prove the dangerous or defective condition of the street, knowledge thereof, express or implied, on the part of the city and its respon-

sible employees, opportunity after knowledge to repair, and failure to repair, and that the condition of the street proximately caused the injuries to plaintiff. Perhaps it would have been better if the trial court had instructed the jury specifically as to the limited purpose for which the ordinance was admissible. However, we do not think that the error would justify the reversal of the judgment against the city. The jury were told expressly that before they could bring in a verdict against the city, the requirements of the public liability act would have to be squarely met and that they could not bring in a verdict on any other theory than one contained within the provisions of that statute. No doubt these limitations were argued to the jury and we think it fair to assume that the jury understood them. Generally, the cases such as the two referred to above which hold the introduction of an ordinance of this type in evidence to be erroneous in a suit against a public agency, are cases wherein that agency alone has been sued. Even if we assume that error was committed as against the city, we could not reverse because of it.

[6] The corporation further contends that, even assuming that as against it the ordinance was properly before the jury, there was no evidence of a violation of its terms. This we think is not a sound contention. We think it apparent from what we have already said that the jury could have found the corporate appellant was guilty of violating the ordinance in that it did not better protect the excavation, or in other words that it did not erect the sort of barrier about the excavation which the ordinance required.

The city contends that the trial court committed prejudicial error in that it gave to the jury conflicting instructions with respect to municipal liability. To lay a foundation for its claim of conflict, the city refers to an instruction given, apparently of the court's own motion, which is taken from BAJI, Number 53. It reads as follows:

"While there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair con-

sideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. The instructions given you govern the case as to each defendant, to the same effect as if he were the only defendant in the action, and regardless of whether reference is made to defendant or defendants in the singular or plural form."

[7, 8] The city emphasizes the last sentence in the instruction and interprets it as telling the jury that each and every instruction given is applicable to both defendants. We do not so construe it. By the instruction, the court is cautioning the jury that there are two defendants in the action, and that they are not both to be held liable merely because one may be; that each is entitled to have its case determined independently and without prejudice by what may be done with the case of the other; that the jury must apply instructions to each defendant, which are applicable to such defendant, without regard to the other defendant. The last sentence cannot, in view of the instructions given, be construed as telling the jury that each and every instruction is applicable to each defendant. To do so would make it impossible to harmonize this instruction with many of the instructions given, which must be done where reasonable. *Bates v. Newman*, 121 Cal. App.2d 800, 807-808, 264 P.2d 197. The instructions given show that many of them are applicable to one defendant and not to the other. For instance, we will take the instruction concerning the city's liability under the public liability act. The court told the jury:

"Plaintiffs' cause of action, if any they have, against the defendant City of Sacramento is based upon, and must meet the requirement of, a law of this state known as the Public Liability Act. That act provides as follows: [Here the instruction quotes from the act.]

"The law just read to you is the only authority under which this action can be maintained, if at all, against the defendant City of Sacramento; and it follows that before the plaintiffs or either of them may be entitled to your

verdict, you must find from a preponderance of the evidence:

"First: That plaintiffs, or either of them, suffered an injury from which a proximate cause was some dangerous or defective condition of 25th Avenue which the City at the time and under the conditions had authority to remedy.

"Second: That before the accident in question, the governing or managing board of said City of Sacramento, or whatever Board, officer or person was authorized to remedy the alleged dangerous or defective condition, had knowledge or notice thereof.

"Third: That before the accident in question, such board, officer or person had a reasonable time, after receiving such notice, to remedy the condition or to take such action as was reasonably necessary to protect the public against it, and it failed to do either."

There are other instructions applying specifically and only to the corporation. Pursuing its thesis of conflicting instructions, the city calls attention to instructions as follows: (1) An instruction that it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person. We agree that this instruction has no application to the city. For the city's liability as stated in the instruction specifically addressed to that subject, and from which we have quoted, is not based upon the ordinary concept of common law negligence. (2) An instruction that violation of the ordinance introduced in evidence constituted negligence *per se*. For the reason given just before, this has no application to the city. (3) An instruction that the fact that the corporation had placed a sign on the street stating that it was closed did not relieve it from complying with the ordinance. We do not think from this record that the jury could have considered that the foregoing instructions had any application to the case of the city in view of the specific instruction which stated the exact limits of the city's liability and the exact requirements that the plaintiffs must meet before a cause of action against the city was proved.

[9-11] Certain instructions were given which, on their face, applied to the city, and they should not have been given. We refer to an instruction that if the city's superintendent of streets negligently failed to require the corporation to perform its contract in accordance with plans and specifications and with the requirement of Ordinance No. 258 in evidence requiring the placing of barriers, and if, as a proximate result of said superintendent's negligence and carelessness in failing to require such performance by the corporation, the plaintiff had suffered damage, the verdict of the jury should be against the city. There was yet another instruction along the same line as the one just referred to in which the court told the jury that it was the duty of the city superintendent of streets to require the corporation to comply with the terms of its contract. Again, the court told the jury that the digging of the ditch by the corporation was done under the direction of the city superintendent of streets. It was error to give these instructions; for the city's liability could not be predicated upon any negligent conduct of its engineer in failing in the performance of any assumed duty to compel the corporate defendant to remedy the dangerous condition of the street. However, we do not believe that the instructions were prejudicial for these reasons. In order to find the corporation guilty of actionable negligence in the count against it, the jury had to find that it had left the excavation in the street unguarded, and had thus set up a condition dangerous to users of the street; that without contributory fault on his part plaintiff Ronald McNeill had fallen into the excavation and been injured; that the negligence of the corporation in these matters was a proximate cause of the injuries which Ronald suffered. The jury made these findings by implication and there was ample evidence to support them. To find against the city, the jury had to find that the excavation created a danger so long as it was left unguarded and that this dangerous condition was a proximate cause of plaintiff's injuries. The only additional findings that it had to make against the city, and that it did not have to make against the corporation, were the findings as to the notice and

as to the lapse of time after notice, that is, as to a reasonable time for, and the lack of, repair. The jury made these findings. The finding of notice was based upon direct testimony that the responsible city officials had knowledge of the existence of the dangerous condition in the city streets for much more than ample time to cause it to be remedied or to remedy it itself as was its duty. All this being so, we think the jury, having found against the corporate defendant, would also have found against the city, and that such finding was not brought about by the erroneous instructions that the city could be held liable by reason of the negligence of its city superintendent in failing to compel the corporate defendant to remedy the defect that created the danger to those who might use the city's street. The evidence in this case is such that we think it impossible to suppose the jury would hold the corporate defendant liable and release the city. We feel sure from the whole record that the verdict was not caused or contributed to by the erroneous instructions.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; SHENK, J., dissenting.



137 Cal.App.2d Supp. 852

Albert P. GOUBERT and Eliza M. Goubert,
Plaintiffs and Appellants,

v.

POMONA VALLEY WATER COMPANY, a
corporation, and Paul Greening, et al.,
Defendants and Respondents.

C. A. 26.

Appellate Department, Superior Court,
San Bernardino County,
California.

Nov. 10, 1955.

Trespass action. The Municipal Court, San Bernardino Judicial District, Edward P. Fogg, J., rendered judgment and land

289 P.2d—38½

owners appealed. The Appellate Department of the Superior Court, San Bernardino County, Mitchell, J., held that rights reserved in deed conveying land and retaining right to develop water by artesian or surface wells and to convey water from land, became fixed, if not by terms of reservation, then by drilling of well and installation of pipeline, and owners of such right, in absence of landowner's consent, could not increase extent of servitude and could not build additional structures for purposes not mentioned in reservation and not therefore exercised.

Reversed.

1. Waters and Water Courses §156(4)

The reservation of easements and rights to use water are limited in extent by terms of reservation and by nature of enjoyment or use thereof, and if right is unlimited by terms of reservation the extent of right is fixed by manner of its use and may not be enlarged without consent of owners of land. West's Ann.Civ.Code, § 806

2. Waters and Water Courses §156(4)

Rights reserved in deed conveying land and retaining right to develop water by artesian or surface wells and to convey water from land became fixed, if not by terms of reservation, then by drilling of well and installation of pipeline, and owners of such right, in absence of landowners' consent, could not increase extent of servitude and could not build additional structures for purposes not mentioned in reservation and not therefore exercised. West's Ann.Civ. Code, § 806.

Charles D. Warner, Chino, for appellants.
Harold E. Prudhon, Los Angeles, for respondents.

MITCHELL, Judge.

Appellants, as owners of a parcel of land, i. e., Lot 46, in the Rancho Santa Ana del Chino, complain of an alleged trespass thereon by the defendants. Compensation for the use of the land occupied by the respondents is sought.

In 1912 the Chino Land and Water Company conveyed to the L. M. Jacobs Company several parcels of land including the one involved here, retaining the right to develop water on one acre in Lot 46 by artesian or surface wells, and the right to convey such water from said Lot.

In 1922 the Chino Land and Water Company conveyed this "right" to Pellissier, together with the well which had been developed on Lot 46.

Appellants acquired Lot 46 and respondents acquired the well.

In 1953 respondents, over the objection of appellants, entered upon the appellants' land and installed thereon a new structure and installed a hydro-pneumatic system.

[1] Appellants contend that the right or rights reserved by the Chino Land and Water Company are limited in extent by the terms of the deed and by the nature of the enjoyment or use thereof. Civ.Code, § 806.

In this the appellants are correct. *Woods Irrigation Co. v. Klein*, 105 Cal.App.2d 266, 233 P.2d 48; *Winslow v. City of Vallejo*, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S., 851; *MacGregor v. Knowlden*, 102 Cal.App. 42, 282 P. 438; *Colegrove Water Co. v. City of Hollywood*, 151 Cal. 425, 90 P. 1053, 13 L.R.A.,N.S., 904; *Kern Island Irr. Co. v. City of Bakersfield*, 151 Cal. 403, 90 P. 1052; *Vestal v. Young*, 147 Cal. 715, 82 P. 381.

Appellants next contend that if the right is unlimited by the terms of the grant then the extent of the right is fixed by the man-

ner of its use and may not be enlarged without the consent of the appellants. In this, too, the appellants are correct.

"Where the right, not definitely limited by grant, has become fixed by the manner of its use, it cannot be enlarged without the consent of the parties who may be affected." *Colegrove Water Co. v. City of Hollywood*, 151 Cal. 425, 429, 90 P. 1053, 1055, 13 L.R.A., N.S., 904. Cases cited: *Winslow v. City of Vallejo*, 148 Cal. 725, 84 P. 191; *Vestal v. Young*, 147 Cal. 715, 82 P. 381; *Kern Island Irr. Co. v. City of Bakersfield*, 151 Cal. 403, 90 P. 1052.

[2] In this case the right reserved in the 1912 deed from Chino Land and Water Company to Jacobs became fixed, if not by the terms of the reservation, then by the drilling of a well and the installation of a pipeline.

This was the extent of the use of the right from 1912 to 1946.

Respondents may not, in the absence of appellants' consent, increase the extent of the servitude on appellants' land.

By building new, different and additional structures on appellants' land for purposes not mentioned in the conveyance and not heretofore exercised, respondents are attempting to enlarge their right in and on appellants' land.

The judgment is reversed.

COUGHLIN, P. J., and HILLIARD, J., concur.

45 Cal.2d 474

CALIFORNIA LETTUCE GROWERS, Inc.,
a corporation, Plaintiff and
Respondent,

v.

UNION SUGAR COMPANY, a corporation,
Doe Company, a corporation, Roe Company,
a co-partnership, Doe I, Doe II, Doe III,
Doe IV and Doe V, Defendant and Appel-
lant.

L. A. 23650.

Supreme Court of California.

In Bank.

Nov. 8, 1955.

Action for value or contract price of beets delivered to defendant sugar company by plaintiff corporation or damages for defendant's alleged breach of contract in refusing to pay full value of beets. Defendant filed counterclaims for damages because of plaintiff's failure to deliver all beets contracted for and apply additional manure to land on which they were grown, as required by agreement for extension of defendant's lease of such land to plaintiff. From a summary judgment of the Superior Court, Santa Barbara County, Atwell Westwick, J., for plaintiff, defendant appealed. The Supreme Court, Shenk, P. J., held that contract requiring plaintiff to grow and deliver to defendant 239 acres of beets during 1949 was not illusory and void for failure to stipulate purchase price of beets, where plaintiff knew of usage and custom in sugar beet industry for processors and growers to enter into supplemental agreements for payment of growers according to sugar content of beets on basis of net return from sugar sold by processor during current crop year.

Judgment reversed.

Opinion, Cal.App., 278 P.2d 106, vacated.

1. Contracts ⚡9(1)

A contract which is so uncertain and indefinite that parties' intention in material particulars cannot be ascertained is void and unenforceable. West's Ann.Civ.Code, § 1598.

2. Sales ⚡1(3)

Where price of commodity contracted to be sold is intended to be left to parties' subsequent agreement, contract is merely agreement to agree and hence nudum pactum until price is fixed or agreed on.

3. Contracts ⚡9(1)

The law does not favor, but leans against, destruction of contracts because of uncertainty.

4. Contracts ⚡147(1)

Agreements will be construed, if feasible, as to carry into effect parties' reasonable intentions, if ascertainable.

5. Contracts ⚡168

Provisions not expressed in written contract may be inferred from writing or external facts.

6. Sales ⚡1(3)

A sale contract need not specify price, if it can be objectively determined.

7. Sales ⚡1(3)

Absence of price provisions does not render an otherwise valid sale contract void. West's Ann.Civ.Code, §§ 1655, 1656, 1728.

8. Sales ⚡1(3)

Where sale contract does not specify price, court should make necessary findings and set price under applicable code provisions, unless parties intended to leave determination of price to future negotiations. West's Ann.Civ.Code, § 1729.

9. Sales ⚡355(1)

In action for reasonable value or contract price of beets delivered to defendant sugar company by plaintiff grower or damages for defendant's alleged breach of contract in refusing to pay full value of beets, allegation of answer that parties knew and understood that defendant's standard practice was to enter into separate annual supplemental and specific sugar beet contracts with growers was sufficient, with allegations of history of parties' commercial transactions, to put parties' prior dealings and practice of sugar beet industry in issue.

10. Customs and Usages ⚡10

Generally, persons carrying on trade in which there is a known usage are deemed

to have contracted in reference to such usage, unless contrary appears.

11. Customs and Usages ⚡10, 15(1)

A known usage of trade carried on by parties to contract forms part of contract, and evidence thereof is always admissible to supply deficiency or as means of interpretation, where it does not alter or vary terms of contract. West's Ann.Civ.Code, §§ 1655, 1656; West's Ann.Code Civ.Proc. § 1870, subd. 12.

12. Estoppel ⚡118

Evidence that corporation entered into beet growing agreement with sugar company with knowledge of sugar beet industry's usage and custom for processors to enter into uniform supplemental contracts with growers and that parties understood that corporation would deliver beet crop to sugar company under terms made available thereby to all its growers showed sufficient pattern of prior dealing to support conclusion that parties intended crop to be governed by procedure previously followed, and corporation having failed to voice intention to adopt different procedure should not be permitted to deny effect of such prior course of dealing in its action against sugar company for value or contract price of beets delivered thereto.

13. Contracts ⚡10(4)

Sales ⚡1(4)

A net return formula in beet growing contract, providing for payment of grower by sugar company according to sugar content of beets sold on basis of net return from sugar sold by processor during current crop year, computed in accordance with company's established system of accounting, was sufficiently definite to satisfy requirements of certainty and mutuality of contract, though accounting procedures were those of sugar company, as it could not alter its accounting system for purpose of varying resulting net return figures.

14. Sales ⚡1(3)

A beet grower, contracting for sale of beets to sugar company with reference to existing accounting system thereof could not claim that accounting procedures were unilateral and unfair in action for value or

contract price of beets delivered by grower to such company or damages for its alleged breach of contract by refusal to pay full value of beets, especially where contract required verification of average net selling price by independent firm of public accountants, though it was to be chosen by sugar company.

15. Contracts ⚡168

A contract conferring on one party thereto a discretionary power affecting other party's rights imposes duty to exercise such discretion in good faith and in accordance with fair dealing. West's Ann.Civ.Code, §§ 1655, 1656.

16. Contracts ⚡10(4)

The fact that prior course of dealing between parties to supplemental sugar beet growing contract, which left open precise amount to be paid grower by sugar company, probably left to such company power to set ultimate price paid, did not render contract illusory and void, in view of statutory provision that when contract does not determine amount of consideration or leaves such amount to an interested party's discretion, consideration must be so much money as object of contract is reasonably worth. West's Ann.Civ.Code, § 1611.

17. Sales ⚡1(3)

An agreement that price shall be fixed by interested party to sale contract is valid, if his interest is known and there is no bad faith. West's Ann.Civ.Code, §§ 1655, 1656, 1729.

18. Contracts ⚡10(1)

A sugar beet growing agreement was not lacking in mutuality because of its failure expressly to obligate sugar company to accept delivery of and purchase beets from grower, as obligation to purchase must be inferred from agreement, in absence of showing of parties' contrary intention.

19. Contracts ⚡189

Intention of parties to 1949 beet growing agreement to bind sugar company to accept and purchase beets from grower must be inferred from parties' prior dealings, where their transactions relating to 1946, 1947 and 1948 beet crops showed without question that they expected 1949 agreement

to obligate sugar company to purchase and accept delivery of contract beets.

20. Contracts ⇨9(1, 3)

A sugar beet growing agreement was not fatally defective in not stating time, place and manner of delivery of beets by grower to sugar company, in view of statutes supplying rules for determining such matters when not otherwise controlled by contract or parties' dealings. West's Ann. Civ.Code, § 1763.

21. Landlord and Tenant ⇨138

A sugar company, leasing land to beet grower, was not entitled to recover damages for lessee's failure to apply seven tons of manure to each acre of land under cultivation during term of lease extension requiring lessee to apply minimum of seven tons of manure per acre in addition to minimum fourteen tons per acre required by existing lease, in view of provision in extension agreement that amount of manure to be applied to any particular area and time of its application should be at lessee's sole discretion, parties' intention being that lessee should have right to choose time to apply manure in accordance with lessee's convenience in growing beets.

22. Judgment ⇨181(24)

Pleading ⇨216(1)

Whether lease extension agreement, requiring lessee of land for beet growing to apply minimum of seven tons of manure per acre in addition to minimum fourteen tons per acre required by existing lease, required lessee to apply seven tons of manure to each acre of land under cultivation during term of extension, and parties' custom or prior dealings required fertilization of land at particular times, were matters which would ordinarily be resolved as fact questions during trial of lessee's action for value or contract price of beets delivered to lessor, not as questions of law on demurrer to lessor's counterclaim or on lessee's motion for summary judgment.

23. Damages ⇨6

When a party clearly appears to have suffered damage from breach of contract, liberal rule should be applied in allowing court or jury to determine amount of dam-

ages and uncertainty as to exact amount is no reason for denying all recovery.

24. Damages ⇨6

While statute provides that no damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and origin, fact that amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery thereof. West's Ann.Civ.Code, § 3301.

25. Judgment ⇨181(10)

Pleading ⇨195

In beet grower's action against sugar company for reasonable value or contract price of beets delivered to defendant by plaintiff or damages for defendant's breach of contract for plaintiff's growing of beets on land leased thereto by defendant, defendant's counterclaim for damages for plaintiff's failure to apply quantity of manure specified by lease extension agreement to each acre of leased land was sufficiently definite as to injury and measure of damages to withstand attack by demurrer and motion for summary judgment.

26. Set-Off and Counterclaim ⇨55

A defendant's mere pleading of unliquidated counterclaims for damages does not render unliquidated an otherwise certain or determinable debt owing to plaintiff, as such counterclaims are treated as discounts, not as payments made when debt is due, and hence do not affect liquidated or unliquidated character of debt.

27. Interest ⇨39(1)

In beet grower's action against sugar company for value or contract price of beets delivered to defendant by plaintiff, trial court erred in allowing plaintiff interest on amount found to be due for beets from date of defendant's statement of amount due, where plaintiff rejected such statement, sought recovery of larger amount on common count of complaint, and did not concede accuracy of statement until it moved for summary judgment, as claim was not certain when statement was tendered and reasonable or fair market value of beets was not readily ascertainable.

28. Judgment ¶186

On plaintiff's motion for summary judgment under statute, trial court must determine whether defendant has presented any facts giving rise to triable issue or defense and not determine such issue itself. West's Ann.Code Civ.Proc. § 437c.

29. Judgment ¶181(10)

In beet grower's action against sugar company for value or contract price of beets delivered thereto by plaintiff or damages for defendant's breach of contract by refusal to pay full value of beets, defendant's counterclaims presenting questions of parties' intentions on embarking on their contractual relations, their prior dealings, and certain trade practices, raised fact questions on which evidence should have been taken, so as to preclude summary judgment for plaintiff.

Richard E. Guggenheime, Eugene S. Clifford, Heller, Ehrman, White & McAuliffe, San Francisco, and Twitchell & Rice, Santa Maria, for appellant.

O'Melveny & Myers, William L. Scott, Pierce Works, Los Angeles, Lewis, Grant & Davis, Denver, Colo., and Dennis O'Rourke, Colorado Springs, Colo., as amici curiae on behalf of appellant.

Schauer, Ryon & McMahon and Robert W. McIntyre, Santa Barbara, for respondent.

SHENK, Presiding Justice.

This is an appeal from a summary judgment for the plaintiff. The pleadings and affidavits in support of the motion for the judgment disclose that the controversy arises from the contractual relations of the parties in the sale and purchase of sugar beets during the years 1945 to 1949 inclusive.

On November 1, 1945 the defendant Union Sugar Company leased to California Lettuce Growers approximately 1,000 acres of land situated in Santa Barbara and San Luis Obispo counties for a three year term. Rent for the first two years was fixed in the lease; for the third year the rent was to be determined by arbitration in the absence

of an interim agreement between the parties. The lease provided that the lessee should apply a minimum of fourteen tons of manure per acre during the term of the lease.

On the same day the parties entered into a so-called growing agreement whereby California Lettuce agreed to grow and deliver sugar beets to Union Sugar from 500 acres during 1946, the same amount in 1947 and from 400 acres in 1948. This agreement was silent as to price, terms of payment, place and manner of delivery, and contained no express promise on the part of Union Sugar to accept delivery and buy the beets. On November 1, 1947 the parties entered into an agreement to fix the rental for 1948 and extend the lease an additional year to include the crop period of 1949. The rental for this period was left to future determination. This agreement also provided that California Lettuce would apply at least seven additional tons of manure per acre over the minimum required by the original lease.

Two more agreements were entered into on November 1, 1948. In the first, the parties agreed to release 400 of the original 1,000 acres subject to the lease of 1945 as extended. The rent for the remaining 600 acres was fixed for the 1949 crop season. The second was a growing agreement obligating California Lettuce to grow and deliver beets to Union Sugar from 239 acres during 1949. This growing agreement, like its predecessor, failed to specify price, terms of delivery or obligation of Union Sugar to accept delivery and purchase the beets.

In 1946, 1947 and 1948 California Lettuce grew the sugar beet acreage pursuant to the growing agreement of November 1, 1945 and delivered the contract beets to Union Sugar. In each of those years printed supplemental purchase agreements were concluded by the parties. For the 1946 and 1947 crops the supplemental agreements set a flat purchase price per ton of beets based on their sugar content. The 1948 supplemental purchase agreement contained a price schedule based not on a flat price per ton but on a formula based upon the net return to Union Sugar from the processed

beet sugar. No supplemental purchase agreement was consummated by the parties for the 1949 crop.

The lease, growing, and supplemental purchase contracts were fully performed by both parties during 1946, 1947 and 1948. In 1949, under the growing agreement contemplating the delivery of 239 acres of beets, California Lettuce delivered only 117 acres. In a letter to California Lettuce dated December 13, 1949, Union Sugar recognized its debt in the amount of \$27,300.78 for the beets so received, but it refused to pay this full value because of the following setoffs: (1) The failure of California Lettuce to deliver beets from the full 239 acres under the growing agreement for 1949; (2) The failure of California Lettuce to apply the additional manure contemplated in the 1947 rental agreement; (3) An unpaid debt for sale and delivery of certain manure; (4) Charges due and owing for use of a pumping plant, and (5) Charges for the use of other acreage. If these setoffs were accepted by California Lettuce, the balance owed by Union Sugar would be \$3,825.95. Union Sugar subsequently tendered payment of that amount but California Lettuce refused to accept it. After the present action was commenced, Union Sugar tendered to California Lettuce the sum of \$2,355.09 which was accepted on account.

Refusing the off-sets, California Lettuce commenced this action on January 11, 1950 to recover the reasonable value or the contract price of the 117 acres of beets delivered to Union Sugar or damages for breach of contract. The first amended complaint states the first count in assumpsit for the reasonable value of the beets sold and delivered in the amount of \$45,000. In the second and third causes of action, California Lettuce alleges breach of contract and damages in the sum of \$29,655.37. Each cause of action admits the receipt of \$2,355.09 actually paid by Union Sugar.

Union Sugar answered and counterclaimed. It admitted liability in the amount of \$29,655.87, less \$2,355.09 paid on account and less the setoffs pleaded in five counterclaims. The first counterclaim alleged damages in the sum of \$7,412.45 resulting

from the failure of California Lettuce to deliver the full 239 acres of beets. The second counterclaim alleged a \$14,529.94 debt owed Union Sugar for the failure of California Lettuce to apply the additional manure as required by the 1947 lease extension. California Lettuce demurred to the first and second counterclaim and its demurrer was sustained.

In the affidavit in support of its motion for summary judgment California Lettuce accepted Union Sugar's statement that the reasonable value of the beets sold and delivered in 1949 was \$29,655.87, waiving any additional amounts those beets might reasonably be worth. For purposes of the motion, California Lettuce conceded Union Sugar's third, fourth and fifth counterclaims totalling \$1,532.45 and the sum of \$2,355.09 paid on account, leaving a balance of \$25,768.34.

The trial court found that Union Sugar's first and second counterclaims did not state facts sufficient to constitute a valid setoff against the first amended complaint. Union Sugar's demurrer to the amended complaint was overruled. The demurrers to the first and second counterclaims were sustained without leave to amend. October 19, 1953 the trial court accordingly gave summary judgment on the pleadings to California Lettuce in the amount of \$25,768.34 with interest from December 13, 1949 in the sum of \$6,942.49.

Union Sugar contends that its first and second counterclaims state valid setoffs; that its debt to California Lettuce, if any, was unliquidated and interest was not allowable, and that the judgment is contrary to law.

In support of the first counterclaim, Union Sugar alleges that California Lettuce violated the growing agreement of November 1, 1948 with respect to the 1949 crop in that California Lettuce delivered only 117 acres of beets while the contract called for delivery of 239 acres. The contract provides that California Lettuce "* * * personally grow, on suitable land in Santa Maria Valley, and deliver to (Union Sugar) two hundred thirty-nine (239) acres of beets during the year 1949." California Lettuce

contends that this agreement lacks mutuality, is illusory and void because there is no provision for price, time and place of delivery and no duty on Union Sugar to accept delivery and pay for the beets.

[1-8] The principal question is whether the contract is illusory and void for failing to stipulate the purchase price. California Lettuce argues that the contract leaves the price to the future discretion of one party and therefore lacks mutuality. Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable. See Civ. Code § 1598; Sutliff v. Seidenberg, Stiefel & Co., 132 Cal. 63, 64 P. 131, 469. If the price of a commodity in a sales contract is intended to be left to the subsequent agreement of the parties, the purported contract is merely an agreement to agree and therefore *nudum pactum* until the price is fixed or agreed upon. See Schimmel v. Martin, 190 Cal. 429, 213 P. 33; Avalon Products, Inc., v. Lentini, 98 Cal.App.2d 177, 219 P.2d 485; Jules Levy & Bro. v. A. Mautz & Co., 16 Cal.App. 666, 117 P. 936. Unless the court has ascertainable provisions of agreement before it, there is no contract on which the court may act. However, "The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained." McIlmoil v. Frawley Motor Co., 190 Cal. 546, 549, 213 P. 971, 972; see Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706; Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386; Sutliff v. Seidenberg, Stiefel & Co., supra, 132 Cal. 63, 64 P. 131, 469. Unexpressed provisions of a contract may be inferred from the writing or external facts. Thus it is well settled that a contract need not specify price if it can be objectively determined. Section 1729 of the Civil Code recognizes three ways of determining price. It can be fixed by the parties, determined from the prior course of dealings of the parties, and if these procedures are inapplicable, the contract price may be deemed the reasonable price under

the circumstances of the particular case. The absence of price provisions does not render an otherwise valid contract void. Civ. Code §§ 1728, 1655, 1656; Great Western Distillery Products, Inc. v. John A. Wathen Distillery Co., 10 Cal.2d 442, 74 P.2d 745. Unless the parties intended to leave the determination of price to future negotiations, courts should make the necessary findings and set the price under the applicable code provisions.

[9-11] In the present case Union Sugar alleges that "* * * the parties knew and understood that it was the standard practice of defendant to enter into separate supplemental and specific sugar beet contracts with each of its growers for the respective years in which the beets were to be grown." Pledaded with the history of the parties' commercial transactions, this allegation is sufficient to put the prior dealings of the parties and the practice of the industry in issue. In Buckner v. A. Leon & Co., 204 Cal. 225 at page 227, 267 P. 693, it was said: "It is the general rule that, when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract," quoting from Hind v. Oriental Products Co., 195 Cal. 655, 667, 235 P. 438. See Civ. Code §§ 1655, 1656; Code Civ.Proc. § 1870, subd. 12; 12 Cal. Jur.2d, Contracts § 140.

[12] As stated, the 1949 crop growing contract was preceded by dealings between the parties as far back as 1945. The 1946 and 1947 price and delivery terms were set in printed supplemental agreements which determined a flat price per ton of beets graduated on the basis of their sugar content. In 1948 this per ton pricing formula was replaced by the so-called scale or "net return" contract in wide use throughout the sugar beet industry. Under this type of agreement, the grower is paid for his beets according to the sugar content upon the basis of the net return from the sugar sold

by the processor during the current crop year. The 1948 supplemental price agreement provided: "The 'net return of Company' as used herein means the average net selling price actually realized by Company per 100 lbs. for 1948 crop sugar sold and delivered during the period August 1, 1948, to July 31, 1949, and shall be computed in accordance with the established system of accounting of Company by deducting from the gross selling price actually realized by Company for such sugar all such charges and expenditures as are regularly and customarily deducted by, and as determined by Company * * *. The average net selling price of Company, determined as aforesaid, shall be verified by a firm of independent public accountants chosen by the Company, which verification shall be conclusive."

Thus California Lettuce entered into the 1949 growing agreement with knowledge that it was the industry's usage and custom for each processor to enter into uniform supplemental contracts with all growers who supplied it with beets and that Union Sugar purchased on the same terms from all growers. In the absence of a contrary showing, it can fairly be concluded that the parties fully understood when they entered the 1949 growing agreement that California Lettuce would deliver its 1949 crop to Union Sugar under the same terms as were made uniformly available by Union Sugar to all growers from which it purchased sugar beets. This represents a sufficient pattern of prior dealing to support the conclusion that the parties intended the 1949 crop to be governed by the procedure previously followed. By failing to voice its intention to adopt a different procedure, if indeed it entertained such an intention, California Lettuce induced Union Sugar to rely upon the conclusion that the established pattern of pricing would prevail for the 1949 crop. California Lettuce should not now be permitted to deny the effect of that prior course of dealing.

[13-15] California Lettuce contends, however, that the 1948 "net return" formula cannot be used as a basis for determining price because it also is illusory and renders

the contract void. It argues that this formula is unilateral and lacks mutuality. This contention is not persuasive. The "net return" formula is sufficiently definite to satisfy the requirements of certainty and mutuality. While the accounting procedures adopted are those of Union Sugar, the contract specifically provides that the accounting procedures are "the established accounting system of Company." Thus Union Sugar may not alter its accounting system for the purpose of varying the resulting "net return" figures. Since the parties contracted with reference to an existing accounting system, California Lettuce may not now claim that the accounting procedures are unilateral and unfair. The contract, moreover, expressly calls for verification of the average net selling price by an independent firm of public accountants chosen by the Union Sugar. While Union Sugar has the sole power to select the accounting firm, the duty to select an "independent" firm adequately protects California Lettuce from arbitrary action. In any event, where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing. Civ. Code §§ 1655, 1656; *Universal Sales Corp. v. California, etc., Mfg. Co.*, 20 Cal.2d 751, 771, 128 P.2d 665; *Brogdex Co. v. Walcott*, 123 Cal.App.2d 575, 267 P.2d 28; *Brawley v. Crosby, etc., Foundation, Inc.*, 73 Cal.App.2d 103, 166 P.2d 392. The duty to exercise good faith would also combine with the commercial interests of Union Sugar to maximize its profits to overcome California Lettuce's objection that the agreement does not impose a duty on Union Sugar to sell at the prices best obtainable in the sugar market.

[16, 17] As applied to the 1949 crop, the 1948 supplemental agreement can be considered to leave open the precise amount that Union Sugar must pay per ton of beets. However adjusted to the "net return" to Union Sugar and the sugar content of the beets, the actual payment due could be changed from year to year by Union Sugar. This feature of the prior course of dealing

of the parties probably leaves to Union Sugar the power to set the ultimate price paid to California Lettuce. But this pricing feature should not make the contract illusory and void. Civil Code Section 1611 provides: "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth." Professor Williston says: "Even an agreement that the price shall be fixed by an interested party is valid if his interest is known and there is no bad faith." 1 Williston on Sales (Rev.Ed.) § 167, p. 434-5; see Civ.Code §§ 1729, 1655, 1656. In the present case the actual discretion of Union Sugar in setting the purchase price is limited both by the fact that Union Sugar must charge California Lettuce no more than it charges other growers generally and by the limits prescribed by the United States Secretary of Agriculture under the Sugar Act of 1948, 61 Stat. 922, 7 U.S.C.A. §§ 1100-1160. Regulation of the sugar industry by the U. S. Department of Agriculture pursuant to the Sugar Act of 1948 places effective limits upon the purchase price under growing agreements similar to the contracts involved in the present case. It also appears that the prices set for the 1949 crop were identical with those set for the 1948 crop accepted by the parties and adopted in the 1948 supplemental agreement.

[18,19] Nor does the 1949 growing agreement lack mutuality for failing expressly to obligate Union Sugar to accept delivery and to purchase the beets. The obligation to purchase must be inferred from the agreement in the absence of a showing of a contrary intention of the parties. *King-Keystone Oil Co. v. San Francisco Brick Co.*, 148 Cal. 87, 82 P. 849; *Preble v. Abrahams*, 88 Cal. 245, 26 P. 99; see *Samuels v. Ottinger*, 169 Cal. 209, 146 P. 638. In the present case the intention of the parties to bind Union Sugar to accept and purchase the beets must be inferred from the prior dealings of the parties. The transactions relating

to the 1946, 1947 and 1948 crops show without question that the parties expected the 1949 growing agreement to obligate Union Sugar to purchase and accept delivery of the contract beets. The contrary view, urged by California Lettuce, invites the untenable conclusion that one party agreed to sell but the other did not agree to purchase. The language of the agreement clearly contemplates a "purchase" as well as a "sale."

[20] The contention of California Lettuce that the agreement is fatally defective in not stating the time, place and manner of delivery cannot be sustained. This question is resolved against California Lettuce by section 1763 of the Civil Code which supplies the rules for determining the time, place and manner of delivery when those matters are not otherwise controlled by the contract or the dealings of the parties.

It must therefore be concluded that the trial court improperly sustained the demurrer to the first counterclaim.

[21,22] Union Sugar's second counterclaim, as stated, alleged damages in the amount of \$14,529.94 occasioned by the failure of California Lettuce to apply seven tons of manure to each of the 239 acres of Union Sugar's land under cultivation. This claim arose out of the lease extension agreement of November 1, 1947 which provided: "(4) That Lessee will apply a minimum of seven tons of steer manure per acre upon the leasehold premises in addition to the minimum fourteen tons per acre required in the existing lease, the amount of manure to be applied to any particular area and the time of its application to be at the sole discretion of the lessee." Despite this discretion expressly conferred on California Lettuce in the agreement, Union Sugar's counterclaim is based on a construction of the agreement requiring California Lettuce to apply the manure during the term of the lease extension, that is, any time between November 1, 1948 and October 30, 1949. The parties undoubtedly intended that California Lettuce should have the right to choose the time to apply the manure in accordance with its conven-

ience in growing the beets. If fertilization of the land is required at particular times, custom or the prior dealings of the parties should be shown. These are matters which would ordinarily be resolved as questions of fact during the course of the trial and not as questions of law on the demurrer or motion for summary judgment.

[23-25] Union Sugar alleges that the damages it suffered from the failure of California Lettuce to apply the manure are the cost of the manure and the expense of application. California Lettuce argues that the manure was to be applied to land on which it grew its crop, making the damages, if any, result to California Lettuce, not to Union Sugar, the lessor. Union Sugar concedes that the damages are difficult to ascertain with precision, but it contends that when liability is shown it is not necessary for the injured party to plead his damages with arithmetical exactness where the nature of the injury makes this impossible. Section 3300 of the Civil Code anticipates this kind of problem where it states that the measure of damages "* * * is the amount which will compensate the party aggrieved for all the detriment proximately caused * * * or which, in the ordinary course of things, would be likely to result * * *" from the breach of contract. In *Smith v. Mendonsa*, 108 Cal.App.2d 540, at page 543, 238 P.2d 1039, at page 1040, in dealing with a similar problem the court said, "* * * when it clearly appears that a party has suffered damage a liberal rule should be applied in allowing a court or jury to determine the amount, and that, given proof of damage, uncertainty as to the exact amount is no reason for denying all recovery." While Civil Code section 3301 provides that no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin, the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery. See *Stott v. Johnston*, 36 Cal.2d 864, 229 P.2d 348, 28 A.L.R.2d 580; *Long Beach Drug Co. v. United Drug Co.*, supra, 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386;

Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163; *Meyers v. Texas Co.*, 6 Cal.2d 610, 59 P.2d 132; *Holt Manufacturing Co. v. Thornton*, 136 Cal. 232, 68 P. 708; *Allen v. Gardner*, 126 Cal. App.2d 335, 272 P.2d 99; *Smith v. Mendonsa*, supra, 108 Cal.App.2d 540, 238 P.2d 1039. It follows that the second counterclaim was sufficiently definite as to the injury and the measure of damages to withstand attack by demurrer and motion for summary judgment.

[26] It remains to determine whether the trial court properly allowed California Lettuce the sum of \$6,942.49 interest on the \$25,768.34 found to be due and owing for delivery of the 117 acres of beets to Union Sugar. The prevailing party is entitled to interest on the amount of his judgment where the damages are certain, or capable of being made certain by calculation, and the right of recovery is vested in him upon a particular day. Civ.Code § 3287. California Lettuce correctly contends that the mere pleading of unliquidated counterclaims does not render unliquidated an otherwise certain or determinable debt owing to the plaintiff. The unliquidated counterclaims are given treatment as discounts, not as payments made at the time the debt is due. *Lineman v. Schmid*, 32 Cal. 2d 204, 195 P.2d 408, 4 A.L.R.2d 1380; *Hansen v. Covell*, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670. They do not therefore affect the liquidated or unliquidated character of the debt.

[27] The trial court allowed the interest on the ground that Union Sugar fixed the amount due in its statement to California Lettuce of December 13, 1949. The statement, setting the amount owed at \$27,300.78, was rejected by California Lettuce. In the first cause of action stated in its complaint, California Lettuce sought on a common count to recover \$45,000 which it alleged to be the reasonable value of the beets delivered to Union Sugar. This allegation controverts Union Sugar's statement of the amount due. Not until its motion for summary judgment did California Lettuce concede the accuracy of Union Sugar's statement. Under these circumstances it is

impossible to conclude fairly that the claim was certain at the time Union Sugar tendered its statement. Nor can it be said that the reasonable or fair market value is readily ascertainable in the present case. See *Lineman v. Schmid*, supra, 32 Cal.2d 204, 195 P.2d 408, 4 A.L.R.2d 1380. Difficult questions of the intention of the parties as to price and their prior dealings above mentioned would have to be tried out before it could be said with certainty what the price of the beets delivered should have been. Hence it was improper to allow interest from the date of Union Sugar's statement.

[28,29] Under the foregoing circumstances the trial court erred in granting the plaintiff's motion for summary judgment. Section 437c of the Code of Civil Procedure provides: "* * * if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." The issue to be determined by the trial court in consideration of the motion under section 437c is whether the "* * * defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case." *Coyne v. Krempels*, 36 Cal.2d 257, 260, 223 P.2d 244, 246; *Gardner v. Jonathan Club*, 35 Cal.2d 343, 217 P.2d 961; *Hardy v. Hardy*, 23 Cal.2d 244, 143 P.2d 701; *Eagle Oil & Refining Co. v. Prentice*, 19 Cal.2d 553, 122 P.2d 264; *Walsh v. Walsh*, 18 Cal.2d 439, 116 P.2d 62. The defendant's first and second counterclaims present questions of the parties' intentions upon embarking upon their contractual relations with each other, their prior dealings and certain trade practices. Since these matters are questions of fact on which evidence should be taken, it is clear that the present case is not a proper one for grant-

ing summary judgment. See *Walsh v. Walsh*, supra, 18 Cal.2d 439, 116 P.2d 62; *Travelers Indemnity Co. v. McIntosh*, 112 Cal.App.2d 177, 245 P.2d 1065; *Gibson v. De La Salle Institute*, 66 Cal.App.2d 609, 152 P.2d 774.

The order sustaining the demurrers to the first and second counterclaims, the order granting the motion for summary judgment and the allowance of interest were erroneous.

The judgment is reversed.

GIBSON, C. J., EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., and MUSELL, J. pro tem.



45 Cal.2d 489

Eula Mae SINGLETON, Plaintiff and Respondent,

v.

Manuel Smith PERRY as Administrator with the Will Annexed of the Estate of S. W. Corlett, Deceased, Defendant and Appellant.

S. F. 19288.

**Supreme Court of California,
In Bank.**

Nov. 8, 1955.

Rehearing Denied Dec. 8, 1955.

Actions for malicious prosecution for alleged theft of automobile and other personal property. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Schauer, J., held that where two consolidated malicious prosecution actions were based on one simultaneous arrest for two different criminal charges instigated by defendant and jury found that one charge was justified while the other was not, plaintiff could recover damages for malicious prosecution based on unjust charge without specifically showing what damages were attributed to the malicious prosecution.

Affirmed, and appeal from order denying motion for new trial dismissed.

Opinion, 280 P.2d 531, vacated.

1. Automobiles ⇨19

With respect to transfer of motor vehicles, old rules respecting transfer of personal property must give way to those set forth in the Vehicle Code. Vehicle Code, §§ 175(a), 176, 177, 186, 503.

2. Automobiles ⇨19

Where person paid off balance of purchase price due on automobile purchased by another and allowed such other to continue to use the automobile but had the pink slip of legal ownership issued in his name, there was no transfer of legal ownership to other person. Vehicle Code, §§ 175(a), 176, 177, 186, 503.

2. Malicious Prosecution ⇨64(1)

In malicious prosecution action based on alleged theft of automobile in the legal name of defendant, evidence justified jury finding that defendant had given plaintiff permission to use automobile and had no right to use criminal process to obtain its possession.

4. False Imprisonment ⇨3

"False imprisonment" is unlawful violation of the personal liberty of another, while "malicious prosecution" is procuring the arrest or prosecution of another under lawful process, but for malicious motives and without probable cause. Pen.Code, § 236.

See publication Words and Phrases, for other judicial constructions and definitions of "False Imprisonment" and "Malicious Prosecution".

5. False Imprisonment ⇨10

The provocation, motive and good faith of defendant in an action for false imprisonment constitute no material element in the case, and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages.

6. Malicious Prosecution ⇨39, 55

Malice and want of probable cause are the gist of the action for malicious prosecu-

tion, and without allegation and proof of both, action will fail.

7. False Imprisonment ⇨2, 7(1)

Malicious Prosecution ⇨34

Damages are not recoverable for a legal arrest and conviction, and therefore, in cases of malicious prosecution, it becomes necessary to await the final determination of the action, but the same principle does not apply to an action for false imprisonment, as the form of action is based upon an illegal arrest, and no matter ex post facto can legalize an act which was illegal at the time it was done.

8. False Imprisonment ⇨20(1)

Malicious Prosecution ⇨51

An essential of the complaint for malicious prosecution is that the proceeding upon which it is based has finally terminated in favor of plaintiff, but this is not a necessary or proper allegation in an action for false imprisonment.

9. Malicious Prosecution ⇨67

Damages for malicious prosecution may include loss of time and liberty, injury to reputation, mental suffering, and bodily harm, if any.

10. Malicious Prosecution ⇨64(1)

In action for malicious prosecution for alleged theft of automobile and personal property, evidence sustained a verdict for plaintiff on basis of prosecution for alleged theft of automobile.

11. Malicious Prosecution ⇨56

Where two consolidated malicious prosecution actions were based upon one simultaneous arrest for two different criminal charges instigated by defendant and jury found that one charge was justified while the other was not, plaintiff could recover damages for malicious prosecution based on unjustified charge without specifically showing what damages were attributable to the malicious prosecution only.

12. Pleading ⇨72

The prayer for relief is no part of the statement of the cause of action and should, where necessary, be disregarded.

13. Damages $\Rightarrow$ 157(1)

Generally, in a contested case, plaintiff may obtain relief justified by allegations of complaint and the evidence, even though relief is greater than or different from that demanded.

14. Appeal and Error $\Rightarrow$ 1068(4)

In malicious prosecution actions, where court instructed jury that plaintiff was suing for a total of \$400,000, where in fact she could recover no more than \$200,000 under the complaints, and jury returned a verdict of \$25,000 damages, error, if any, was harmless.

15. Appeal and Error $\Rightarrow$ 110

Order denying motion for new trial is not appealable. West's Ann.Code Civ. Proc. § 963.

Theodore M. Monell and William Klein, San Francisco, for appellant.

Pierre J. Ibos and James A. Himmel, San Francisco, for respondent.

SCHAUER, Justice.

Defendant S. W. Corlett¹ appeals from a judgment pursuant to a jury verdict against him in the amount of \$25,000 in an action for malicious prosecution and for false imprisonment. Plaintiff brought two such actions, the present action, which is based upon defendant's charge that plaintiff stole a Cadillac automobile, and a second action, which is based upon defendant's charge that plaintiff stole rings, luggage, and other personal property.² As a result of the two charges plaintiff underwent a single arrest, imprisonment, and a preliminary hearing which resulted in dismissal of the charges. The two civil actions were tried together. Verdict and judgment in the second action were for defendant and no appeal was taken.

1. After defendant Corlett took this appeal he died and the administrator of his estate was substituted as defendant. References to defendant in this opinion are to Corlett.
2. The pleadings in the second action are not before us but the briefs of plaintiff

The principal issue is whether, in view of the fact that the arrest and detention for the claimed theft of the automobile, on which the present action is based, were simultaneous with the arrest and detention which the jury in the second action found justified, plaintiff has shown in the present action that she was damaged in any measurable amount, or at all. Defendant also contends: the evidence does not support the verdict for plaintiff in that it establishes that the Cadillac belonged to defendant; the verdict in the second action (in which no appeal was taken) is inconsistent with the verdict in this action; the trial court erred to defendant's prejudice by instructing the jury that plaintiff sued for a total of \$400,000 when in fact the total amount for which plaintiff prayed was only \$200,000. We have concluded that each of these issues must be resolved against defendant.

The Evidence

Defendant Corlett and plaintiff were not married but lived together as husband and wife in San Francisco from 1947 until the quarrel in 1952 which led to this action. Defendant supported plaintiff and gave her many presents. Among these was a Buick automobile. Plaintiff traded this car in as part payment on a Cadillac automobile. Defendant was angry about plaintiff's purchase of the Cadillac. Because of his anger plaintiff went to Los Angeles in the Cadillac. While plaintiff was in Los Angeles defendant paid the balance due on the Cadillac and had the "pink slip" of legal ownership issued in his name; plaintiff remained the registered owner. Defendant told plaintiff, "I paid the car off for you" and "I paid the car note off so you don't owe anything on the car." Defendant persuaded plaintiff to return to San Francisco and they continued to live together but they frequently quarreled.

and defendant agree that the complaints in the two actions are substantially identical except for the allegations of the criminal charges in respect to the description of the personal property charged to have been stolen.

While defendant was ill and hospitalized they had an argument. Plaintiff took the Cadillac, luggage (which she testified did not belong to her), rings and other articles of personal property (which are the subject of conflicting testimony as to whether they had been given to plaintiff by defendant), and went to Cleveland, Ohio. Defendant reported the matter to his attorney, then to a police inspector, then to a deputy district attorney. Defendant swore to two complaints against plaintiff, one charging theft of the car (Veh.Code, § 503) and one charging grand theft of other articles of personal property. Defendant gave the police various addresses to which he thought plaintiff might have gone. The police found her in Cleveland. She was jailed there for nearly a month, returned to San Francisco in custody of a police matron, and jailed in San Francisco for about a week. As previously stated, after preliminary hearing both criminal cases were terminated in favor of plaintiff (defendant in the criminal cases) by dismissal. On the issue of damages, plaintiff testified to her mental and physical suffering, humiliation, damage to her reputation among "friends that looked on me as decent and respectable," and her difficulties in obtaining employment.

Defendant recognizes the familiar rule that where the evidence is in conflict the appellate court will not disturb the verdict of the jury, but asserts that "in view of the peculiarity of the particular situation existing in the case at bar, appellant

urges that the record undisputedly shows that he was the owner of the Cadillac and, therefore, entitled to pursue the same in the hands of plaintiff and hence that his procedure in having her arrested constitutes neither false arrest nor can the ensuing criminal proceedings constitute malicious prosecution, even though she was acquitted at the hearing."

[1-3] Defendant's words as to "paying the car off" for plaintiff, followed by plaintiff's possession of the car, could be construed as an executed gift of all defendant's interest in the automobile, in the absence of the special statutory rules as to transfer of legal title to automobiles. But "Old rules respecting transfer of personal property give way to those set forth in the Vehicle Code. [Citation.]" (Pike v. Rhinehart (1952), 112 Cal.App.2d 530, 532, 246 P.2d 963.) The transaction as to the Cadillac took place, as previously stated, in 1952. Applicable sections of the Vehicle Code as amended in 1951 are quoted in the margin.³ Because of those sections no transfer of legal ownership to plaintiff was effected. The parties themselves, however, on the view of plaintiff's evidence which the jury impliedly accepted, could have believed that defendant had given plaintiff the right to use the automobile as she desired and therefore he had no right to use criminal process to obtain its possession.

[4] As stated, plaintiff's action is both for false imprisonment and for malicious prosecution. As the court says in Neves

3. Section 175, par. (a): "Upon transfer of the title or any interest of the legal owner or owner in or to a vehicle registered hereunder, the person whose title or interest is to be transferred shall write his signature, and the transferee shall write his signature and address, in the appropriate spaces provided upon the reverse side of the certificate of ownership issued for such vehicle."

Section 176: "It is unlawful for any person to fail or neglect properly to endorse, date and deliver the certificate of ownership to a transferee who is lawfully entitled to a transfer of registration."

Section 177: "Whenever the owner of a vehicle registered hereunder sells or

transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department."

Section 186 (as enacted in 1935): "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass" until the parties have complied with described procedures as to the "pink slip" of legal ownership and the "white slip" of registration.

v. Costa (1907), 5 Cal.App. 111, 117-118, 89 P. 860, "False imprisonment is the unlawful violation of the personal liberty of another" (Pen.Code, sec. 236), the interference with the personal liberty of the plaintiff in a way which is absolutely unlawful and without authority. Malicious prosecution is procuring the arrest or prosecution of another under lawful process, but from malicious motives and without probable cause.

[5, 6] "The provocation, motive and good faith of the defendant in an action for false imprisonment constitute no material element in the case and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages. On the other hand, malice and want of probable cause are the gist of the action for malicious prosecution. Without allegation and proof of both, the action will fail. [Citation.]

[7, 8] "No one can recover damages for a legal arrest and conviction; therefore, in cases of malicious prosecution it becomes necessary to await the final determination of the action. But the same principle does not apply to an action for false imprisonment, as the form of action is based upon an illegal arrest and no matter *ex post facto* can legalize an act which was illegal at the time it was done. From this it will be seen that one of the essential elements of a complaint for malicious prosecution is that the proceeding upon which it is based has finally terminated in favor of the plaintiff, while it is equally apparent that this is not a necessary or proper allegation in an action for false imprisonment. [Citations.]" (Accord, *Barrier v. Alexander* (1950), 100 Cal.App.2d 497, 499, 224 P.2d 436; *Collins v. Owens* (1947), 77 Cal.App. 2d 713, 715-716, 176 P.2d 372.)

It is to be assumed, in view of the instructions given, that the verdict is based upon the tort of malicious prosecution, rather than the tort of false imprisonment. Concerning false imprisonment the jury were told only that it is defined by the Penal Code (§ 236) and is "the unlawful violation of the person and liberty of another," and that

"the interference of the personal liberty of Eula Mae Singleton was upon a complaint made and a warrant issued by a duly constituted legal authority." There was no instruction as to damages recoverable for the tort of false imprisonment.

[9] On the other hand, the jury were instructed at some length concerning the tort of malicious prosecution, particularly the elements of probable cause and malice and defendant's claim that he acted on the honestly requested advice of counsel after a full and fair presentation of the facts. And they were correctly told (see *Wong v. Earle C. Anthony, Inc.* (1926), 199 Cal. 15, 18, 247 P. 894) that damages for such tort "may include loss of time and liberty, injury to reputation, if any, mental suffering, as well as for bodily harm, if any."

[10] In this state of the instructions it is to be assumed, as indicated, that the jury followed the charge as to malicious prosecution and found the existence of facts which constitute that tort.

Asserted Inconsistency of the Verdicts in Plaintiff's Two Actions

The verdicts of the jury in the two civil actions do not appear to be necessarily and as a matter of law inconsistent. As previously stated, the jury could have concluded that defendant gave plaintiff the right to use the Cadillac automobile as she saw fit and therefore had no proper ground of complaint when she took it. The jury could have believed that defendant's motives in pressing the charge with reference to the automobile were improper. Thus, it could have determined that the elements of a cause of action for malicious prosecution were shown (see *Jaffe v. Stone* (1941), 18 Cal.2d 146, 149, 114 P.2d 335, 135 A.L.R. 775): a judicial proceeding terminated in plaintiff's favor; the existence of facts which show lack of probable cause; and malice. On the other hand, the jury could have believed that defendant acted without malice and with probable cause in pressing the charge as to the other property which defendant had not given plaintiff (luggage which plaintiff herself testified was not hers and other items of personal property which defendant testified belonged to him).

Defendant contends that even though the actions were consolidated for trial only, and even though plaintiff did not appeal in the second action, both actions are before this court, and this court should reconcile the assertedly inconsistent verdicts (citing *Ferroni v. Pacific Finance Corp.* (1943), 21 Cal.2d 773, 780, 135 P.2d 569; *Southern Pacific Co. v. City of Los Angeles* (1936), 5 Cal.2d 545, 548, 55 P.2d 847; *In re Estate of McSweeney* (1951), 107 Cal.App.2d 140, 144, 236 P.2d 846). Since the verdicts are not inconsistent, we need not discuss this contention.

Damages Resulting from Malicious Prosecution of or False Arrest under a Criminal Charge Where Plaintiff is Simultaneously Arrested and Prosecuted under a Justified Charge

As stated, the judgment in the second case became final without appeal. It is a conclusive determination that plaintiff has no cause of action on account of the charge of theft of the rings, luggage, and other personal property. According to defendant, plaintiff's damages were not shown to have been proximately caused by the criminal charge involved in the present action as opposed to the charge involved in the second action. (Citing Civ.Code, § 3333: The measure of damages for a tort, except where otherwise expressly provided in the code, is "the amount which will compensate for all the detriment *proximately caused thereby* * * *." (Italics defendant's). Defendant says, "it was necessary for the plaintiff to show that she sustained damages as a result of the charge of stealing the automobile, as distinguished from the charge of stealing the jewelry. * * * [I]f the particular charge made in the action in which the jury returned a verdict in respondent's [plaintiff's] favor were eliminated, she would, nevertheless, have suffered exactly the same experiences, with no right of recompense or recovery. There is not one scintilla of evidence in the record which shows that by reason of the automobile charge plaintiff sustained any particular damage. Her whole cause is based upon her imprisonment predicated upon the two

charges. It is conceivable that if a person were imprisoned on two charges, entirely dissimilar, a person might sustain damages by reason of being charged with some crime of horror as against a more conventional crime, even though lawfully incarcerated for the conventional crime, but in the instant case both charges were felonies and there is no reason that respondent would have suffered additionally or less because of the making of either charge by itself."

Basically, the problem is this: Must plaintiff, having shown that she was damaged by the prosecution, go further and show specifically that her damage was attributable to the prosecution on the unjustified charge rather than that on the justified charge? It is stated in *Boogher v. Bryant* (1885), 86 Mo. 42, 49, 50, "The authorities show, as we think, that, in order to maintain an action like this [malicious prosecution], 'it is not necessary that the whole proceeding be utterly groundless, for, if groundless charges are maliciously and without probable cause, coupled with others which are well founded, they are not on that account the less injurious, and, therefore, constitute a valid cause of action.' [Citations.] * * *

"[I]t is manifest that whatever difficulty, or impossibility even, there may be, in discriminating between the injuries, resulting from the good and bad counts, thus improperly blended, is chargeable to the wrongful act of the defendants themselves, and, upon principle, it would seem that they should not now be permitted to plead their own wrong in their own justification. If, by their wrongful acts, the plaintiff could not readily apportion his expenses, or dissect his trouble, care, anguish and vexation, and apportion them among the five counts in the information, it would seem cruel to hold that no basis could, therefore, be afforded by which to adjust the damages to the injuries sustained.

"Indeed, it would seem almost a mockery to hold that, by uniting groundless accusations with those for which probable cause might exist, the defendants could thereby escape liability, because of the injured party's inability to divide his damages between

the two with delicate nicety. Such, we think, is not the law."

[11] We agree with the foregoing reasoning, and conclude that plaintiff, having shown that defendant maliciously joined an unjustified charge with a justified charge, does not have the further burden of showing that her damage was specifically attributable to the malicious prosecution as opposed to the prosecution which the jury found was not malicious.

Erroneous Instruction as to Amount of Damages Prayed for

The trial court of its own motion instructed the jury as follows: "[The complaints] asked for \$100,000 for general damages for pain, suffering, confinement, and \$100,000 for punitive damages or damages by way of example. Both complaints ask for the same amount, \$100,000 for general damages and \$100,000 for punitive damages. * * * As I said to you before, the full amount of the two complaints is \$400,000, \$100,000 for general damages on one case and \$100,000 for punitive damages * * *."

In fact, in each complaint plaintiff alleged actual damages of \$100,000 in the first cause of action; in the second cause of action she alleged no actual damages but asked punitive damages of \$100,000; she prayed for only \$100,000. The jury awarded \$10,000 general damages and \$15,000 punitive damages.

[12] Defendant complains that it was prejudicial error to tell the jury that "the full amount of the two complaints is \$400,000," because the amount of plaintiff's recovery was limited to \$200,000, the total amount for which the prayers ask. Plaintiff argues that the instructions as to damages quoted, 289 P.2d 800, correctly state the law because section 580 of the Code of Civil Procedure provides, "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the

issue"; and, as plaintiff says, "the prayer of a complaint for relief is no part of the statement of the cause of action and should where necessary be disregarded" (see *Merlino v. West Coast Macaroni Mfg. Co.* (1949), 90 Cal.App.2d 106, 112, 202 P.2d 748; *Hoffman v. Pacific Coast Const. Co.* (1918), 37 Cal.App. 125, 129-130, 173 P. 776).

[13] It is the usual rule that in a contested case plaintiff may secure relief justified by the allegations of the complaint and the evidence, even though the relief is greater than or different from that demanded. (E. g., *Nathan v. Dierssen* (1913), 164 Cal. 607, 611, 130 P. 12; *Title Ins. & Trust Co. v. Ingersoll* (1910), 158 Cal. 474, 480, 111 P. 360; *Johnson v. Polhemus* (1893), 99 Cal. 240, 244-245, 33 P. 908; *Von Schrader v. Milton* (1929), 96 Cal.App. 192, 198, 273 P. 1074; *Potter-Huffman Land & Livestock Co. v. Witcher* (1920), 48 Cal.App. 93, 96-97, 191 P. 725.) In upholding awards of relief not specifically prayed for, the courts sometimes particularly note that there is a prayer for general relief (such as the prayer in the present complaint "for such other and further relief as to the Court may seem just and proper"). (E. g., *Rogers Development Co. v. Southern California etc. Co.* (1911), 159 Cal. 735, 741, 115 P. 934, 35 L.R.A.,N.S., 543; *Booker v. Aitken* (1903), 140 Cal. 471, 473, 74 P. 11; *Mock v. City of Santa Rosa* (1899), 126 Cal. 330, 341, 58 P. 826; *Geller v. Anolik* (1954), 127 Cal.App.2d 21, 27, 273 P.2d 29; *La Jolla Casa De Manana v. Hopkins* (1950), 98 Cal.App.2d 339, 349, 219 P.2d 871; *Katz v. Driscoll* (1948), 86 Cal.App.2d 313, 318, 194 P.2d 822; *Morgan v. Veach* (1943), 59 Cal.App.2d 682, 692, 139 P.2d 976 [complaint prayed for injunction and general relief; decree awarding injunction or, in the alternative, damages, affirmed]; *Churchill v. Kellstrom* (1943), 58 Cal.App.2d 84, 90, 136 P.2d 602 [damages can be awarded in quiet title suit, upon the theory of inverse condemnation, under prayer for general relief, even though no damages prayed for]; *Martin v. Pacific Southwest Royalties* (1940), 41 Cal.App.2d 161, 172, 106 P.2d 443; *Sintzel v. Wagner*

(1931), 119 Cal.App. 335, 337, 6 P.2d 293.) But it has been held that a court cannot properly award an amount of damages in excess of that for which the complaint prays. (*Meisner v. McIntosh* (1928), 205 Cal. 11, 13, 269 P. 612 [distinguishing *Kimball v. Swenson* (1921), 51 Cal.App. 361, 366, 196 P. 781, which says that relief in an amount exceeding that prayed for was "embraced within the issue" and therefore could be allowed under section 580 of the Code of Civil Procedure]; *Crofoot v. Blair Holdings Corp.* (1953), 119 Cal.App.2d 156, 195, 260 P.2d 156; *Frost v. Mighetto* (1937), 22 Cal.App.2d 612, 616, 71 P.2d 932; *Monterey Park Commercial etc. Bk. v. Bank of W. Hollywood* (1932), 125 Cal.App. 402, 409, 13 P.2d 976; *Brown v. Ball* (1932), 123 Cal.App. 758, 768, 12 P.2d 28; contra, *Du Pont v. Allen* (1930), 110 Cal.App. 541, 543, 294 P. 409 [see *Crofoot v. Blair Holdings Corp.* (1953), supra, at page 196 of 119 Cal.App.2d, footnote, at page 177 of 260 P.2d]; *McKesson v. Hepp* (1923), 62 Cal. App. 619, 620-621, 217 P. 802.)

[14] Regardless of the merits of plaintiff's position contrary to the cases which hold that an amount of damages in excess of that prayed for cannot be awarded, no harm appears to have resulted from the instruction, for the verdict was for an amount well within the limit of the amounts alleged as well as the amounts for which the prayers ask. (*Eastlick v. City of Los Angeles* (1947), 29 Cal.2d 661, 674, 177 P.2d 558, 170 A.L.R. 225; cf. *Redwing v. Moncravie* (1933), 131 Cal.App. 569, 578, 21 P.2d 986.)

[15] For the reasons above stated, the judgment is affirmed. Defendant has also noticed appeals from an order denying his motions, in the alternative, for judgment notwithstanding the verdict or for a new trial. The order denying the motion for judgment notwithstanding the verdict is affirmed. (See Code Civ.Proc., § 629, last paragraph; *MacDonald*, *New Procedure Affecting Motions for New Trial* (1951), XXVI State Bar Journal 299, 303.) The order denying the motion for new trial is not appealable (Code Civ.Proc., § 963; *Armenta v. Churchill* (1954), 42 Cal.2d 448,

451, 267 P.2d 303; *Pipoly v. Benson* (1942), 20 Cal.2d 366, 368, 125 P.2d 482, 147 A.L.R. 515), and the purported appeal from such order of denial is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.



137 Cal.App.2d 158

ARGONAUT INSURANCE EXCHANGE,
an Interinsurance exchange,
Petitioner,

v.

Gordon Frank KATES, a minor, by his guardian ad litem and trustee, Pauline Roblson, and Industrial Accident Commission of the State of California, Respondents.

Civ. 16793.

District Court of Appeal, First District,
Division 1, California.

Nov. 21, 1955.

Hearing Denied Jan. 18, 1956.

Workmen's compensation proceeding. The Commission awarded death benefit to minor son, and compensation carrier sought writ of review and annulment of order. The District Court of Appeal, Bray, J., held that induction of minor son into army did not constitute an emancipation which would relieve divorced father of his obligation to comply with court order for support of minor son, and, therefore, son, who was 17 years and four months old at time of father's fatal injury, was child for whose maintenance father was legally liable at time of injury within Labor Code provision imposing, in such situation, conclusive presumption of dependency.

Award affirmed.

I. Parent and Child ⚡ 16

As between government and parent, minor child becomes emancipated from control of parent on enlistment or drafting into the armed forces.

2. Parent and Child ⚡16

Father may emancipate his child. West's Ann.Civ.Code, § 211.

3. Divorce ⚡310**Parent and Child** ⚡16**Workmen's Compensation** ⚡460

Induction of minor son into army did not constitute an emancipation which would relieve divorced father of his obligation to comply with court order for support of minor son, and, therefore, son, who was 17 years and four months old at time of father's fatal injury, was child for whose maintenance father was legally liable at time of injury within Labor Code provision imposing, in such situation, conclusive presumption of dependency. West's Ann. Labor Code, § 3501; West's Ann.Civ.Code, §§ 203, 204, 211.

Leonard, Hanna, & Brophy, San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent Industrial Accident Comm.

BRAY, Justice.

Raising the interesting question as to whether enlistment in the United States Army by a minor under 18 constitutes an emancipation making the presumption of dependency provided in section 3501, Labor Code, inapplicable, petitioner seeks review and annulment of an order of the commission awarding a death benefit to respondent Gordon, the minor son of John Kates who was killed in an industrial accident.

Facts.

John and his wife, Pauline, were divorced in 1939 by a decree of the superior court of the state of Washington, under which she received no alimony, but which ordered John to pay her \$40 per month for the support of their three children, of whom she was given custody. April 22, 1954, John was killed in an industrial accident in California. At that time said decree was in full force. The other two children had passed the ages of 18. Gordon was 17 years and 4 months old. A week after his 17th birthday and almost 4 months prior to

his father's death, Gordon, with his mother's consent, enlisted in the army, and at the time of his father's death was receiving \$74 a month as a private. For an extended period prior to his death John had not in fact paid the support money ordered by the court nor supported Gordon in any manner. The commission applied the presumption of dependency provided by section 3501, Labor Code, and granted to Gordon a death benefit of \$7,000.

Emancipation.

Section 3501, Labor Code: "The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * * (b) *A child under the age of eighteen years or over that age but physically or mentally incapacitated from earning, upon the parent with whom he is living at the time of the injury of the parent or for whose maintenance the parent was legally liable at the time of injury, there being no surviving dependent parent.*" (Emphasis added.)

It is contended that the father was no longer legally liable for Gordon's maintenance because the latter's enlistment emancipated him from his parents and hence the conclusive presumption of that section does not apply. Whether this is so is a matter of first impression in this state. Although the Civil Code provides that a child may be emancipated by an abuse of parental authority, § 203, by marriage or attaining majority, § 204, or by the parent voluntarily relinquishing it, § 211, there is no provision for emancipation by enlistment in the service.

[1] It has long been established that as between the government and the parent the minor becomes emancipated from the control of the latter on enlistment or drafting into the armed forces. See *Baker v. Baker*, 1868, 41 Vt. 55; *In re Morrissey*, 1890, 137 U.S. 157, 11 S.Ct. 57, 34 L.Ed. 644; *United States v. Williams*, 302 U.S. 46, 58 S.Ct. 81, 82 L.Ed. 39, rehearing denied 302 U.S. 779, 58 S.Ct. 361, 82 L.Ed. 602.

The effect of a minor's enlistment upon the father's obligation to comply with a court order for the minor's support has

been determined elsewhere in *Corbridge v. Corbridge*, 1952, 230 Ind. 201, 102 N.E.2d 764. There, with the consent of both parents, the minor son enlisted in the army at a time when a divorce decree requiring the father to pay \$45 per month for the minor's support was still in effect. On appeal from a judgment finding the father in contempt for failing to comply with the decree, the court flatly held that the minor's enlistment emancipated the child and made the father no longer liable for his support. The court referred to a statement in the *Morrissey* case, *supra*, 102 N.E.2d at page 767: "'An enlistment is not a contract only, but effects a change of status'" and the following in *Iroquois Iron Co. v. Industrial Comm.*, 1920, 294 Ill. 106, 109, 128 N.E. 289, 290, 12 A.L.R. 924: "'When a minor enlists in the military service of this country, he ceases to be a part of his father's family, and puts himself under the control of the government, and is consequently emancipated so long as this service continues. * * *'" It then held, 102 N.E.2d at page 768:

"By the son's enlistment, his custody was placed in the United States Army. We cannot presume that the federal government did not and would not make full and adequate provision for his support, maintenance, medical care, and education if required. This would be true whether the son enlisted or was drafted.

"As soon as the son entered the armed forces the purposes of the trust for support, maintenance and education abated, and so continued as long as that service continued. * * *

"There is no more reason for equity granting the coercive remedy of imprisonment to compel payment of past due installments of support after a son is a member of the armed forces of the United States than if he had attained his majority, or if prior thereto he had been absolutely emancipated."

The *Iroquois* case, *supra*, dealt with a situation almost identical with ours. Under a divorce decree in full force at the

time of the father's death resulting from an industrial injury, the father was ordered to pay certain sums weekly for the support of his minor son. With the father's consent, but without the mother's, and approximately three years before the father's death, the minor enlisted in the United States Marines, and was still in that service and a minor at the father's death. The commission awarded the son compensation for the death of the father. The problem before the court was stated, 128 N.E. at page 290: "It seems too clear to require argument that Reginald Olesen was not dependent upon his father for support, but the question of dependency is not controlling here. The question we are called upon to determine is whether the deceased was under legal obligation to support this son at the time of the injury." (This is identically our problem.) As set forth in the *Corbridge* case, *supra*, the reviewing court held that the minor's enlistment constituted an emancipation and that thereafter the father was "not under legal obligation to support his son." 128 N.E. at page 290. The award was reversed. In *Peters v. Industrial Comm.*, 1924, 314 Ill. 560, 145 N.E. 629, the Illinois Supreme Court approved the rule of the *Iroquois* case but modified it to the extent that if at any time during minority the child is discharged from military service and returns home, he again becomes subject to parental control and the emancipation terminates. To the same effect is *Green v. Green*, Mo.App. 1950, 234 S.W.2d 350, where the court reversed an order of the trial court denying the father's motion to modify a divorce decree ordering support of the minor son, after that son had enlisted in the navy. See *Dean v. Oregon R. & Navigation Co.*, 44 Wash. 564, 87 P. 824, to the effect that if enlistment in the army constitutes an emancipation, it terminates upon the minor's discharge. To the same effect, 67 C.J.S., Parent and Child, § 88, p. 814.

In *Swenson v. Swenson*, Mo.App. 1950, 227 S.W.2d 103, 20 A.L.R.2d 1409, the father failed to pay the amounts ordered in a divorce decree for the support of his minor son on the ground of the son's induction into the army. In reversing the

trial court's order refusing to quash execution for the unpaid amount the reviewing court quoted from the Iroquois case, *supra*, and held that such induction emancipated the child and relieved the father from complying with the divorce decree.

There is authority to the contrary of the rule stated in the Iroquois case. In *Torras v. McDonald*, 1943, 196 Ga. 347, 26 S.E.2d 598, a father whose minor son was inducted into the United States Coast Guard, contended that such fact emancipated the child, and thereby rendered the father not liable in contempt for failing to comply with a previous divorce decree ordering him to pay monthly for the son's support. It appears that in Georgia, unless the power to alter or amend a decree of that type is reserved in the decree it may not be thereafter modified. The court pointed out that in making the order for support the court takes that fact into consideration. As to the contention that the minor's induction into service terminates the father's duty to pay the support provided in the decree the court said, 26 S.E.2d at page 600: "The induction of a minor son into the armed forces is nothing more than a rise or fall of the needs of a minor for maintenance and support, and is indefinite and uncertain as to the duration of such status."

In *Harwood v. Harwood*, 182 Misc. 130, 49 N.Y.S.2d 727, affirmed 268 App.Div. 974, 52 N.Y.S.2d 573, the question in a suit brought by a minor's mother against his father, her former husband, was: "The questions presented on this appeal are, first, whether the induction of a minor into the Military Service of the United States operates as a temporary emancipation during his term of service so as to suspend the obligation of his father to make payments, under a separation agreement, for the son's support, maintenance and education * * *." The court referred to the rule of the Iroquois case, *supra*, distinguishing the two cases upon the ground that this was an action upon a contract, while the Iroquois case was an issue of dependency under the Workmen's Compensation Law. The court said, however,

"But to the extent that the Iroquois case is contrary to the views here expressed, we do not follow it. The induction of the boy into the Armed Services results only in a suspension of any right appellant may have to his boy's services during such period as the Nation exercises its superior right to such services. The pay received by the boy may be regarded in the nature of a gratuity from the Government, because the Government in time of war unquestionably has the right to determine what sum, if any, it will pay to those whom it calls into service. Even while the boy is in actual service, there may be many obligations which the parent is still called upon to assume.

"The obligation under the contract is not one of reimbursement to the wife for any expenses incurred by her in maintaining and supporting the son, and nothing else. The obligation does not spring into existence only upon a showing by the plaintiff that she has expended certain sums in maintaining and supporting the boy. That does not mean, nor does she claim, that she would be entitled to retain for her own use and benefit the full sum specified in the contract to the exclusion of her son, the other beneficiary; but the fact that she would have no right to the sole use and benefit of the full installment does not impair her right to collect the entire amount. With respect to any benefits intended for the boy, her position would be that of a trustee charged with the duty, both legal and moral, to affect collection so as to make available to the boy the benefits intended for him. *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639, 2 A.L.R. 1187. The plaintiff is not seeking a 'windfall' for herself, as the appellant charges. Rather she is seeking to prevent the appellant from taking advantage of a situation arising because of the gravest of all national emergencies." 49 N.Y.S. 2d at pages 730-731.

Eisenberg v. Eisenberg, Sup.1945, 59 N. Y.S.2d 534, approved and followed the

Harwood case in granting an order requiring the father to comply with the requirement of a separation agreement to pay support for a minor son who had entered the Merchant Marine. In *Wack v. Wack*, Sup., 74 N.Y.S.2d 435, there was a similar situation, the minor son being in the navy. Giving the Harwood case as a reference the court said, at page 436: "* * * defendant is entitled to no credit; induction into military service does not constitute an emancipation nor suspend nor abrogate the father's contractual obligation to contribute to his son's maintenance."

In *Carson v. Carson*, 1950, 120 Ind.App. 1, 89 N.E.2d 555, the separation agreement which provided for the support of the minor son was incorporated in a divorce decree. In an action on the contract, the father contended he was excused from complying with its terms because of the alleged emancipation of the son by reason of his being in the army. The court said, 89 N.E.2d at page 558: "It is our opinion that no emancipation of the son has occurred by reason of his entering the Armed Forces to release the father from the performance of his contractual obligations. Although, on occasion 'emancipation' has been used to signify complete severance of the legal rights and liabilities attendant upon the relationship of parent and child, it has frequently and more accurately been held to operate merely as a relinquishment to the child of its earnings, free of any of the rights or claims thereto in favor of the parent. 'Emancipation' does not operate to release a parent from liabilities and obligations involving his child which he has expressly covenanted to perform. The doctrine of emancipation has as its basis sound principles of public policy and has been applied by the courts, for the most part, to protect the best interests of children and those who have provided them with necessities when their parents have failed to do so. The entering of the child into the Armed Services does not constitute a voluntary surrender of control on the part of the parent. *Harwood v. Harwood*, 1944, 182 Misc. 130, 49 N.Y.S.

2d 727. * * * The pay received by the boy may be regarded in the nature of a gratuity from the Government, because the Government in time of war unquestionably has the right to determine what sum, if any, it will pay to whom it calls into service. Even while the boy is in actual service, there may be many obligations which the parent is still called upon to assume."

2 *Armstrong*, California Family Law, p. 1259, states: "Although no decision squarely meets this question, statements made by the supreme court in workmen's compensation cases in regard to the general scope of the parental duty to support the child suggests that California accepts the general rule that emancipation, except by marriage of the minor, *affects only the rights of the parent and not his duties.*" (Emphasis added.) This statement is based partially¹ on language in *Federal Mutual Liability Ins. Co. v. Industrial Acc. Comm.*, 1925, 195 Cal. 283, 233 P. 335, where the court upheld an award to a minor child for the industrial death of her father who for 8 years had failed to provide for her and only shortly before his death had commenced to contribute anything to her support. In concluding that the conclusive presumption of the Workmen's Compensation Act (now Labor Code, § 3501) applied, the court said, 195 Cal. at pages 289-290, 233 P. at page 337: "Whether such conclusion is based upon the proofs of the voluntary resumption on the part of the father of his parental relations and obligations to his child, or upon the legal liability for the support of his child imposed by the terms of the divorce decree, or upon the broader ground of the basic legal obligation imposed by law upon a father to support his dependent child to the end that it shall not become a public charge, the award of the Commission upon either and all of these grounds can be sustained."

Thus *Armstrong's* statement can hardly be applied to the question of emancipation by enlistment in the armed forces.

As above shown, the majority of jurisdictions where the question has been considered hold that such enlistment constitutes an

1. It is also partially based upon a reference to *Madden*, *Persons and Domestic Relations*, 408, which, however, discuss-

es emancipation in general without any consideration of the effect of enlistment.

emancipation during its continuance which releases the parent of the obligation to support² except where he has contracted to support the child during minority, in which case he would be held on the contract.³

The only case we have been able to find flatly holding in the absence of an agreement to support the minor, that the latter's enlistment does not constitute an emancipation and does not relieve the father of complying with the support order is the Georgia case of *Torras v. McDonald*, supra, 26 S.E. 2d 598.⁴

Petitioner cites the quotation (hereafter set forth) in *Aetna Life Ins. Co. v. Industrial Acc. Comm.*, 175 Cal. 91, 94, 165 P. 15, L.R.A.1918F, 194, taken from *Lackman v. Wood*, 25 Cal. 147, as being in support of its claim that the minor here was emancipated. The *Aetna* case dealt with a 19 year old son whom it was held was not emancipated by the fact that for work on his father's ranch where the family lived the father gave the son from time to time small sums of money as payment of wages. Obviously the case itself is not in point. The *Lackman* case dealt with the question of whether at the time he took up certain land, the son of defendants, upon whose acts the defendants relied for their title, had been emancipated by the father. The language referred to above is, 25 Cal. at page 151: "The power of a father to emancipate his minor child cannot be questioned; nor can there be any doubt as to the effect of such emancipation upon the relations of the persons who are parties to it. The child is freed by emancipation from parental control; he can claim his earnings thereafter as against his father, and is in all respects his own man."

[2] While it is true the father may emancipate his child, Civ.Code, § 211, he

had not done so in our case, unless Gordon's joining the army constituted an emancipation.

Respondent commission in determining that enlistment of the minor did not constitute emancipation, relied upon, in addition to *Torras v. McDonald*, supra, 26 S.E.2d 598, *Pacific Employers Ins. Co. v. Industrial Acc. Comm.*, 1947, 81 Cal.App.2d 37, 183 P.2d 344, where the court held that the presumption we are dealing with here applied even though the minor was self-supporting and the father had not contributed to his support for over 10 years, saying, "Irrespective of the presumptions mentioned in Labor Code, section 3501, the first duty of a father is to support his legitimate children", 81 Cal.App.2d at page 41, 183 P.2d at page 346; also *Federal Mutual Liability Ins. Co. v. Industrial Acc. Comm.*, 195 Cal. 283, 233 P. 335 (discussed above), and *Kamper v. Waldon*, 1941, 17 Cal.2d 718, 112 P.2d 1, which holds that the marriage of a minor and the emancipation thereby provided by section 204(2), Civil Code, does not release the father from his obligation to comply with the terms of a property settlement agreement entered into theretofore in which he agreed to pay monthly for the support of said minor. This holding was based upon the statement that "It may be assumed, in the absence of an agreement to the contrary, that a parent is released from the legal duty of support upon the complete emancipation of a minor child, as by its lawful marriage," and the further statement: "Upon sufficient consideration the parent may agree and be bound to do more than the statute requires, so long as the additional obligation is not contrary to nor inconsistent with the statutory provision." 17 Cal.2d at page 720, 112 P.2d at page 2.

It should be pointed out that in the *Waldon* case the court did not determine wheth-

2. *Indiana*, *Illinois*, *Missouri*.

3. *New York*, *Indiana*.

4. While *New York* has not passed upon the question except where a separation agreement was involved, the language hereinbefore quoted from *Harwood v. Harwood*, 182 Misc. 130, 49 N.Y.S.2d 727, to the effect that the father's contract liability still exists after the minor's enlistment and that the moneys

owed by the father are to be held in trust by the mother for the boy, coupled with the statement, 49 N.Y.S.2d at page 730, "The induction of the boy into the Armed Services result *only* in a suspension of any right appellant [the father] may have to his boy's services" during the period of the boy's remaining in the service, might indicate that in a case similar to ours the court might follow the Georgia rule. (Emphasis added.)

er complete emancipation results from the minor's marriage; it merely assumed for the purpose of the case that it did and then held that in spite of such assumption the father's agreement to support continued in force.

[3] This court is faced with the question of whether it will follow the majority or the minority rule as to the effect of induction into the armed services. Because the majority rule is that the emancipation may be only a temporary one, ending if the minor is released from service during his minority, and also does not release the father of his contract obligation; because as stated in *Torras v. McDonald*, supra, 26 S.E.2d at page 600, "The induction of a minor son into the armed forces is nothing more than a rise or fall of the needs of a minor for maintenance and support, and is indefinite and uncertain as to the duration of such status"; because in all the cases discussing the matter it is held that the payment by the father of support for the minor during the period of enlistment must be held by the mother as trustee for the minor "to make available to the boy the benefits intended for him", *Harwood v. Harwood*, supra, 49 N.Y.S.2d 727, 731, and because under *Pacific Employers Ins. Co. v. Industrial Acc. Comm.*, supra, 81 Cal.App. 2d 37, 183 P.2d 344, had the minor here been completely self-supporting in industry, rather than in his country's service, he would not have been emancipated and would have been entitled to compensation by reason of his father's death, we believe that the minority rule is the better one and should be applied in this state. We are of the opinion, therefore, that the conclusive presumption of dependency set forth in section 3501, Labor Code, applies; that the induction of the minor son into the army did not constitute such an emancipation as to relieve the father of his obligation to comply with the court order for support, and hence the "parent was legally liable at the time of injury * * *." Labor Code, § 3501(b).

The award is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Mary BRAZIL, Plaintiff and Appellant,
v.

Raymond BRAZIL and Alice Smith, personally and as Executors of the Last Will and Testament of Manuel Brazil, Deceased, and Bertha I. Helntz, Defendants and Respondents.

Civ. 8600.

District Court of Appeal, Third District,
California.

Nov. 18, 1955.

Rehearing Denied Dec. 9, 1955.

Hearing Denied Jan. 5, 1956.

Action to establish and quiet title in certain realty. From an adverse judgment of the Superior Court, Napa County, Anthony Brazil, J., the plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that where wife in absence of fraud or misrepresentation consented in writing to joint tenancy in property with her husband, subsequent deeds by husband from himself to third party and from third party to himself creating a tenancy in common were valid thereby destroying joint tenancy and consequently devisees under will of deceased husband were entitled to husband's interest in property.

Affirmed.

1. Husband and Wife ⇨14(3)

Where husband and wife executed joint tenancy deed to certain real property, the parties in the absence of fraud, intended and did create a joint tenancy title with all the incidents thereof, notwithstanding what the real interests of the husband and wife might have been in the property prior to execution of the deed and however they might have been held.

2. Husband and Wife ⇨14(3)

In action by widow to quiet title to property which husband had devised to children of first wife after property had been placed in joint tenancy by deceased and his widow, evidence was sufficient to show no fraud was practiced on wife in creation of the joint tenancy, which had been destroyed prior to husband's death by his deed of his interest to third party and

third party's deed of such interest to husband as his separate property.

3. Husband and Wife ⚭14(10)

Wills ⚭5

Where wife in the absence of fraud or misrepresentation, consented in writing to joint tenancy in property with her husband, subsequent deeds by husband from himself to third party and from third party to himself creating a tenancy in common were valid and destroyed joint tenancy and consequently devisees under husband's will of his interest in the property were entitled to the same to the exclusion of his wife.

Riggins, Rossi, King & Kongsgaard, by Ralph Trower, Napa, for appellant.

Francis H. Frisch, Napa, and L. G. Hitchcock, Santa Rosa, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in favor of defendants in an action wherein plaintiff, the widow of Manuel Brazil, sought to establish and quiet her title in certain real property as against the claims of two children of Manuel by a prior marriage who claimed under his will.

Appellant and Manuel Brazil intermarried in 1921 and lived together as husband and wife until his death in 1952. The evidence showed that at the time of their marriage Manuel was possessed of about \$3,000, a part of which at least was used by him to pay the expenses of the honeymoon trip of the couple to the Azores Islands. Appellant at the time of her marriage to Manuel was a widow with three minor children. She was the guardian of the children and of their estates and was in receipt of \$40 per month therefrom for their support. She owned property of her own which the court found to have approximated in value the sum of \$10,000. Throughout their marriage, as the court found, appellant reposed the greatest trust and confidence in Manuel and he handled all business matters and managed her separate property, as well as such separate property as he may have had, and the com-

munity interests of the parties. Soon after returning from their wedding trip, Manuel and appellant and her children moved on to the ranch property which is the subject of this litigation. He rented the property for about five years. In 1926 he purchased it for \$8,000. He took title in his own name. The trial court found that the cash purchase price was paid from community funds, from the separate funds of appellant, and from the separate funds of Manuel, and further that the exact amount of the funds from each source was unknown. However, there was a great deal of credible evidence, both oral and documentary, that at the very least \$5,750 of the total purchase price was supplied by appellant from her separate funds, and likewise there was strong evidence that thereafter an additional \$4,250 of her separate funds were used in improving the property. After the property was purchased Manuel built a large dairy barn thereon in which he conducted a substantial dairy business and he also built on the property a two-story nine-room dwelling house which was the home of the family up to the time of his death in 1952. Appellant testified that Manuel on a number of occasions told her the property belonged to her and she said she did not discover the title stood in his name alone until 1945. She said she turned over to him and he handled all the funds which came to her from her separate estate, including the monthly allowance for the support of her children. In 1945, at Manuel's request, appellant accompanied him to an attorney's office where she joined him in the execution of a deed which conveyed the property to the two of them as joint tenants. She testified that she was told and she understood that the purpose of this was to place the title in such condition that if either of the two died the survivor would take the whole without the expense of probate. The attorney who prepared the joint tenancy deed and saw to its execution testified that he explained the matter to her in just that way. There was no evidence that it was also explained to her or that she understood that it was within the power of either party thereafter to destroy

the joint tenancy and cause the property to be vested in the two as common tenants. She testified that after the joint tenancy deed had been executed Manuel on several occasions told her the property belonged to her. The title to the property remained unchanged after the execution of the joint tenancy deed until in 1951, a few months before he died, when Manuel caused another attorney, who had represented him on occasions, to prepare a deed of his interest in the property from himself to a third party and a deed from the third party back to him as his separate property. Shortly after the recordation of these deeds he died. Under the terms of his will his two children by his prior marriage succeeded to his undivided one-half interest.

[1-3] The trial court found that when the parties joined in the conveyance to themselves as joint tenants they thereby intended to and did create a true joint tenancy estate and, therefore, concluded that the two deeds last referred to effected a destruction of the joint tenancy status, and caused the property to be vested in Manuel and appellant as tenants in common; and that, by virtue of Manuel's will, the defendants were the owners of his interest. Appellant attacks the findings and her argument runs as follows: That from the evidence as to the source of the funds from which the property was purchased the trial court was compelled to find that Manuel held the legal title to the property in trust for appellant; that it appears without conflict that the greater part of the purchase price was furnished from the separate property of appellant; that as to the balance Manuel was guilty of commingling such community funds as might have gone into the purchase price with the separate funds of appellant in his hands; that the burden was upon him to prove any claim he might have to any interest in the property and that, failing such proof, it was all held by him in trust for appellant; that in any event there was a pro tanto resulting trust; and that equity will follow trust property, no matter what forms of conveyance or muniments of title are executed. However, we think the execu-

tion of the joint tenancy deed affords sufficient support for the trial court's findings that, by the execution thereof, the parties intended to and did create a joint tenancy title in the two with all the incidents thereof; and that this is true notwithstanding what the real interests of the parties may have been prior to the execution of that deed and however they may have been held. For example, if, after taking the title in himself, Manuel had executed and delivered to appellant an express declaration that he held the whole title or some part thereof in trust for her, nevertheless her joining in the execution of the joint tenancy deed would support the findings of the trial court. The execution of that deed was in itself an expression of an intention of the parties thereafter to hold the property in accordance with its terms. *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003. The court impliedly found that no fraud was practiced upon her. There is nothing in the record which compels a finding to the contrary. When she executed the joint tenancy deed, in the absence of fraud or misrepresentation she, in effect, consented in writing to a new status with respect to her interest and that of Manuel in the subject property. *Schindler v. Schindler*, 126 Cal.App.2d 597, 272 P.2d 566. It ought to be mentioned that, in addition to the evidence we have referred to, it appears from the record that Manuel and appellant had for years made use of joint tenancies in respect of their property. He had made a number of loans wherein the notes ran in favor of both and the deeds of trust securing payment of the same recited that their beneficial interests were those of joint tenants. At least one bank account, which shortly before his death had amounted to nearly \$10,000, had long been kept in joint tenancy and appellant had withdrawn the funds from that account while Manuel still lived. As the trial court observed, it was probable from the evidence before it that these two knew a good deal more about joint tenancies than the average person knows.

For the reasons given, the judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

137 Cal.App.2d 211

**I. H. CUPPS and Pearl C. Cupps, Plaintiffs,
Cross-Defendants and Appellants,
v.**

**Gale HENDRICKS and Beatrice Hendricks,
Defendants, Cross-Complainants and
Respondents.
Civ. 8614.**

District Court of Appeal, Third District,
California.
Nov. 22, 1955.

Purchasers' action to rescind contract for sale of motel and to recover money judgment because of vendors' alleged fraudulent representations as to motel income, wherein vendors cross-complained seeking to have their title to motel property quieted, and purchasers answered disclaiming interest in property except lien for benefits conferred on vendors under contract. The Superior Court, Lake County, Benjamin C. Jones, J., entered judgment cancelling contract and quieting vendors' title to property, and purchasers appealed. The District Court of Appeal, Schottky, J., held that where court found for vendors but made no finding on unjust enrichment issue, it was duty of court to determine whether vendors would be unjustly enriched by retention of all or part of benefits they received.

Affirmed in part, reversed in part and remanded with directions.

Vendor and Purchaser ⇨341(4)

In purchasers' action to rescind contract for sale of motel and to recover money judgment because of vendors' alleged fraudulent representations as to motel income, wherein vendors cross-complained seeking to have their title to motel property quieted, purchasers answered disclaiming interest in property except lien for benefits conferred on vendors under contract, and court found for vendors but made no finding on unjust enrichment issue, it was duty of court to determine whether vendors would be unjustly enriched by retention of all or part of benefits they received.

Kasch & Cook, Ukiah, for appellants.

Ralph V. Devoto and Philip C. Crump,
Lakeport, for respondents.

SCHOTTKY, Justice.

Plaintiffs and appellants filed the instant action to rescind a written contract for the sale and purchase of a motel and furnishings located in Lake County, and for judgment in the sum of \$15,000 because of respondents' alleged fraudulent representations as to the amount of income they had earned from the operation of the motel. Respondents answered and cross-complained, praying that their title to the property be quieted. Appellants' answer to the cross-complaint disclaimed any right, title, or interest in the property except a lien thereon in the amount, and until the return, of the benefits conferred upon respondents under the contract. The trial court found that appellants' charges of fraud were untrue and entered judgment cancelling the contract and quieting respondents' title to the property. A motion for a new trial was denied and plaintiffs have appealed from the judgment.

The written contract was entered into between the parties on May 24, 1950. The respondents thereby agreed to sell the real and personal property herein involved to the appellants for the sum of \$60,000, of which \$15,000 was to be paid upon the execution of the contract and the balance, together with 5 per cent interest on the unpaid principal, at the rate of \$335 a month, commencing on June 26, 1950. It was provided that the down payment of \$15,000, receipt of which was thereby acknowledged, was represented by a deed from appellants to respondents of a house in Colfax, the title to which respondents were to take subject to a deed of trust. During the pendency of this action, respondents exchanged this house for one in Oakland which they thereafter sold. Time was made the essence of the contract and it was provided that if appellants defaulted, the respondents should retain all moneys paid as rent and compensation for the use and occupancy of the premises.

The appellants took possession of the motel on June 1, 1950, and, on July 1st, made a payment of \$335 to respondents. However, appellants became dissatisfied with the income realized from the operation of the motel and early in August served respondents with a notice of rescission of the contract of May 24, 1950, on the ground that they were induced to enter into it by fraud practiced upon them by respondents. Nevertheless, appellants remained in possession, and on August 21st paid respondents \$165. Respondents testified that it was then agreed that instead of the \$335 monthly payments provided for in the contract, the appellants would pay \$1,000 on January 1, 1951, and \$1,500 semi-annually thereafter. This was denied by appellants who claimed they did not withdraw their rescission but were persuaded to remain by respondents' misrepresentation that business improved in the winter and that they would be satisfied with the income. In any event, appellants made no payments after August 21st, but continued to operate the motel until January 1, 1951, when they quit the premises. The instant action was filed on January 8, 1951. Respondents retook possession of the property and on April 15th sold it for \$54,000.

Appellants do not attack the findings that there were no fraudulent representations on the part of respondents, as they concede that the evidence on this issue was in substantial conflict, but they contend that the court erred in not finding that they were entitled to restitution in the sum of \$15,000 secured by a lien upon the real property here involved. They argue that the conveyance of the Colfax house represented \$15,000, that they paid respondents \$500 in cash, and added improvements to the motel worth \$200 so that they should recover the total of said amounts less \$700 chargeable as the reasonable rental value of the motel during seven months' occupancy.

Appellants' principal contention is that: "A defaulting purchaser of real and personal property, even where the default is 'wilful' is entitled to repayment of the excess of his payments and benefits conferred upon the seller over and above the actual

damages suffered by the seller as the result of the default and the reasonable value of the occupancy of the property."

In the recent case of *Bird v. Kenworthy*, 43 Cal.2d 656, at page 659, 277 P.2d 1, at page 2, the court said:

"In *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1, it was held that, although the vendee in a conditional contract for the sale of real estate is a willful defaulter, the vendee may recover the amount which constitutes unjust enrichment of the vendor by reason of the termination of the contract. Such recovery may be had though the vendee could receive no relief under section 3275 of the Civil Code.

"To have the benefit of the rule against unjust enrichment, the burden of proof is upon the defaulting vendee to show that the payments made by him exceed the vendor's damages. *Major-Blakeney Corp. v. Jenkins*, 121 Cal.App.2d 325, 332, 263 P.2d 655; *Baffa v. Johnson*, 35 Cal.2d 36, 40, 216 P.2d 13."

And in *Major-Blakeney Corp. v. Jenkins*, 121 Cal.App.2d 325, at page 332, 263 P.2d 655, at page 659, the court said:

"Where the remedy of specific performance is not possible and restitution offers the only effective relief to a defaulting vendee, relief may be granted if the vendee is able to prove that his down payment exceeds the damages to the vendor produced by his default. *Barkis v. Scott*, supra [34 Cal.2d 116, 208 P.2d 367], and cases there cited; see *Baffa v. Johnson*, 35 Cal.2d 36, 39, 216 P.2d 13. In *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal.2d 16, 20, 230 P.2d 629, 631, 31 A.L.R.2d 1, relying upon sections 1670, 1671, and 3369 of the Civil Code, the court stated that even a wilfully defaulting vendee may be relieved from a forfeiture, since 'the damage provisions of the Civil Code, together with the policy of the law against penalties and forfeitures provide an alternative basis for relief independent of section 3275.' The burden rests upon the defaulting vendee seeking restitution to prove how much of his down payment exceeds the vendor's damages. *Baffa v. Johnson*, supra."

As hereinbefore set forth, the respondents agreed to sell the motel property to appellants for the sum of \$60,000 and accepted the Colfax residence of appellants as a down payment at an agreed valuation of \$15,000. Appellants paid the additional sum of \$500 and occupied and operated the motel property for a period of seven months. After respondents retook possession of the property they resold it for \$54,000. There is evidence that respondents later traded the Colfax house for a house in Oakland, which was later resold by them. The record is not clear as to how much respondents eventually realized from the Colfax property, but it does show that they did realize in excess of \$11,000. Respondents in their cross-complaint sought to quiet their title to the motel property, and appellants in their answer to the cross-complaint re-alleged their charges as to fraud and alleged their right to have returned to them the benefits conferred on respondents by virtue of the contract. The court found against appellants' allegations of fraud and against the allegations of appellants' answer to the cross-complaint, and entered a judgment quieting respondents' title to said property. The court made no findings as to what benefits respondents had received or if they would be unjustly enriched by the retention of all or a part thereof.

In the case of *Crofoot v. Weger*, 109 Cal. App.2d 839, 241 P.2d 1017, which was an action by purchasers seeking relief from forfeiture of payments made under an installment contract, we held that the court should have determined all issues concerning relief and unjust enrichment. We there said, 109 Cal.App.2d at page 842, 241 P.2d at page 1019:

"In addition to the foregoing, if the court had found that the breach was willful or

grossly negligent so as to prevent equitable relief under section 3275 of the Civil Code there was still the duty of the court to go further and find whether or not the termination of the contract by the respondents for the appellants' default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment. *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, supra. * * * It is apparent that a situation was portrayed by the evidence which would have justified findings of unjust enrichment if relief could not be given through reinstatement of the contract, and it was therefore the duty of the court to proceed and find upon these matters and if it found unjust enrichment had resulted to give judgment for the amount thereof."

We believe that under the authorities hereinbefore cited it was the duty of the court in the instant case, just as it was in *Crofoot v. Weger*, to have determined and made findings upon the issue of unjust enrichment, and that because of its failure to do so the judgment must be reversed.

The judgment is reversed in so far as it fails to adjudicate the issue of unjust enrichment, and the cause remanded with directions to the trial court to proceed, upon the evidence taken or such additional evidence as the parties may see fit to offer, to determine what benefits, if any, respondents have received and if they will be unjustly enriched by the retention of what they have received under the said contract. In all other respects the judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

137 Cal.App.2d 194

The PEOPLE of the State of California,
Petitioner,

v.

SUPERIOR COURT of the State of California,
IN AND FOR The CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 17004.

District Court of Appeal, First District,
Division 1, California.

Nov. 22, 1955.

Mandamus proceedings. The District Court of Appeal, Peters, P. J., held that, where, in prosecution for possession of narcotics, trial judge refused to admit evidence of the marijuana because search at police station during which the narcotic was discovered was not incidental to defendant's lawful arrest on drunk and assault charges, writ of mandate would not lie to test correctness of such ruling, even though People would not have right of appeal if accused was erroneously dismissed or acquitted for lack of evidence.

Writ denied.

1. Mandamus ⇨28, 40

Writ of mandate may, in proper case, be used to correct an abuse of judicial discretion, but it cannot be used to control a discretionary act of a superior judge and may not be used to compel a judge to admit or exclude evidence during trial, even if judge's ruling is erroneous.

2. Courts ⇨1

Trial judge has jurisdiction to decide matters before him erroneously as well as correctly.

3. Mandamus ⇨40

Ruling on admission of evidence is not, even if wrong, an abuse of discretion but is simply an erroneous ruling.

4. Mandamus ⇨61

Where, in prosecution for possession of narcotics, trial judge refused to admit evidence of the marijuana because search at police station during which the narcotic was discovered was not incidental to defendant's lawful arrest on drunk and as-

sault charges, writ of mandate would not lie to test correctness of such ruling, even though People would not have right of appeal if accused was erroneously dismissed or acquitted for lack of evidence.

Thomas C. Lynch, Dist. Atty., City & County of San Francisco, Irving F. Reichert, Jr., Deputy Dist. Atty., San Francisco, for petitioner.

Mervyn Schneider, San Francisco, for respondent (real party in interest).

PETERS, Presiding Justice.

The petition alleges that Verne Peacock was lawfully arrested and booked on charges of drunkenness and suspicion of assault with a deadly weapon; that the accused was searched at the scene of the arrest and then taken to the police station; that there, pursuant to normal police procedure, the accused was directed to empty his pockets; that among the objects in Peacock's possession was a glass vial containing marijuana; that thereupon, the charge of possession of narcotics was added to those already made; that subsequently, the drunk and assault charges were dropped, and Peacock proceeded to trial on the felony narcotic charge; that the trial judge, on such trial, sustained an objection to the admission into evidence of the marijuana on the ground that such evidence was not admissible under the rule of *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905, because, so the trial court ruled, the search at the police station during which the narcotic was discovered was not incidental to the lawful arrest on the drunk and assault charges. The trial court, however, agreed to the request of the prosecutor to continue the trial until November 28, 1955, so that the present writ of mandate could be filed to test the correctness of the ruling. Thereupon, this petition was filed requesting that the trial court be compelled by mandate to admit the evidence.

[1-3] While a writ of mandate may, in a proper case, be used to correct an abuse of judicial discretion, it cannot be used to control a discretionary act of a superior judge. In particular, the writ may not be

used to compel a judge to admit or exclude evidence during a trial, even if such ruling is an erroneous one. It is elementary that a trial judge has the jurisdiction to decide matters before him erroneously as well as correctly. That is one reason why we have appellate courts. A ruling on the admission of evidence, even if wrong, is not an abuse of discretion but simply an erroneous ruling.

[4] That mandamus will not issue in such cases is well settled in this state. *Short v. Superior Court*, 94 Cal.App. 664, 271 P. 783; *Gubin v. Superior Court*, 104 Cal.App. 331, 285 P. 1071; *Lyders v. Superior Court*, 129 Cal.App. 635, 19 P.2d 300. Petitioner, while recognizing the force of these cases, correctly points out that the cited cases were all civil cases, where the point could be reviewed on an appeal, and also correctly points out that the People have no right of appeal if the accused is erroneously dismissed or acquitted for lack of evidence. It is urged that, assuming the ruling on the evidence was erroneous,¹ unless mandamus be granted the People will suffer a wrong without a remedy. That this is so is undoubtedly true. But the argument is one that should be addressed to the Legislature or perhaps to the People via a proposed constitutional amendment, and not to the courts. The lawmakers of this state have determined that except under very limited circumstances not here involved, the People have no right of appeal in criminal cases. What petitioner is seeking in the present case is to review the propriety of a ruling of the trial court on the admission of evidence. If petitioner is correct that mandamus will issue in a criminal case in such a situation, then every ruling of a trial court adverse to the prosecution in a criminal case may be reviewed by means

of a writ of mandamus, thus giving the People, in effect, the very appeal that the lawmakers have denied to them.

The petition for the writ is denied.

BRAY and FRED B. WOOD, JJ., concur.



137 Cal.App.2d 83

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Guy MADDOX, Defendant and Appellant.
Cr. 895.

District Court of Appeal, Fourth District,
California.

Nov. 17, 1955.

Petition for writ of error coram nobis. The Superior Court, Kern County, Norman F. Main, J., entered order denying petition, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence failed to disclose mental incapacity of defendant at time he pleaded guilty.

Affirmed.

Criminal Law §997(15)

On application for writ of error coram nobis, the evidence was sufficient to indicate that defendant was mentally capable of understanding nature of proceeding and what he was doing at time his plea of guilty was entered. Pen.Code, § 288.1.

1. Petitioner argues quite forcefully that the search here was one incidental to a lawful arrest and therefore not illegal. *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399; see discussion 35 Yale Law Journal 612. We express no opinion on this subject because the point is not before us. In this opinion we have

assumed that the ruling on the admission of the marijuana was erroneous. But this assumption is made simply to pass on the question of the propriety of using mandamus to test the ruling. We do not deem it proper to rule on the admissibility question. To do so would be to do indirectly what we have no power to do directly.

Willis Mevis, Bakersfield, for appellant.
Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with incest with his daughter and, in a second count, with committing a lewd and lascivious act upon the same daughter, who was then under 14 years of age. The court appointed an attorney to represent him, and he later pleaded not guilty as to both counts. Subsequently, the court granted his request to withdraw his pleas of not guilty. He then pleaded guilty to the second count, the first count was dismissed on motion of the district attorney, and he applied for probation. Pursuant to Section 288.1 of the Penal Code, a doctor was appointed to examine the defendant and report to the court. A hearing was later held in which the doctor's report and the report of the probation officer were considered. On October 13, 1950, probation was denied and judgment was pronounced sentencing the defendant to state prison. No appeal was taken from the judgment.

On August 26, 1954, the defendant in propria persona filed in the trial court a petition for a writ of error coram nobis asserting, among other things, that at the time he pleaded guilty his ability to reason and understand the nature of the case was that of an imbecile. A different attorney was then appointed by the court to represent the defendant and a hearing was had, at which evidence was presented. The petition was denied and the defendant has appealed from that order.

Appellant's sole contention is that there was an error in fact made by the trial court in believing that the appellant was mentally capable of understanding the nature of the proceedings under which he pleaded guilty, and that there are "bits of evidence" which, when taken together, proved that he was at that time mentally incapable of understanding the nature of the proceedings. The appellant relies on four matters which appear in the record. (1) After he had withdrawn his plea of not guilty and when

asked "How do you plead to the second count of the information; namely, Lewd and Lascivious Conduct?", the defendant replied "I plead guilty, I suppose". He was then told to confer with his counsel, after which he replied "I plead guilty." (2) When arraigned for judgment on October 13, 1950, the court asked the defendant whether he had any legal cause to show why he should not now be sentenced. His attorney replied "He does not, Your Honor". The court then asked the defendant to speak for himself and the defendant replied "None, I reckon". The court then asked if he understood the question and the defendant replied "None, I reckon, no legal cause." (3) The report of the doctor appointed to examine the defendant, which report was dated October 9, 1950, contains this sentence: "His intelligence and mentality are, according to my examination and various tests, definitely dull and below the borderline of dull normal, even when one considers his complete lack of training." (4) A doctor, who testified at the hearing on the petition for writ of error coram nobis, interpreted the report filed by the other doctor as meaning that the defendant was a moron who might not understand the nature of the charges and if it were explained to him might not remember it.

The first two of these matters require no comment. The report of the doctor who examined the defendant before the probation hearing takes up six pages of the transcript. It states that the defendant said to the examiner "Now they claim I had intercourse with my daughter; the other charge 'L. and L.', what is that? I thought I would get a jail sentence but now it will be San Quentin." It further states: "Reading is very slow and spelling comparable to a third grader. Writing is poor. Intelligence is rather limited to quite concrete thinking." It states that when asked whether he thought his actions concerning his daughter were right, the defendant replied: "No, it is not right. They framed me. I am not guilty of that. It would not be right, I don't believe in it. I only put medicine on that child. Eighteen years is the age for girls." After referring

to the defendant's lack of education and living conditions the report contains the sentence relied on by the appellant, and then states "His drinking, plus the poorest domestic quarters as further contributing factors often produce circumstances to predispose to the commission of sexual offenses."

The doctor who made this report had died and another doctor was called as a witness in behalf of the petitioner at the hearing on the application for the writ. This doctor's attention was called to the sentence in the other doctor's report which is now relied on, and he was asked: "Now, if a person is definitely dull and below the borderline of dull normal, is there any classification as to his mental condition?" The witness replied "This falls into the classification of the moron". The court then asked the doctor "Any person below dull normal is a moron?", and the doctor replied: "For purposes of classification. It does not mean these individuals cannot carry out useful tasks. It means their normal exercise of obtaining information frequently is impaired or they have to do their work under supervision. Many of them can do tasks which require repetition, but they lose a great deal of their initiative. In fact, they have little or no initiative." When asked whether in his opinion a moron charged with lewd and lascivious acts could understand this charge, the doctor replied: "I would think not, especially in this instance, since the man had had—in addition to his subnormal mental attainments had not had the benefit of any educational advantages. He may have been able to understand these things in, say, simple and you might say common language, but perhaps not in this particular language used here." The doctor then explained that this opinion was based on the idea that without any explanation the defendant would not understand that language. On cross-examination, the doctor was asked whether he thought a person such as described in the report would understand the nature of his act at the time he was committing the act, and replied: "If

he was in full possession of his faculties, he probably would." When asked whether he thought it could be explained to the defendant by his counsel "so he would understand the nature of the charge placed against him" the doctor replied: "It could be done yes, that is right." When asked on redirect whether he would say that if this charge were fully explained to him at one time it was possible that at a later time he would not remember it, the doctor replied: "It is possible." The doctor then testified that he had not seen the defendant and that his assistance was of less value than if he had been able to see the man.

The attorney who represented the appellant in the trial court up to the time judgment was pronounced filed an affidavit in which he stated that he was appointed counsel for the defendant on July 11, 1950, and interviewed the defendant on a number of occasions between that time and October 13, 1950; that at all times the defendant appeared to know the nature of the charges against him and was able to cooperate with his counsel in the preparation of his defense; that affiant's investigation revealed that the evidence against the defendant was exceptionally strong; that affiant fully informed the defendant of all the facts that came to his notice, and told the defendant to make up his own mind as to how to plead; that the defendant was given several days in which to consider his decision and thereafter expressed the intention of pleading guilty to the second count; that the defendant was informed of all the possible results of his plea, and was informed that neither the district attorney nor his counsel could determine in advance what the decision and judgment of the court would be; and that at no time did the defendant indicate any lack of understanding of the nature of the proceedings or of the charges against him.

The question was one of fact for the trial court, and the evidence is sufficient to support the order complained of. While the evidence indicates that the appellant's degree of mentality was not too high it falls far short of showing that he was an

imbecile or of establishing, as a matter of law, that he was not mentally capable of understanding the nature of the proceedings or what he was doing at the time his plea of guilty was entered.

The order is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



137 Cal.App.2d 216

Adriane KIRCHMANN, Plaintiff and
Appellant,

v.

CITY OF ANAHEIM, a Municipal
Corporation, Defendant and
Respondent.

Civ. 5205.

District Court of Appeal, Fourth District,
California.

Nov. 22, 1955.

Rehearing Denied Dec. 16, 1955.

Hearing Denied Jan. 18, 1956.

Action for injuries sustained by plaintiff when she stepped into hole in city street. The Superior Court, Orange County, Robert Gardner, J., entered judgment in favor of city, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that evidence did not demand finding that city was equitably estopped from relying on statutory requirement for filing of claim against city.

Affirmed.

1. Municipal Corporations ⚡812(5)

Governmental agency may be estopped from relying on the failure to file claim for injuries sustained because of defect in street within the statutory time when the conduct of its officers or agents was such as to mislead the claimant with respect to the necessity of filing the claim within the required time. West's Ann.Gov.Code, §§ 53050-53056.

289 P.2d—52

2. Municipal Corporations ⚡819(8)

In action against city by pedestrian who claimed that she sustained injuries when she stepped into a hole in city street and who claimed that adjuster of city's insurer told her that claim would be investigated and that there was nothing further she need do until she heard from city, evidence did not demand finding that city was equitably estopped from relying on statutory requirement for timely filing of claim against city. West's Ann.Gov.Code, § 53052.

McCabe & Schumacher, Fullerton, for appellant.

Harry E. Sackett, Raoul Francoeur, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries claimed to have been suffered by the plaintiff when she stepped into a hole in a city street. The complaint, filed on December 8, 1953, alleged that the accident happened on December 12, 1952; that on November 23, 1953, the plaintiff filed with the city clerk a verified claim in accordance with the provisions of Sections 53050 to 53056 of the Government Code; that the defendant city "through its agents and employees" and its insurance carrier informed the plaintiff that the city was desirous of settling her claim; that the city, "through its said agents and employees", secured from the plaintiff a full statement concerning her accident; that the said agents of the city then and there advised the plaintiff it would not be necessary for her to do anything further, and that the city would process said claim and there after inform plaintiff as to what it would do about said claim; that because the plaintiff believed the statements of the city made through its agents she did not, for several months, employ an attorney; that she did not take any steps relating thereto until the city through its agents informed her, about thirty days before she filed her claim, that the city and its insurance carrier denied all liability in connection with her injuries; that within a reasonable time thereafter she employed attorneys and presented her claim

against the city; that by reason of the foregoing the city waived the requirement that plaintiff file a claim within 90 days; and that the city is estopped by reason of the foregoing to complain of the late filing of plaintiff's claim.

The city filed an answer and a trial was first had on the special issue raised by the pleadings as to whether an equitable estoppel existed, as against the city, which would excuse plaintiff's failure to file a verified claim within the time required by Section 53052 of the Government Code.

The plaintiff's husband testified that he was manager of the Northern Orange County Citrus Exchange, and had been in that business for 37 years; that before January 1, 1953, he contacted the city clerk and asked if he had any recourse "and if the city carried insurance to cover this sort of a thing"; that the clerk replied that the city was insured and referred him to the local agent for the insurance carrier; that he then talked to this local agent and "outlined the accident which occurred"; that the agent said he would get in touch with the insurance company; that on January 13, a Mr. Winser came to their home and identified himself as the representative of the insurance carrier; that Winser stated he was there to get the facts; that Winser wrote down a statement of the facts, as given him, which was signed by the plaintiff; that Winser asked him what they had in mind in the way of a settlement, and they told him they could not yet tell what the ultimate results of the accident would be; that they asked Winser "as to when we might hear and what action might be taken further and what procedure would be followed"; that Winser said it would be necessary for him to contact the doctors and submit his report to the insurance company, "and we would hear from the insurance company in due time"; that they pressed him as to how long this might take and Winser stated that "we would be advised just as soon as the report had been processed"; that they asked Winser if there was anything further they should do and he said there was nothing further they need do, "that we would hear from the insurance company"; that Winser did not tell them not to go to a lawyer;

that nothing was said about a lawyer or about money, and Winser did not say when he would be back; that Winser gave him his card; that he did not call Winser; that no one called him or came to see him; that between January 13 and the end of October he talked to no one and made no inquiry of anyone concerning his wife's claim against the city; that about November 1, he called the local agent who later informed him that the insurance company had turned down the claim; and that he then told the agent he would seek legal advice to find out "if we have a claim against the insurance company." When asked why they had not made further contacts during those months, he replied that he saw no point in pressing the matter, and that they hoped to know the extent of his wife's injuries "before we got the word" from the insurance company.

The plaintiff testified to the same effect with respect to what occurred when her statement was taken, and that between January 13 and November 25 she did not call or write to anyone concerning her claim, and no one contacted her. When asked why she did not press this matter during the summer and fall of 1953 she replied: "Well, I still was having so much trouble with my knee I thought it would be better if we waited to see just how badly handicapped I would be before we tried to make a settlement, and it was my impression that after a year elapsed we wouldn't be entitled to anything, so I waited as long before that year elapsed as I possibly could." Mr. Winser testified that he was an insurance adjuster working for an adjustment company in Santa Monica; that he discussed the facts with the plaintiff and her husband on January 13, and took her written statement and also took an authorization to get needed information from her doctors; that he did not do or say anything while there other than to discuss the facts of the accident, take the statement, and have her sign it; that there was no talk about a settlement or contacting them later; that he did not tell them that they would hear from the insurance company, or that they would hear from the city; that he was not asked, and that he said nothing with respect to whether

or not there was anything further they would have to do; and that after January 13 he never talked to either of them in person or by phone.

So far as material here, the court found that Winsor called on the plaintiff on January 13, 1953, and in the presence of her husband identified himself as an insurance adjuster employed by Bay Cities Adjustment Company, and working in behalf of the insurance carrier for the defendant city; that he obtained a written statement from the plaintiff and requested authority to further investigate the claim and examine the medical reports of her physician; that plaintiff asked Winsor what she was to do next and how long it would take to complete the investigation; that Winsor told her that they would hear from him and that there was nothing more they needed to do; that Winsor did not offer the plaintiff any money or mention any amount of settlement, or tell her when she would hear from him; that plaintiff was never advised not to retain an attorney and was never advised not to file a verified claim with the city; that neither plaintiff nor her husband heard from or saw Winsor again until after the suit was filed; that plaintiff and her husband kept Winsor's card containing his telephone number and address; that neither of them from January 13 up to November, 1953, ever attempted to or did contact anyone concerning their alleged claim against the defendant city; that plaintiff filed her alleged verified claim with the city clerk on November 25, 1952; that the reason given by plaintiff and her husband for not filing the claim until the expiration of 11½ months was because she was waiting to see whether or not she would suffer permanent disability; that there was no fraud or deceit in the matter of taking plaintiff's written statement on January 13, as to the facts surrounding the accident; that plaintiff was not lured into a sense of false security by reason of any word or act on behalf of the defendant city, or its agents or employees; and that as a reasonably prudent person the plaintiff was in no way prevented from filing her claim within the time prescribed by law.

The appellant contends that the court's findings to the effect that an equitable estoppel as against the city did not here exist are not supported by the evidence, and that the findings of fact do no support the judgment. It is argued that it is now clearly held, under the usual rules of equity, that a city may be estopped from relying on the statutory requirement for the filing of a claim within 90 days, where the city does anything which would reasonably tend to mislead a claimant with respect to the necessity for filing such a claim within that time; that it is only natural for a citizen to be more easily lulled into a false sense of security when a city tells him that it will investigate his claim, and there is nothing further he needs to do; and that the court here found that the appellant was told that the city would investigate further, and that there was nothing more that she needed to do.

[1] It is now well settled that a governmental agency may be estopped from relying on the failure to file such a claim within the statutory time when the conduct of its officers or agents was such as to mislead the claimant with respect to the necessity of filing the claim within the required time. *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323; *Cruise v. City and County of San Francisco*, 101 Cal. App.2d 558, 225 P.2d 988; *Mendibles v. City of San Diego*, 100 Cal.App.2d 502, 224 P.2d 42. In all of those cases the appeals were from judgments based on the pleadings or on the granting of a nonsuit. In the *Cruise* case [101 Cal.App.2d 558, 225 P.2d 991], it was pointed out that where an estoppel is pleaded "the question as to whether such estoppel exists is a question which should be left to the trier of fact to be determined as a question of fact, and not determined as a question of law."

[2] Assuming that the evidence here, in view of one of the facts found, would have supported a conclusion and judgment in favor of the appellant, it cannot be held as a matter of law that such a conclusion and judgment were required. The court did not find, as the appellant argues, that she was told by the city that it would inves-

tigate her claim and that there was nothing further she needed to do until she heard from the city. The statement in the findings relied on by the appellant was a part of a long finding relating to what the insurance adjuster told the appellant, with respect to how long the investigation would take and as to whether there was anything more she needed to do in connection with that investigation. That this statement in the findings was intended to relate to the investigation being conducted for the insurance carrier, and not to any steps that should or should not be taken in connection with enforcing a claim against the city, rather clearly appears from the other findings, to the effect that the appellant was in no way misled with respect to the filing of a verified claim with the city. No offer of a settlement was made on January 13, no statement was made that the claim would probably be settled, and nothing was asked or stated except with respect to how long the investigation would take and that the appellant would eventually hear from the adjuster. Although she was given the adjuster's address and telephone number the appellant made no attempt to contact him, the insurance carrier or the city for nearly ten months, and no claim was filed for about 11½ months after the accident. The evidence rather clearly shows that instead of relying on any representations to the effect that the filing of any suit would be unnecessary, the appellant at all times had the intention of bringing a suit within a year, and was waiting as long as possible before that year elapsed. Her own neglect and her own knowledge and intention had an important bearing on the equitable question presented to the trial court.

There is no evidence of any misleading statements made to appellant by the city or any of its employees, or regular agents. Over a long period the appellant chose to deal with the insurance carrier alone. There were many factual questions presented to the trial court, including the authority of the adjuster to act for and bind the city under these circumstances and for the purpose claimed, the meaning and effect to be given the statements made to the appellant on January 13, the extent of her reliance upon

any statements made to her by the adjuster, and her subsequent acts and conduct. In our opinion it cannot be held, as a matter of law, that an estoppel against the city here appears which sufficiently excused the belated filing of the verified claim required by the statute.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



137 Cal.App.2d 222

ESTATE of Aloysius Joseph UNIACK,
Deceased.

CENTRAL REALTY COMPANY, Appellant,
v.

UNION BANK & TRUST CO., et al.,
Executors, Respondents.

Civ. 21028.

District Court of Appeal, Second District,
Division 1, California.

Nov. 23, 1955.

Rehearing Denied Dec. 12, 1955.

Hearing Denied Jan. 18, 1956.

Estate proceeding. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered order confirming sale of realty and broker appealed from that portion thereof fixing broker's commissions. The District Court of Appeal, Doran, J., held that where trial court announced at hearing on return of sale of estate realty that all further bids were subject to \$10,000 commission and broker who was present and heard the announcement failed to make any statement in open court and did not object and did not speak to his client who made an increased bid, broker was estopped to demand a commission in excess of \$10,000 allowed by court.

Affirmed.

Estoppel ⇨91(1)

Where trial court announced at hearing on return of sale of estate realty that

all further bids were subject to \$10,000 commission and broker who was present and heard the announcement failed to make any statement in open court and did not object and did not speak to his client who made an increased bid, broker was estopped to demand a commission in excess of \$10,000 allowed by court. Probate Code, § 761.5.

Irwin M. Fulop, Beverly Hills, George I. Devor, Los Angeles, for appellant.

Pearlson & Pearlson, Herbert D. Pearlson, Albert Pearlson, Beverly Hills, Latham & Watkins, A. R. Kimbrough, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by real estate brokers from that portion of an "Order Confirming Sale of Real Property" fixing brokers' commissions on a sale price of \$780,000. The total commission allowed was \$10,000, of which appellant's share was \$5,000.00.

"Appellants contend that the Court failed to perform its judicial function to determine 'a reasonable compensation' as required by Probate Code, Section 761.5, and that Finding of Fact XIII (Clk. Tr. p. 23 that the brokers are estopped to demand a commission beyond that announced and fixed by the Court) is not supported by the evidence".

Section 761.5 of the Probate Code provides that, "Where an original bid is made by a purchaser direct to the estate and thereafter at the time of hearing the return of sale containing the original bid, an increased bid is made by a bona fide agent which results in the confirmation and sale of the property at such increased bid, the court shall allow a commission to the agent who procured the increased bid, which commission shall be fixed by the court at such amount as the court, in its discretion, finds will be a reasonable compensation for the services of the agent to the estate".

As summarized in appellants' and respondents' brief, one of the executors in the Uniack estate wrote to appellants describing "the Geraldine Tract", involved herein, listing it for sale and requesting bids, "Subject

to the foregoing conditions and to the requirement that the purchaser shall deposit approximately 10 per cent of the purchase price with the offer to purchase, commission will be paid at the regular and current Los Angeles Realty Board rate only to real estate broker submitting written offer accepted by us". The current commission rate is 5 per cent.

"Appellants, licensed real estate brokers with thirty years experience, thereupon endeavored to interest one L. K. Shapiro in the property. Shapiro apparently was acting for the Western Harness Racing Association. From June 4 to September 23, 1954, * * * most of Mr. Rosenthal's (one of two partners in Central Realty Co.) time was devoted to the Geraldine Tract and adjacent properties. * * * Mr. Rosenthal did not submit a written bid during this period but he was looking to executor for his commission".

About September 13, 1954, Mr. Rosenthal telephoned the executor and was advised that an acceptable bid had been received from one Teague. On September 23, 1954, the executors notified Rosenthal that the return of sale on the Teague bid would be heard in court on October 7, 1954. During this period Rosenthal advised the executors "that he would produce a buyer in court", and was informed that such purchaser should be equipped with cashier's check and a letter of credit. The Teague bid was \$430,000, with a commission of \$10,750 claimed, and it is appellant's claim that this reduced commission arrangement "was unknown to him until the commencement of the hearing".

At the hearing, seventeen bids were made by various parties, "all with commission claimed, including bids by L. K. Shapiro, who designated appellants as the broker. The last bid in this series, which included none by Mr. Teague, was \$496,000.00 by Mr. Shapiro". Mr. Teague then announced, "I was the original bidder. I will raise mine to \$500,000 and on this bid and subsequent bids there will be a \$10,000.00 commission claimed only". Thereafter there was spirited bidding by various persons without mention of commission. Mr. Teague's last bid was \$650,000, and a sale of the property to

Mr. Shapiro, appellant's bidder, was by the court, "confirmed for \$780,000, \$10,000 commission".

It is stated in appellant's brief that "Mr. Shapiro assumed, as a minimum, that the \$10,000.00 would be wholly allocated to appellants. Not a word of testimony was taken on the services of the brokers nor on the reasonableness of the compensation to them". Two weeks later, appellant's brief continues, a further hearing was held on this claim, but "The Court refused to determine any other amount, on the ground that appellants had waived and relinquished any right to further commission and were estopped to assert any claim", by reason, as stated in the trial courts Conclusions of Law, "of their silence and failure to speak or act or object to the statements made by the Court at the time of the hearing of sale", when the commission of \$10,000 was confirmed. Appellants "assail such finding and assert that it has no support in the evidence".

The appellants' contention that the procedure adopted by the trial court in fixing the broker's commission was improper, cannot be sustained. A survey of the record indicates that appellants were present at the hearing of the return of sale, and "appellants make no claim that he (Mr. Rosenthal) did not hear the statements made by the parties and the Court at the hearing of October 7, 1954. He did hear those statements. It is also clear that he made no statement in open court, and he did not speak to his 'client' Mr. Shapiro during the bidding". Appellants' attempt to explain this silence by stating that "Mr. Rosenthal believed he required an attorney to participate in the proceedings", is not convincing.

The trial court announced that it would be assumed that all further bids were subject to a \$10,000 commission. This statement, as said by the respondent, "specifically invited an answer or denial", and must have been so understood by every person in the court room, whether lawyer or layman. If appellants were not satisfied with the arrangement mentioned by the court, this was the time to make known any objection

thereto. Cases cited by appellants furnish no support for the contentions here made.

Appellants seem to contend that by reason of previous negotiations between the executors and brokers, some sort of fiduciary relation resulted or that there was some understanding that the brokers would be compensated in accordance with prevailing rates, or at least in a "reasonable" amount; that the trial court inequitably "froze" the amount of commission without hearing, thereby defeating appellants' rightful claim. In this connection it may be noted that appellants' client had entered no bid whatever prior to the court hearing and was in no different situation than any other prospective bidder. At the hearing all bidders were given the same opportunities and were bound by the same rules.

The fixing of "a reasonable compensation" to the agent who has produced an increased bid is, by the express terms of Section 761.5 of the Probate Code, a matter within the discretion of the trial court. In the instant case, the amount of \$10,000 was fixed by the court as such a reasonable amount, apparently with the full acquiescence of the various bidders present. No abuse of this discretionary power has been shown.

None of the cases cited by appellant support the claim that the trial court was required to hold a special hearing to determine "(a) What services the broker has rendered, and (b) What those services are reasonably worth". As pointed out in respondents' brief, the cases cited deal with factual situations dissimilar to that here involved. And, as hereinbefore noted, the trial court actually accorded to appellants a second hearing on October 20, 1954 at which Mr. Rosenthal was examined and cross-examined, after which the court declined to change the previous ruling as to the commission.

The findings are supported by the record and the latter discloses no reversible error.

The order is affirmed.

WHITE, P. J., and NOURSE, Justice pro tem., concur.

137 Cal.App.2d 206

Jesse A. LOMBARDI, Plaintiff and Appellant,
v.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a national banking association, as Executor of the Will and Estate of Minnie B. Hutchin, Deceased, Defendant and Respondent.

Civ. 21132.

District Court of Appeal, Second District.
Division 2, California.

Nov. 22, 1955.

Hearing Denied Jan. 18, 1956.

Action against executor to recover on a rejected claim, based on an obligation allegedly signed by decedent. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment of nonsuit, and claimant appealed. The District Court of Appeal, Fox, J., held that where claimant appeared as his own attorney and offered the purported obligation, trial court was not required to advise claimant on how to lay a foundation for admission of document.

Judgment and order affirmed.

1. Attorney and Client §62

A litigant has a right to act as his own attorney, but he should be restricted to the same rules of evidence and procedure as required of those who practice law, and ignorance should not be unjustly rewarded.

2. Trial §29(1, 2, 3)

A trial judge must see that a cause is not defeated by mere inadvertence or want of attention, and should call attention to omissions of evidence or defects in pleading which are likely to result in a decision other than on merits and, within reasonable limits, by proper questions, clearly to bring out facts so that important function of his office may be fairly and justly performed, but he is not required to act as counsel for litigant in presentation of his evidence.

3. Witnesses §125

The rules of evidence under the dead man's statute are designedly technical in order to protect estates against spurious de-

mands. West's Ann.Code Civ.Proc. § 1880, subd. 3.

4. Trial §29(2)

In action against executor to recover on obligation allegedly signed by decedent, wherein claimant appeared as his own attorney and offered the purported obligation, trial court was not required to advise claimant on how to lay a foundation for admission of document. West's Ann.Code Civ.Proc. § 1880, subd. 3.

Littlejohn & Callister and Roy Littlejohn, Los Angeles, for appellant.

Allan L. Leonard and Iverson & Hogo-boom, Los Angeles, for respondent.

FOX, Justice.

This is an appeal by plaintiff from an order and judgment of nonsuit.

Plaintiff brought this action against the executor of the estate of Minnie B. Hutchin, deceased, to recover on a rejected claim. He alleged that on or about April 8, 1938, Minnie B. Hutchin executed and delivered to him an instrument in writing wherein she acknowledged that for a valuable consideration she was indebted to him in the amount of \$25,000 and agreed to pay such sum to plaintiff and authorized and directed her executor to pay the same to plaintiff. There was attached to the complaint a copy of a letter purportedly signed by the decedent containing the alleged promise and direction to pay.

Defendant denied the allegations of the complaint and particularly that decedent had executed or delivered to plaintiff the letter in question. Defendant also charged that the signature on the document had been obtained upon a blank piece of paper by means of fraud and concealment and without the knowledge of the decedent, or by means of fraud and fraudulent representations on the part of plaintiff.

At the trial, plaintiff, appearing in propria persona, took the witness stand in his own behalf. Counsel for defendant advised the court he would insist upon the examination proceeding by question and answer because he intended to invoke the protection of sec-

tion 1880, subdivision 3,¹ Code of Civil Procedure, as to any matter occurring before the decedent's death. Thereupon the following transpired:

"Mr. Lombardi: I offer this letter from Minnie B. Hutchin which is the basis of my claim.

"Mr. Leonard: I object to the tender on the ground that there is no proof that that is the signature of Minnie B. Hutchin and we object to Mr. Lombardi's testimony in that regard and move to strike.

"The Court: That part may go out. You will have to lay your foundation for the introduction of the document.

"Mr. Lombardi: I can prove the signature by other documents.

"The Court: You will have to present evidence.

"Mr. Lombardi: I offer a report of Clark Sellers covering the examination of that document and three other documents where he reports it is her signature. May I offer this?

"Mr. Leonard: Object to it on the ground that no proper foundation has been laid and it is hearsay.

"The Court: Sustained.

"Mr. Lombardi: I don't know what to do.

"The Court: I can't tell you. I am trying the case, I am not an attorney to advise you.

"Mr. Lombardi: I don't know how to lay my foundation that it is her signature.

"The Court: You will have to proceed or not proceed, that is all. I cannot help you on that.

"Mr. Lombardi: That is all I had to offer.

"Mr. Leonard: At this time, your Honor, we move for a nonsuit on the ground of failure of proof."

The court granted the motion and judgment was accordingly entered.

The gravamen of plaintiff's appeal is that the trial judge failed to lend him any assist-

ance in the presentation of his evidence and as a consequence he was unable to get his evidence before the court. We find no justification for a reversal.

[1] A litigant has a right to act as his own attorney, *Gray v. Justice's Court*, 18 Cal.App.2d 420, 63 P.2d 1160, "but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded." *Knapp v. Fleming*, 127 Colo. 414, 258 P.2d 489; *Monastero v. Los Angeles Transit Co.*, 131 Cal.App.2d 156, 160-161, 280 P.2d 187. The Supreme Court of Arizona, in *Ackerman v. Southern Arizona Bank & Trust Co.*, 39 Ariz. 484, 7 P.2d 944, stated the principle in this language: "A layman with resources who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse." To that same effect is *Biggs v. Spader*, 411 Ill. 42, 103 N.E.2d 104. The fact that a layman elects to represent himself "certainly does not excuse him from a failure of proof" of his cause of action. *Pete v. Henderson*, 124 Cal.App.2d 487, 491, 269 P.2d 78, 80.

Applying these principles to the proceeding at hand, it is clear plaintiff received the decision to which he was entitled, namely, a nonsuit, since he did not establish any element of his case. But, he argues, the judge knew he was a layman unlearned in legal procedure and the technical rules of evidence, therefore he should have helped him out. That would have been an unjust reward for ignorance as the Supreme Court of Colorado pointed out in the *Knapp* case, *supra*. Plaintiff was not entitled "to capitalize" on his own ignorance. *Monastero v. Los Angeles Transit Co.*, *supra*.

[2,3] It is the duty of a trial judge to see that a cause is not defeated by "mere inadvertence", *Hellings v. Wright*, 29 Cal. App. 649, 156 P. 365, or by "want of at-

ed, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

1. Section 1880, Code of Civil Procedure, reads in part: "The following persons cannot be witnesses: * * * 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted

tention", Bare v. Parker, 51 Cal.App. 106, 196 P. 280, 281, and "to call attention to omissions in the evidence or defects in the pleadings" which are likely to result in a decision other than on the merits, Farrar v. Farrar, 41 Cal.App. 452, 182 P. 989, 991, and "within reasonable limits" by proper questions "to clearly bring out the facts so that the important functions of his office may be fairly and justly performed." In re Estate of Dupont, 60 Cal.App.2d 276, 140 P.2d 866, 873. He is not, however, required to act as counsel for a litigant in the presentation of his evidence. That is virtually what plaintiff insists the trial judge should have done for him. Claims against an estate are not easily proved where the "dead man's statute" is involved. The rules of evidence in such matters are somewhat technical, and designedly so, in order to protect estates against spurious demands. Warren v. Nair, 102 Cal.App.2d 298, 300, 227 P.2d 515. This case presented difficulty of proof for issues were made not only as to the genuineness of decedent's signature to the document in question and the manner in which it was procured but also as to the circumstances under which it was delivered to plaintiff by her, if in fact any delivery was ever made. To explain section 1880, subd. 3, Code of Civil Procedure, and the decisions construing it to a layman so that he could understand and apply them in the presentation of evidence in a suit on a transaction had with a deceased person, is to forget the difficulty that even some members of the legal profession have in properly presenting competent evidence to prove claims against estates in these circumstances. Such an undertaking would undoubtedly prove abortive and a waste of time. Also, it might well take from the proceeding the appearance of objectivity and impartiality which are so important to public confidence in the administration of justice. This is not a case where a few suggestions on the part of the trial judge would have solved plaintiff's difficulty. Had it been such, the trial judge would undoubtedly have followed the customary practice and offered appropriate suggestions.

Plaintiff takes the position that because the trial judge failed to assist him in the

presentation of his evidence he "was unnecessarily and arbitrarily deprived of a fair and just trial on the merits of his case." The obvious answer is that he, and not the trial judge, is responsible for his present plight. If plaintiff had a legitimate claim against this estate for \$25,000 it would have been an easy matter to employ competent counsel to represent him in the trial court as he has now done at this late date on appeal.

[4] Plaintiff relies on *Miller v. Republic Grocery, Inc.*, 110 Cal.App.2d 187, 242 P.2d 396, 399. That was a suit on a promissory note. Due "to an oversight" the allegation as to the assignment of the note was omitted from the complaint. When the assignment was offered in evidence objection was made and sustained on the ground it was not within the issues. Counsel did not ask leave to amend his complaint. The nonsuit followed. Plaintiff later made a motion under section 473, Code of Civil Procedure, to set aside the judgment of nonsuit, to reopen the case and for permission to file an amended complaint. The motion was denied. On appeal it was held that it was an abuse of discretion to deny the motion. That was obviously a very different situation from the one at bar. In the *Miller* case, a suggestion by the trial judge that the complaint be amended to allege the assignment was all that was required and such a suggestion should have been made. Here, however, the trial judge is called upon to perform a dual role: (1) to assist and advise the plaintiff in the presentation of his evidence, and then (2) to pass upon its admissibility and weight. In view of the intricacies involved in the problems here presented this is an undue burden to place upon him and he should not be expected or required to assume it.

It is not necessary to consider other questions discussed in the briefs.

The judgment and order are affirmed.

McCOMB, Acting P. J., and ASHBURN, J. pro tem., concur.

Hearing denied; McCOMB, J., not participating.

137 Cal.App.2d 226

**PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Elmer R. PUGH, Defendant and Appellant.
Crim. 5220.**

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 23, 1955.

Rehearing Denied Dec. 6, 1955.

Hearing Denied Dec. 21, 1955.

Defendant was convicted of grand theft. The Superior Court, Los Angeles County, David Coleman, J., in trial before jury, entered judgment, and denied motion for new trial. The District Court of Appeal, McComb, Acting P. J., held that evidence was sufficient to sustain conviction.

Judgment and sentence affirmed.

1. Criminal Law ⇨1144(13)

Upon appeal from judgment of conviction and from order denying motion for new trial, evidence would be viewed in light most favorable to the people.

2. Escrows ⇨12

Where grant in escrow is made upon condition, such grant takes effect upon performance of the conditions and upon delivery of deed by the depository to the grantee.

3. False Pretenses ⇨12

In prosecution for obtaining property by false pretenses acquisition of the property is complete only upon receipt by defendant of possession and title.

4. Criminal Law ⇨149

Date of commission of offense of grand theft was date defendant obtained title to the property, and, therefore, prosecution brought within three years of recordation of deed by which defendant obtained title was not barred by statute of limitations.

5. False Pretenses ⇨49(1)

Evidence was sufficient to sustain conviction for grand theft. Pen.Code, § 1110.

6. False Pretenses ⇨22

Even if property is worth consideration paid therefore, such fact is not defense to charge of grand theft where there is sub-

stantial evidence that defendant knowingly made false representations with intent to defraud and with purpose and effect of inducing prosecuting witness to part with something of value.

7. Criminal Law ⇨417(1)

Where declaration is part of a transaction, which is fact in dispute or evidence of that fact, such declaration is evidence as part of the transaction. West's Ann. Code Civ.Proc. § 1850.

8. False Pretenses ⇨6, 49(1)

Where vendors believed that they were selling their property directly to purchaser unencumbered and did not know that they had signed title over to realty broker who caused trust deed to be placed on the property, trust deed was part and parcel of a false scheme and was false token, as well as corroborating evidence sufficient to meet requirements of penal code provision requiring corroboration. Pen.Code, § 1110.

9. Criminal Law ⇨402(1)

In prosecution for grand theft, proper foundation was laid for admission of oral testimony relative to contents of letter relating to defendant's misrepresentations, in view of fact that recipient of letter testified to such receipt but stated that she did not have letter at time of trial and had searched for it in designated places at designated times.

10. False Pretenses ⇨41

In prosecution for grand theft, admission of testimony of participants in transaction which was part of scheme which defendant had devised to defraud certain person was relevant and properly admitted.

11. Criminal Law ⇨478(1)

In prosecution for grand theft of realty, admission of testimony of two witnesses as experts to value of the realty involved was not error in view of fact that such witnesses testified they had bought and sold property in the area and were familiar with the property values over a long period of time.

12. Criminal Law ⇨480

Usual expert as to value of realty is qualified by proof of his familiarity with

the property and with other property in the neighborhood, his experience in the business, and his familiarity with state of market and of sales of similar property in the vicinity.

13. False Pretenses ☞11

Realty may be subject of theft just the same as personalty. Pen.Code, §§ 484, 532.

14. Criminal Law ☞829(1), 830

In prosecution for grand theft, giving of certain instructions and refusal to give other instructions requested by defendant was not error, in view of facts that jury was fully, fairly and correctly advised on each material issue and that instructions requested and refused were either covered by other instructions or were properly refused as inapplicable.

Edmund G. Brown, Atty. Gen., Norman Sokolow, Deputy Atty. Gen., for respondent.

Morris Lavine, Los Angeles, for appellant.

McCOMB, Acting Presiding Justice.

From a judgment of guilty of grand theft after trial before a jury, defendant appeals. There are also appeals from the order denying a motion for a new trial, and "all proceedings had at the time of passing judgment and sentence."

[1] *Facts*:* There are two parcels of real property involved in this case. The first, which will be hereinafter referred to as "the 304 acres", consists of 304 acres of desert land near Harper's Dry Lake in San Bernardino County, owned by Mr. Asher Goodrick, who had settled on the property, drilling one well sufficient for chicken raising and domestic use, and had obtained title to it by a United States Patent in 1935.

The land was situated on the slope of a hill with a rise of 50 feet per mile. It was very sandy and without water development unsuitable for alfalfa farming. It had a

market value of between \$1 to \$5 per acre in 1950.

The second parcel of land was a large rooming house hereinafter referred to as the "State Street property" located at 6200 State Street in Los Angeles County, owned by Mrs. Verna Harold. It had been purchased in 1949 for \$15,750.

In July, 1950, Mr. and Mrs. Goodrick listed the 304 acres for sale with defendant, a licensed real estate broker, asking a price of \$1,500. Defendant, unbeknown to the Goodricks, became interested in buying the property for himself and intended to put his son on the property to develop it. Defendant told Mr. Goodrick that he could not get more than \$300 for it. To facilitate a deal he requested Mr. and Mrs. Goodrick to sign a paper, which they did. Mr. Goodrick had shown defendant, at his request, the 304 acres.

Thereafter, defendant told Mr. Goodrick that the deal had fallen through and purportedly returned the paper to Mr. Goodrick. In July, 1950, defendant informed the Goodricks that he had a purchaser, Mary Baker, who would pay \$300, and an escrow was consummated at the Security-First National Bank, the Goodricks signing a deed to Mary Baker. Thereafter, the Goodricks received a check through the escrow for \$300.

Mrs. Mary Baker, an elderly person, had previously sold some lots in Oklahoma through defendant. She then owned no property except a small interest in a plastics concern in which she worked as a bookkeeper. She was a person of limited means. Defendant contacted Mrs. Baker in July, 1950, and informed her that he had a deal she could profit by. He told her that he had for sale 304 acres of perfectly flat desert land worth \$200 an acre; that he had seen the land and a Vice President of Richfield Oil Company owned the land next to it and paid \$200 an acre for it; that this land was producing alfalfa; that he thought he could get the 304 acres for her for \$200 down plus the expense of escrow

* The evidence is viewed in the light most favorable to the people (respondent) pursuant to the rules set forth in *People v.*

Pianezzi, 42 Cal.App.2d 265, 269 [2], 108 P.2d 732 (hearing denied by the Supreme Court).

of about \$100; that there was a deed of trust in the sum of \$15,000 that had to be cared for. Mrs. Baker told defendant she did not have any money and could not pay the trust deed. Defendant then told Mrs. Baker that he had two men in his office who wanted to lease the land and plant it to alfalfa, and he assured her these men would lease it as soon as she bought it, and that the rental on the land would more than pay off the trust deed.

Defendant took Mrs. Baker to the escrow department of the Security-First National Bank, where she signed a note to Lulu Brockman for \$15,000, payable \$5,000 in 3 years, \$5,000 in 5 years and \$5,000 in 7 years. She also signed a trust deed to Lulu Brockman to secure the note against the 304 acres and paid \$300 in cash. Lulu Brockman was the mother-in-law of defendant.

In 1949, Keith Harold, the son of Mrs. Verna Harold, bought the State Street property through defendant for \$15,750, and in the fall of 1949 bought another house and lot through defendant who then promised to sell the State Street property without commission, and thereafter brought prospective purchasers to look at the property. Verna Harold paid off certain encumbrances on the State Street property and Keith Harold deeded this property to his mother with the understanding that when it was sold Mrs. Harold would be reimbursed with interest, and the balance of the proceeds would go to Keith Harold. Mrs. Opal Glover, the sister of Verna Harold, occupied the State Street property with Keith. They had also three roomers as tenants.

In August, 1950, defendant proposed an exchange of the \$15,000 note and trust deed on the 304 desert acres, plus \$500 cash, for the State Street property. Keith told defendant that his mother had the largest interest in the property and it was in her name, and that he would have to convey anything that defendant said to his mother to see whether she considered it satisfactory or not.

Defendant represented to Keith Harold that he had an old lady who had a trust

deed on some alfalfa land (that is, the 304 acres) in San Bernardino, whom he thought might be interested in trading the land for the State Street property and would give in addition \$500 cash; that Mary Baker, the maker of the note (which was secured by the trust deed) owned the alfalfa ranch very close to the 304 acres, and Mary Baker also owned several apartment houses, was an executive and part owner of a plastics concern, that with two sons-in-law she intended setting up in business to grow alfalfa seed on the 304 acres, and that the first payment was made payable in three years so that they might have time to raise at least one crop before the first installment became due; that Lulu Brockman was a widow and no longer had the ability to farm the land and therefore decided to sell it; that the land was worth \$75 an acre, at least \$50 an acre; that it had been farmed; that it was cleared, had two good wells on it, was perfectly level, and it had what he thought was a perfect slope for irrigation; and that the country all about it grew alfalfa. He also reported that Mary Baker had substantial assets.

Keith Harold wrote to his mother in effect repeating these representations to her. Verna Harold replied by letter to her son. Pursuant to this letter, Keith Harold told defendant that his mother advised that if everything defendant had said was true, and if the deal looked all right to him it would be all right to put it in escrow.

The escrow was opened accordingly. Mrs. Verna Harold received by mail a deed which she signed, conveying the State Street property to Lulu Brockman. The deed was mailed to the escrow agent. Defendant paid \$500 and produced into escrow an assignment of the note and trust deed on the 304 acres from Lulu Brockman to Verna Harold. On September 19, 1950, the deed was forwarded by the escrow agent to the Title Insurance and Trust Company, and it was directed to comply with escrow instructions to obtain insured titles and to record both deeds simultaneously.

On or shortly prior to October 2, 1950, the titles to the two properties were insured and the escrow agent ordered the recording of the instruments, which were record-

ed October 3, 1950. Keith Harold and his aunt moved out of the State Street property about October 12, 1950, and delivered the keys to defendant.

Thereafter, the State Street property was transferred from Lulu Brockman to Mary Pugh, the daughter of defendant, who obtained a \$6,500 loan upon it on November 9, 1950. Ultimately \$10,000 of the proceeds of the sale of the property found its way into the bank account of defendant.

In July, 1953, Mrs. Verna Harold sent the note and trust deed on the 304 acres to a bank in Los Angeles for collection. Thereafter Keith Harold was contacted by an attorney for Mary Baker and went to defendant. Keith Harold told defendant of the facts he had learned and asked just who Lulu Brockman was. Defendant said, "I am Lulu Brockman."

Mary Baker was not aware that the 304 acres were unencumbered, that is, that the note and deed to Lulu Brockman were a new note and trust deed. Neither Keith Harold nor Mary Baker had seen the property prior to their entering the transactions relating to the 304 acres and the note and trust deed above described.

Questions: First: *Was the prosecution of the present action barred by the statute of limitations?*

[2-4] *No.* Defendant urges that the three-year statute of limitations barred the prosecution of the present action, stating that the date (September 12, 1950) when Mrs. Verna B. Harold signed the deed transferring the State Street property to Lulu Brockman, with the intent to transfer the property, was the date the alleged offense occurred. Such date is not controlling. The deed was recorded October 3, 1950, less than three years from the date of the filing of the information (September 29, 1953). The escrow officer acknowledged that this recording was in the course of the transaction pursuant to the instructions. In other words, the transaction was not deemed completed until recordation of the deed. Possession of the property was not in fact surrendered to defendant until subsequent to that date.

It is settled that where a grant in escrow is made upon conditions, such grant takes effect upon the performance of the conditions and upon delivery of the deed by the depository to the grantee. (In re Reed, 204 Cal. 119, 123, 266 P. 948; Watts v. Mohr, 86 Cal.App.2d 256, 262 [3], 194 P.2d 758.) The foregoing rules considered in connection with the rule that in a prosecution for obtaining property by false pretenses, the acquisition of the property is complete only upon possession and title being received by the defendant (People v. Pillsbury, 59 Cal.App.2d 107, 111 [1], 138 P.2d 320; cf. People v. Fawver, 29 Cal. App.Supp.2d 775, 779, 77 P.2d 325), makes it clear that the date of the commission of the offense was not prior to October 3, 1950, the date defendant obtained title to the property. Therefore the present proceeding was not barred by the statute of limitations.

Second: *Was there substantial evidence to support the judgment of guilty?*

[5] *Yes.* (1) Defendant contends that Mrs. Harold got just what she bargained for, a trust deed note and some cash in exchange for the State Street property. This is not the fact.

The record discloses that she was defrauded by defendant who made representations to her son knowing that such representations were false and would be transmitted to Mrs. Harold and acted upon by her. Among other material misrepresentations made by defendant was the one that the maker of the note, Mary Baker, was a woman of means, and that the 304 acres which secured the trust deed was alfalfa land. By such representations Mrs. Harold was induced to part with the State Street property which had been purchased the year before for more than \$15,000 and in return she received a note and trust deed secured by property worth no more than \$1,500, and the maker of the note and trustor lacked financial assets sufficient to meet the obligation which she had assumed.

[6] Even if property is worth the consideration paid therefor, this is not a defense where there is substantial evidence,

as in the present case, that defendant knowingly made false representations with the intent to defraud and with the purpose and effect of inducing the prosecuting witness to part with something of value. (*People v. Raines*, 66 Cal.App.2d 960, 962, 153 P.2d 424.)

People v. Tufts, 167 Cal. 266, 139 P. 78, relied on by defendant, is not here controlling. In such case it was held that a husband's untrue representation that he had power of attorney from his wife to transfer certain notes was immaterial if the transfer would be valid without the power of attorney. Such is clearly not the case here.

Testimony of defense witnesses also relied upon by defendant which was contradicted by prosecution witnesses must, of course, be disregarded on appeal. (See *People v. Frankfort*, 114 Cal.App.2d 680, 700 [28], 251 P.2d 401.)

(2) Defendant urges that there is no proof of false representation to Mrs. Verna Harold; that any alleged representation to her son was not transferable to her so as to constitute a false representation within the meaning of the statute; that her son was not the agent of defendant but was the agent of Mrs. Harold and therefore defendant was not bound by any letter from the son to his mother purportedly relaying defendant's representations.

This is contrary to the evidence. Keith Harold testified that defendant made certain representations to him respecting the purported trade; that he told defendant his mother had the largest interest in the State Street property and he would have to convey defendant's statements to his mother; that he subsequently told defendant he had conveyed defendant's statements to his mother and the latter had advised him that if everything was as defendant represented he should proceed with the escrow, and thereafter defendant initiated the escrow.

[7] This evidence as to defendant making the representations to Keith Harold and his conveying the representations to his mother was proper, and falls within the rule that where a declaration is part of a transaction, which is the fact in dispute

or evidence of that fact, such declaration is evidence as part of the transaction. (*Airola v. Gorham*, 56 Cal.App.2d 42, 50 et seq., 133 P.2d 78; Code of Civ.Proc. sec. 1850.) The rule is aptly stated in 22 Am. Jur. (1939) 458 as follows:

"* * * The rule is, moreover, that it is not necessary that the false representations be made to the person defrauded in order to convict one of obtaining money or property by false pretenses. A false representation to an agent or clerk has been held a false pretense to the principal. Likewise, one may be guilty of obtaining money under false pretenses where he makes his representations by means of an advertisement directed to the general public. * * *" (See also *People v. Green*, 22 Cal.App. 45, 50, 133 P. 334.)

(3) Defendant contends that the evidence is insufficient for lack of corroboration under Penal Code, section 1110, providing that in a prosecution for obtaining property by false pretenses defendant cannot be convicted unless the false pretense was expressed in language accompanied by a false token or writing, or, among other things, that the pretense be proven by the testimony of two witnesses or of one witness and corroborating circumstances.

This argument is devoid of merit. The People's evidence showed that the 304 acres were unencumbered when owned by the Goodricks; that as far as the Goodricks were concerned the 304 acres were being sold by them to Mary Baker for the total consideration of \$300. As far as Mary Baker was concerned, however, she was buying this property for a consideration of \$15,300. The property was represented to her by defendant as being encumbered when in fact it had not been.

Defendant maintained that the Goodricks sold this property to him, and that he caused the trust deed to be placed on the property, with Lulu Brockman (his mother-in-law) as his nominee.

[8] The Goodricks' testimony was contrary to this. They testified in substance that they believed they were selling their property directly to Mary Baker unencumbered. They were not aware they had

signed title over to defendant and that defendant caused a trust deed to be placed on the property. Accordingly, in light of this evidence, the trust deed was part and parcel of a false scheme.

People v. Wynn, 44 Cal.App.2d 723, 728 et seq., 112 P.2d 979, is here applicable. In such case conditional sales contracts and chattel mortgages served to carry out the false pretense that the security was bona fide, and, as in that case, we here hold that the trust deed was a false token as well as a corroborating circumstance sufficient to meet the requirements of section 1110 of the Penal Code.

In addition, there was direct testimony of two witnesses as to defendant's representations which also meet the requirements of the Penal Code, section 1110.

[9] Third: *Was a proper foundation laid for the admission of oral testimony relative to the contents of the letter from Keith Harold to his mother relaying defendant's misrepresentations?*

Yes. Verna B. Harold testified that she received the letter; that she did not have the letter at the time of trial; that she had searched for it and could not find it; that she did not recall what she had done with it after she had showed it to her husband; that she looked for the letter in September, 1953, both at home and in her safety deposit box at the bank where she kept papers relating to the transaction in question. Clearly this was sufficient foundation for the admission of oral testimony predicated upon the finding of the trial court that the written document itself had been lost.

Fourth: *Did the trial court err in admitting testimony of Mr. and Mrs. Goodrick and of Mary Baker?*

[10] No. Defendant contends that such testimony was irrelevant. It was relevant to the transaction with Keith Harold as showing part of the scheme which defendant had devised for the purpose of defrauding Mrs. Harold. (See *People v. Eddards*, 25 Cal.App. 660, 664 et seq., 145 P. 173.)

There was likewise no error in permitting Mr. Goodrick to testify as to what he

thought the 304 acres were worth on August 8, 1950, since he then was the owner of the property and had been for a number of years. Therefore his opinion as to its value was proper. (*People v. La Macchia*, 41 Cal.2d 738, 746 [11], 264 P.2d 15.)

[11, 12] Neither is there any merit in defendant's contention that the court erred in admitting the testimony of Mr. De Flon and Mr. Depue as experts as to the value of the 304 acres. Each testified they had bought and sold property in the area and were familiar with the property values over a long period of time. Their qualifications fell within the rule stated by the Supreme Court in *People v. La Macchia*, supra, 41 Cal.2d 746 [10], 264 P.2d 21, as follows:

"The usual expert is qualified by proof of his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and of sales of similar property in the vicinity * *"

Fifth: *Is real estate a subject of theft?*

[13] Defendant contends that Penal Code, sections 484 and 532 are inherently unconstitutional and not applicable to real property, relying upon *People v. Cummings* (1896), 114 Cal. 437, 46 P. 284. After the decision in *People v. Cummings*, our Supreme Court in *People v. Rabe* (1927), 202 Cal. 409, 416, 261 P. 303, held that, in view of the subsequent amendment of the statute (sec. 532) to include real property the holding in *People v. Cummings*, supra, no longer states the law, and that real property may be the subject of theft just the same as personal property. (Cf. *People v. Roland*, 134 Cal.App. 675, 680 et seq., 26 P.2d 517; *People v. Hiden*, 102 Cal.App.2d 655, 659 [2], 228 P.2d 95.)

Sixth: *Did the trial court err in (a) giving certain instructions, and (b) refusing to give other instructions requested by defendant?*

[14] No. An examination of the record shows that the trial judge fully, fairly and correctly advised the jury on each and every material issue, and that the instructions requested by defendant and refused were either covered by the instructions read

by the trial judge to the jury or were properly refused as inapplicable to the present case. (*People v. Gardner*, 128 Cal.App.2d 1, 8 [15], 74 P.2d 908 (hearing denied by the Supreme Court).)

The judgment and order denying the motion for a new trial and "all proceedings had at the time of passing judgment and sentence" are, and each is, affirmed.

FOX, J., and ASHBURN, Justice pro tem., concur.



137 Cal.App.2d 78

John CALDWELL and John Caldwell, as guardian ad litem for Johnnie Leroy Caldwell, a minor, Plaintiffs and Respondents,

v.

Frank Joseph GELDREICH, Ardell Hynes, et al., Defendants and Appellants.

Civ. 5085.

District Court of Appeal, Fourth District, California.

Nov. 17, 1955.

Guardian's action on behalf of minor and himself against motorist for minor's personal injuries. After jury verdict for motorist, the Superior Court of Riverside County, Hilton H. McCabe, J., entered an order purporting to grant a new trial and motorist appealed. On appeal guardian moved to augment record. The District Court of Appeal, Griffin, J., held that affidavit of guardian's attorney that he had searched his files and could not find copy of notice of entry of judgment was insufficient to show that affidavit of mailing of such notice was false, and order purporting to grant new trial entered more than 60 days subsequent to mailing of notice of entry of judgment, was invalid.

Reversed and motion to augment record denied.

1. Judgment $\Rightarrow$ 276

Affidavit of attorney for defeated party that he had searched his files and could not find copy of notice of entry of judgment and could not remember receiving same, would not support a finding that prevailing party's affidavit of mailing of notice of entry of judgment was false or fraudulent. West's Ann.Code Civ.Proc. §§ 1012, 1013.

2. Notice $\Rightarrow$ 14

Where service of notice is made by mailing same to party's attorney, burden is not upon sender to show that notice was actually received by addressee. West's Ann.Code Civ.Proc. §§ 1012, 1013.

3. Notice $\Rightarrow$ 10

Service of notice and papers through mail, where authorized by statute, is termed substituted service and is intended to take the place of and be equivalent in point of law and service to a personal service. West's Ann.Code Civ.Proc. §§ 1012, 1013.

4. New Trial $\Rightarrow$ 116(2)

Under statute providing that power of the court to pass upon motions for new trial shall expire 60 days from and after service on moving party of written notice of entry of judgment, service of such notice upon attorney by mail was completed when deposit of same was made in the post office. West's Ann.Code Civ.Proc. §§ 12a, 660, 1012, 1013.

5. Attorney and Client $\Rightarrow$ 29

If name of attorney was signed to written notice of entry of judgment by an associate in his office, it must be presumed that the associate was authorized to do so.

6. Attorney and Client $\Rightarrow$ 29

Where attorney for defeated parties secured stipulation extending time to file affidavits to support his motion for new trial by procuring associate of attorney for prevailing party to sign attorney's name to stipulation, defeated party was estopped from claiming that prior written notice of entry of judgment signed in the name of attorney for prevailing party by associate, was invalid. West's Ann.Code Civ.Proc. § 660.

7. New Trial $\Rightarrow$ 116(2)

Where order purporting to grant new trial was entered more than 60 days after written notice of entry of judgment addressed to moving party was deposited in the mail, order was invalid. West's Ann. Code Civ.Proc. §§ 12a, 660, 1012, 1013, 1013a, 1963, subd. 1.

John L. Roberts, Riverside, for appellants.

Harmon C. Brown, Riverside, for respondents.

GRIFFIN, Justice.

Plaintiff and respondent John Caldwell, individually and as guardian for his minor son Johnnie Leroy Caldwell, brought this action against defendants and appellants for claimed injury to them as a result of the collision of the son's bicycle with the defendants' automobile. Trial was had by jury resulting in a verdict for defendants. The series of events that followed were these:

On July 13, 1954, judgment for defendants was entered. Written notice of its entry was served on plaintiffs by mailing a copy thereof to plaintiffs' counsel in Riverside on July 26, 1954, according to an affidavit filed on July 27th. On August 4th, plaintiffs filed notice of intention to move for a new trial. On August 16th, the trial judge signed an order fixing September 17th as the time for hearing the motion. The motion was heard. On October 6, more than 60 days after the written notice of entry of judgment was served and more than 60 days after notice of intention to move for a new trial was filed, the trial court signed an order granting a new trial, but did not include insufficiency of the evidence as one of the grounds. The showing made by the affidavits in support of this motion indicated that there was additional or newly discovered evidence which plaintiff failed to produce at the trial.

Except as otherwise provided in section 12a of the Code of Civil Procedure, under section 660 thereof the power of the court to pass on a motion for new trial expires

sixty days from and after service on the moving party of written notice of entry of the judgment, or if such notice has not theretofore been served, then sixty days after filing of the notice of intention to move for a new trial. If such motion is not determined within said period of sixty days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court.

Apparently, from the present state of the record on appeal, the order attempting to grant a new trial, at the time here indicated, was beyond the court's jurisdiction and ineffective. *Dolan v. Superior Court*, 47 Cal.App. 235, 190 P. 469; *Schomer v. R. L. Craig Co.*, 137 Cal.App. 620, 31 P.2d 396.

Confronted with this dilemma plaintiffs have belatedly, after the submission of the case on appeal, moved this court to have the record augmented, asked that certain portions of it be expunged, and to substitute a claimed minute entry of the trial court granting the motion for new trial on October 4, 1954, in order to establish the trial court's right to grant the new trial. The request is that they be allowed to present to this court, upon affidavit or otherwise, their claim that in fact no notice of entry of judgment was *received* by or on behalf of the plaintiffs. They also aver that the notice mailed, in any event was defective in form, etc., and consequently the time for determination of the motion was sixty days from the date of filing the notice of motion for such new trial. For this claimed reason they seek to expunge from the record the notice of entry of judgment and affidavit of mailing contained in the clerk's supplemental transcript.

There is positive showing by affidavit of defendants that notice of entry of judgment was mailed to counsel for plaintiffs on July 26, 1954. The effect of plaintiffs' counsel's affidavit is that he searched the files of his office and found no notice of entry of judgment in the above-entitled case therein, and to the best of his knowledge and belief no such notice was ever received by him; that he made no inspection of the files in the county clerk's office and had

no knowledge of the claimed service until he was served with a copy of such notice and affidavit of mailing to be used in a supplemental transcript on appeal in May, 1955. He alleged that after arguing the motion for new trial on October 1st, he received a card from the clerk of the court through the mail post-marked "October 4, 1954—5:30 p. m." reciting: "Caldwell v. Geldreich—Motion for New Trial—Motion granted"; that thereupon he prepared and forwarded to the court for signature a formal order granting the new trial, and that the judge, instead of dating it October 4th, dated it October 6th, and signed it on that date; that due to illness and press of business he did not seek an early hearing on the motion for new trial. He did obtain from defendants' counsel a stipulation extending time to file affidavits in support of the motion for new trial.

[1-3] Assuming that the motion here pending was granted by us, we would be immediately confronted with two opposing affidavits. We would necessarily be inclined to believe that such a notice was in fact mailed to counsel for plaintiff as indicated therein. Since counsel for plaintiffs stated in his affidavit that he did not have a memory of receiving such a notice, it might be suggested that the notice was lost in the mail or misplaced in his office and was not brought to his attention. These facts alone would not support a finding that defendants' affidavit of mailing was false or fraudulent. *McKeon v. Sambrano*, 200 Cal. 739, 255 P. 178. It does not appear from a reading of sections 1012 and 1013 of the Code of Civil Procedure that the burden is upon the sender to show that the notice was actually *received* by the addressee. In *Traders Credit Corporation v. Superior Court*, 111 Cal.App. 663, 666, 296 P. 99, it was held that where service is made by mail, in cases permitted by these sections, such service is declared to be complete at the time of the deposit in the post office of the sender in a sealed envelop addressed to the person upon whom it is to be served. In that case they cited *Heinlen v. Heilbron*, 94 Cal. 636, 30 P. 8, to the effect that the service by mail authorized by section 1012,

supra, does not contemplate a delivery as a part of the service, as seen by the provision of section 1013 that "The service is complete at the time of the deposit" in the post office. Such service is termed a "substituted service", and is intended to take the place of and be equivalent in point of law and service to a personal service. In *McKeon v. Sambrano*, supra, service by mail was held to be complete at the time of the deposit in the post office, and the addressee incurs the risk of the failure of the mail. To the same effect is *Gill v. Southern Pacific Co.*, 174 Cal. 84, 161 P. 1153; *In re Estate of Richards*, 154 Cal. 478, 98 P. 528; and *Brown v. Green*, 65 Cal. 221, 3 P. 811.

[4] *Labarthe v. McRae*, 35 Cal.App.2d 734, 97 P.2d 251, is distinguishable because a different section of the code, 659 C.C.P., was there under consideration. That section provides that the ten-day period within which to move for a new trial should not start to run until "after receiving" the written notice of entry of judgment. Section 660, supra, contains no such provision but provides that the power of the court "to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment * * *." Under the above-cited decisions the service of notice of decision was complete when the deposit was made in the post office.

Upon the showing made and considering the delay in seeking the relief here indicated, the motion to vacate the submission and strike the affidavit and notice of entry of judgment filed in the action should be denied.

[5, 6] There is an added claim that the notice of entry of judgment filed with the affidavit of mailing was a copy and not an original and that this copy was signed "John L. Roberts", as attorney for defendants, when in fact the name John L. Roberts was signed by attorney Byron C. Morton, who was associated with attorney Roberts in his office and in said case, while said attorney Roberts was on vacation.

The claim is that attorney Morton lacked authority to sign said notice of entry of judgment and accordingly he was not the attorney of record in the case. It is contended that the notice was therefore a nullity, citing such authority as *Jansson v. National Steamship Co.*, 34 Cal.App. 483, 486, 168 P. 151. We see no merit to this point. The typewritten record shows the name of John L. Roberts appended to the notice. If it was signed by attorney Morton it must be presumed he was authorized to do so. Section 1963, subd. 1, C.C.P. At least counsel for plaintiffs should be estopped to deny his authority so to do because he secured a stipulation (signed in a similar fashion) to file affidavits in support of his motion for new trial after the time required by law to file them from attorney Morton, in the absence of attorney Roberts. This stipulation was filed in said action and plaintiffs relied upon it. *Wells Fargo & Co. v. City and County of San Francisco*, 25 Cal.2d 37, 42, 152 P.2d 625; 10 Cal.Jur. p. 611, sec. 2.

The record before us does not indicate that the notice of entry of judgment filed with the clerk of the court was a copy rather than the original, as contended by plaintiffs. However, this claim, if true, would not necessarily be fatal. Section 1013a of the Code of Civil Procedure provides that proof of service by mail may be made by affidavit affixed to the original, or to a true copy of the document served and filed in the cause. Plaintiffs filed their notice of intention to move for a new trial within the time required, and the time for hearing the motion was set well within the 60-day period.

[7] Under the record before us it must be held that the time within which the trial court had to pass upon the motion for a new trial expired 60 days after the service of the notice of entry of judgment and that the notice was sufficient in form. It therefore becomes unnecessary to determine the advisability of allowing plaintiffs to show that there may have been some minute entry of the clerk of the court granting the motion for a new trial on October 4, 1954, since that claimed minute order was made

more than 60 days after service of notice of entry of judgment.

The motion to vacate the order of submission of this cause, to strike portions of the record, and to augment it, is denied. The purported order granting a new trial is reversed.

BARNARD, P. J., and MUSSELL, J.,
concur.



137 Cal.App.2d 14

Joe A. GALLEGOS et al., Plaintiffs
and Respondents,

v.

NASH, SAN FRANCISCO, a corporation,
et al., Defendants,

Nash, San Francisco, a corporation,
Appellant.
Civ. 16384.

District Court of Appeal, First District,
Division 1, California.

Nov. 16, 1955.

Action against automobile dealer, arising out of collision of a truck with an automobile recently purchased for a plaintiff from the dealer. In Superior Court, City and County of San Francisco, Orla St. Clair, J., a verdict was rendered in favor of the dealer and it appealed from an order granting a new trial. The District Court of Appeal, Bray, J., held that the trial court had properly given an instruction on assumption of risk and erred prejudicially in granting a new trial upon the sole ground that it should not have given such instruction.

Order reversed.

I. Appeal and Error ⇐977(3)

New Trial ⇐6

Granting of new trial is a matter resting largely in discretion of the trial court

and will not be disturbed except upon a manifest abuse.

2. Automobiles ⇨16

In action arising out of collision of truck with automobile recently purchased from defendant dealer, if there was evidence that dealer had violated statutes requiring test of brakes and lights before sale, then court erred in giving instruction on assumption of risk, but if there was no evidence of violation then instruction was properly given. Vehicle Code, § 660.

3. Automobiles ⇨16

Even if automobile dealer failed to adjust brakes after being requested by buyer to do so, such fact did not in itself prevent application of doctrine of assumption of risk. Vehicle Code, § 660.

4. Automobiles ⇨16

Statute providing that dealer shall not sell new or used motor vehicle without first testing and if necessary adjusting lights and brakes to conform with code and regulations does not require dealer to inspect brake system for defects (except as they might affect stopping of automobile), but merely to test and adjust brakes to conform with Vehicle Code. Vehicle Code, §§ 660, 670.

5. Automobiles ⇨16

If automobile dealer violated statute requiring test, and, if necessary, adjustment of brakes and lights before sale of automobile, then defense of assumption of risk was not available to the dealer. Vehicle Code, § 660.

6. Automobiles ⇨16

In action arising out of collision of truck with recently purchased automobile, burden of showing that defendant dealer violated statute requiring test of brakes and lights before sale of automobile, evidence of which violation would make defense of assumption of risk unavailable to dealer, was upon plaintiffs. Vehicle Code, § 660.

7. Automobiles ⇨16

In action arising out of collision of truck with recently purchased automobile,

evidence failed to establish defendant dealer's violation of statute requiring test of brakes and lights before sale, and hence there was no reason based on such statute why instruction as to assumption of risk should not have been given. Vehicle Code, § 660.

8. Automobiles ⇨16

Where plaintiff knew that his brakes caused skidding, it was question for jury, in his action against automobile dealer who sold the automobile, whether plaintiff assumed the hazard of the danger. Vehicle Code, § 660.

9. Negligence ⇨105, 136(26)

An objective standard must be applied in determining whether a plaintiff had knowledge and appreciation of his risk which he has allegedly assumed, and his knowledge and appreciation of danger is ordinarily a question for the jury.

10. Automobiles ⇨16

In action arising out of collision of truck and automobile recently purchased from defendant, on evidence that defendant by his salesman had told plaintiff that the brakes had been inspected and had been checked and were o. k. the time they had been brought in before, it was jury question whether statement made by salesman was an assurance of safety or a promise of protection, so it was not improper for trial court to give instruction on assumption of risk. Vehicle Code, § 660.

11. Appeal and Error ⇨1072 New Trial ⇨39

Where instruction on assumption of risk was properly given in civil negligence case, trial court's granting of new trial on sole ground that it should not have given such instruction was error requiring reversal of order granting new trial.

Boyd & Taylor, San Francisco, for appellant.

MacInnis, Alaga & Glassman, Harry P. Glassman, San Francisco, for respondents.

BRAY, Justice.

Defendant Nash, San Francisco, a corporation,¹ appeals from an order granting a new trial after verdict in its favor.

Question Presented.

Was the new trial improperly granted, being based upon the trial court's assumption that it erred in giving an instruction on the doctrine of assumption of risk? The application of the doctrine depends upon whether there was evidence of one or more of the following matters: (a) violation of section 660, Vehicle Code; (b) knowledge by plaintiffs of the hazard; (c) assurance by defendant of condition of brakes.

Record.

The theory of the complaint was that the brakes were faulty, that defendant before sale of the car had failed to comply with section 660 and thereafter had failed, although requested, to adjust the faulty brakes, and that the faulty brakes were the proximate cause of the accident. The jury found in defendant's favor. The court granted plaintiffs' motion for a new trial "on the authority of *Finnegan v. Royal Realty Co.*, 38 Cal.2d 409, at page 430 [218 P.2d 17]."²

Evidence.

At 5:30 p. m. December 27, 1951, on U. S. 40 near Truckee, the auto driven by plaintiff Joe and occupied by his wife and six children, collided with a truck, injuring all occupants. Plaintiff Joe testified that the accident was caused by failure of his brakes and the resultant skid on the ice and snow when the car was shifted quickly to a lower gear. The car was purchased from defendant. Although the car functioned perfectly at first, plaintiff Joe became dissatisfied with the brakes; they were "spongy," very sensitive, so about a week or so after purchase he had Paul take it to the defendant for checking, and for oil changing.³ On taking it out the manager told him he had

checked the brakes and they were all right. Defendant's evidence showed that the car had only been in the shop once for servicing (December 24th) and there was no record of complaint concerning brakes. Plaintiff Joe testified he brought the car in the day of the accident, December 27th, for the 1000 mile check and service and complained about the brakes. On being told that the shop would not be able to service the car until very late that day, he left and started on the fatal journey. After the accident the car was examined in a San Francisco garage and it was found that fluid was in the brake system and there was a spongy brake pedal. A mechanic testified that in his opinion there was a leak in the brake "junction block," which leak could cause the brakes to fail. An expert testified that "air in the lines" causes a spongy brake.

Assumption of Risk.

(a) Violation of section 660.

[1-3] The granting of a new trial is a matter resting largely in the discretion of the trial court and will not be disturbed except upon a manifest abuse. *Sloboden v. Time Oil Co.*, 131 Cal.App.2d 557, 281 P.2d 85. Here the court granted the new trial on the basis of the decision in *Finnegan v. Royal Realty Co.*, 35 Cal.2d 409, 430, 218 P.2d 17, where the court held that where a defendant violates an ordinance which is a police regulation and which violation causes a plaintiff injury, the doctrine of assumption of risk may not be applied. See also *Friedman v. Pacific Outdoor Adv. Co.*, 74 Cal.App.2d 946, 170 P.2d 67, and *Bickham v. Southern Cal. Edison Co.*, 120 Cal.App.2d 815, 263 P.2d 32. Here the court instructed on assumption of risk, and granted the new trial on the ground that it erred in so doing because of the claimed violation of section 660. If there is evidence of such violation, then the assumption of risk instruction should not have been given and the new trial was properly granted. But if there is no evidence of such

1. Defendant Nash-Kelvinator Sales Corp. was granted a nonsuit. No appeal was taken therefrom.

2. Should be 35 Cal.2d 409, 430, 218 P.2d 17.

3. Although purchased by plaintiff Joe's brother Paul, and title taken in his name, it was purchased for the exclusive use of plaintiff Joe.

violation then the instruction was properly given. See *Conner v. Southern Pacific Co.*, 38 Cal.2d 633, 637, 241 P.2d 535, 538, to the effect that where instructions are correct there is no basis on a motion for new trial for the exercise of the court's discretion, and no legal ground in that respect on which a new trial may be granted. "The inquiry as to whether instructions are erroneous presents purely a question of law [citation] and if it appears on appeal that a trial court in granting a new trial based its order exclusively upon an erroneous concept of legal principles applicable to the cause, its order will be reversed [citation]." There was no error of law, and as the new trial was granted solely on the assumed error, the new trial was improperly granted.⁴

[4-7] What evidence is there that defendant did not make the tests required by section 660? That section provides: "No dealer shall sell a new or used motor vehicle without first testing and if necessary adjusting the lights and brakes on such vehicle to conform with the provisions of this code and department regulations adopted pursuant to this code unless such vehicle is sold for the purpose of being wrecked or dismantled." It should be pointed out that there is nothing in the statute which requires the dealer, prior to sale and delivery of a car, to inspect the brake system for defects (other than as they might affect the stopping of the car), but merely to test and adjust the brakes to conform with the provisions of the Vehicle Code. The special provision on this subject was section 670, which prescribed the stopping distances under various conditions. Defendant's vice-president testified that it was customary and standard practice of his agency to inspect a car before delivery, checking against a factory form the matters which he detailed, which included inspection of certain details of the brake condition, and it was standard procedure to "road check" every car which included checking the brakes. While he did

not know of his own knowledge that stopping distances were checked, he assumed they would be. The burden of showing that this test was not made was on plaintiffs. There was no direct evidence that the test was not made. Plaintiffs rely primarily on the fact that some 20 days after delivery and after the car had been driven approximately 1200 miles, the brakes failed, and there was testimony based upon examination of the car after the accident from which the jury might have concluded that there had been some defect in the brake system. There was no testimony that the testing required by section 660 would have disclosed this defect. We are not considering whether defendant, in failing to make such an inspection, might not have been negligent. We are only concerned here with the question of whether defendant may have violated section 660, which violation would have denied it the defense of assumption of risk. According to plaintiff Joe's own testimony he "guessed" the car functioned perfectly when delivered to him, the sponginess developing subsequently. The car at all times prior to the moment of the accident would stop on the first application of the brakes without pumping; plaintiff Joe had no difficulty in stopping the car at any time; the day of the accident he had full brake. There is no evidence that at any time prior to the accident, the brakes would not stop the car within the distances prescribed by section 670. There was no evidence of the violation of section 660, and hence no reason based on that section why the assumption of risk instruction should not have been given.

(b) Knowledge.

"The defense of assumption of risk rests upon the plaintiff's consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of harm from a particular risk. Such consent may be found: * * *

"b. By implication from the conduct of the parties. When the plaintiff enters

4. We are not concerned here with the claimed failure of defendant to adjust the brakes after being requested to do

so, if such request was made. As to that contention, the defense of assumption of risk would apply.

voluntarily into a relation or situation involving obvious danger, he may be taken to assume the risk, and to relieve the defendant of responsibility. Such implied assumption of risk requires knowledge and appreciation of the risk, and a voluntary choice to encounter it." Prosser on Torts, 2d Ed., p. 303.

The testimony of plaintiffs' witnesses as to the car's condition after the accident indicated that the leak in the brake junction block was caused by a metal particle and that such a leak, by letting air in the hydraulic system, could cause the brakes to fail. There was no testimony that such condition must have existed at the time of the purchase of the car or that it could have been discovered by making the stopping distance tests required by section 670. Although the car seemed to be in good condition at first, shortly after delivery of the car Joe discovered that the brake pedals were spongy and the brakes on application were sensitive, locking the wheels and causing the wheels to skid. He testified that he knew there was air in the brakes. While, of course, plaintiff Joe would not know what was causing this condition, he did know of the condition and he knew it on the very day that the accident happened. In spite of the knowledge that the brakes when applied on occasion caused a locking of the wheels and a skidding of the car, he drove it on a mountain road upon which there was ice and snow.

[8,9] In *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, at page 162, 265 P.2d 904, at page 906, the court said: "Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk." Here plaintiff Joe knew that his brakes caused skidding. Thus it was for the jury to determine whether he assumed

the hazard of that danger. As said in Prosser on Torts, 2d Ed., p. 310, concerning both assumption of risk and contributory negligence: "At the same time, it is evident that in all such cases an objective standard must be applied, and that the plaintiff cannot be heard to say that he did not comprehend a risk which must have been obvious to him. * * * In the usual case, his knowledge and appreciation of the danger will be a question for the jury * * *."

There was, therefore, ample evidence from which the jury could (and probably did) conclude plaintiff Joe had knowledge of the hazard and assumed the risk.

(c) Assurance.

[10] Plaintiff Joe testified that the morning of the accident he took the car in. He wanted the 1000 mile check up and the brakes examined and checked. Defendant's salesman told him that nothing could be done that day until very late, and that the brakes "had been inspected and had been checked, and were o.k. * * * the time they had been brought in before." Because of this statement, plaintiffs claim the assumption of risk doctrine could not apply, basing their contention on the following language from Prosser on Torts (Hornbook Series 1941) quoted but not commented on in *Fred Harvey Corporation v. Mateas*, 9 Cir., 1948, 170 F.2d 612, 616: "If, however, he (plaintiff) surrenders his better judgment upon an assurance of safety or a promise of protection, he does not assume the risk, unless the danger is so obvious and so extreme that there can be no reasonable reliance upon the assurance." It was a jury question whether the statement made by the salesman here was an "assurance of safety or a promise of protection." According to his own testimony, plaintiff knew that the brakes, in spite of the salesman's statement, were not "o.k." They were "spongy" and on occasion would cause skidding.

[11] The instruction on assumption of risk was properly given.⁵ Therefore, the

5. No contention is made that the form of the instruction was improper.

trial court erred in granting a new trial upon the sole ground that it should not have given that instruction.

The order is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



137 Cal.App.2d 62

Jose TORREZ, also known as Jose Torres, and Maria R. Torrez, also known as Maria R. Torres, Plaintiffs and Appellants,

v.

Leslæe GOUGH, Aline Gough, L. E. Sharp, Jane Doe Sharp, Henry Preclado, Geraldine T. Preclado, and Security Title Insurance & Guarantee Co., a corporation, Defendants and Respondents.

Civ. 8675.

District Court of Appeal, Third District, California.

Nov. 17, 1955.

Hearing Denied Jan. 5, 1956.

Action by grantors against grantees and subsequent bona fide purchaser to quiet title to real property or to reform a deed to grantees on the ground of fraud or mistake. The Superior Court, Madera County, Stanley Murray, J., entered judgment quieting title in purchaser and grantors appealed. The District Court of Appeal, Schottky, J., held that where grantors have conveyed realty to grantees who subsequently conveyed the same to a bona fide purchaser for value, and original grantors with knowledge of second conveyance commenced an action against grantees and purchaser to reform original deed on ground that it described more property than was intended, and recorded *lis pendens* before deed of bona fide purchaser was recorded, statute voiding every conveyance as against any judgment affecting title unless conveyance is recorded before notice of action, did not defeat title of bona fide purchaser.

Affirmed in part and reversed with directions.

1. Deeds ⇨211(2, 3)

In grantors' action against grantees and subsequent bona fide purchaser for value, evidence presented a *prima facie* case for reformation or rescission of deed from grantors to grantees on the ground of misrepresentation and/or mistake.

2. Judgment ⇨788(1)

Primary purpose of statute voiding every conveyance of real property as against any judgment affecting title, unless such conveyance shall have been duly recorded prior to record of notice of action, is to protect those who in good faith acquire an interest in real property in reliance upon the record. West's Ann.Civ.Code, § 1214.

3. Judgment ⇨788(1)

Where grantors conveyed realty to grantees who subsequently conveyed to a bona fide purchaser for value, and original grantors with knowledge of second conveyance commenced an action against original grantees and bona fide purchaser to quiet title or reform original deed on ground that it described more property than was intended, and recorded a *lis pendens* before bona fide purchaser's deed was recorded, statute voiding every conveyance as against any judgment affecting title unless conveyance is recorded before record of notice of action, did not defeat right of bona fide purchaser. West's Ann.Code Civ.Proc. § 738; West's Ann.Civ.Code, § 1214.

4. Judgment ⇨788(1)

Under statute voiding every conveyance as against any judgment affecting title, unless conveyance shall have been recorded prior to record of notice of action, such unrecorded conveyance will be subordinated to a judgment cutting down or voiding title which grantor in unrecorded conveyance purported to convey, but statute has no application to a judgment creating a new title in the judgment holder which before judgment he did not have, or which merely adjudicates a good title which he received after the unrecorded conveyance. West's Ann.Civ.Code, § 1214.

5. Vendor and Purchaser Ⓒ244

In grantors' action against original grantees and subsequent grantee to reform deed, evidence supported finding that second grantee was a bona fide purchaser for value without notice.

6. Appeal and Error Ⓒ117(6)

Where grantors brought action against grantees and subsequent purchaser for value to quiet title to real property or to reform a deed on ground of fraud or mistake, and their right to judgment quieting title was precluded because of intervening right of subsequent purchaser for value, but complaint alleged false and fraudulent representations by original grantees and there was evidence to support these allegations, case would be remanded for determination of issues as to alleged fraudulent representations, even though complaint did not specifically pray for damages for such representations. West's Ann.Code Civ.Proc. § 738.

James V. Paige & William B. Johnston,
Fresno, for appellants.

Coffee & Wolfe, Madera, for respondents.

SCHOTTKY, Justice.

Plaintiffs above named commenced an action to quiet title to certain real property or to reform a certain deed, dated November 26, 1951, conveying said real property to defendants Gough and Sharp. The amended complaint set forth two causes of action, the first being the usual quiet title action under section 738 of the Code of Civil Procedure. The second cause of action alleged ownership and possession on November 26, 1951, of certain real property described as Lots 17 and 18, 21 through 24, inclusive, and 25, excepting from the last a triangular portion of the northwest corner and a rectangular portion in the northeast corner, El Torres Addition, County of Madera, per map on file in the Official Records of Madera County. It further alleged that on said date plaintiffs orally agreed with defendants Gough and Sharp that plaintiffs would sell and said defendants buy for \$800 Lot 25, with the above exceptions and the

further exception of a portion of land lying between the above exceptions, hereinafter called the Sandoval parcel; it further alleged defendants Gough and Sharp prepared a deed which conveyed all the aforesaid real property owned by plaintiffs, and falsely represented to them it conveyed only that portion of Lot 25 orally agreed upon to be sold and conveyed, and that plaintiffs relied on such representations and were thereby induced to sign such deed; and it also alleged that on said date plaintiffs did execute and deliver to said defendants such deed. It was further alleged in this cause of action that plaintiffs first discovered the mistake in the deed on or about the 27th of April, 1952, and thereupon they immediately demanded correction of the mistake or rescission with an offer of restoration of consideration received, but said defendants refused this demand. It was also alleged on information and belief that defendant Preciado after delivery of the aforesaid deed had made a conveyance of said real property to defendant Security Title Insurance & Guarantee Company by trust deed, with defendants Gough and Sharp as beneficiaries.

The answers of the several defendants, in general, admitted the former ownership of plaintiffs of said real property but denied any present ownership or interest therein by them, alleged the conveyance by plaintiffs for \$800 consideration paid, denied the allegations of misrepresentation and mistake and plaintiffs' offer to rescind and restore the consideration paid, and alleged a subsequent conveyance to defendant Preciado as a bona fide purchaser for value without any notice of any prior claims.

Following a trial, the court found that on the 26th of November, 1951, plaintiffs were the owners of the real property as alleged in their complaint, excepting further from Lot 25 the Sandoval parcel (title to which was in a separate action quieted in Sandoval, et ux, against all parties herein); that on said date plaintiffs executed and delivered a deed to said real property to defendants Gough and Sharp for consideration of \$800 paid; that on or about the 13th of December, 1951, and prior to commencement of this suit or recording of lis pendens here-

in, said defendants, for a valuable consideration, conveyed said property to defendant Preciado and the latter took same as a bona fide purchaser for value without notice of any defect, fraud, or mistake in the conveyance from plaintiffs to defendants Gough and Sharp and without any knowledge to put him on notice.

The findings then stated further that because of the aforesaid findings it was unnecessary to make any findings concerning the allegations of fraud, mistake, etc., in the complaint. The court concluded that defendant Preciado took title to the real property by the deed of December 31, 1951, as a bona fide purchaser for value without notice, and any defect in the prior conveyance from plaintiffs could render the earlier deed voidable only if rights thereunder were exercised prior to the intervention of rights of third persons purchasing for value without any notice of fraud, etc.

In accordance with said findings, judgment quieting title to said real property was entered in favor of defendants Preciado and plaintiffs have appealed from said judgment.

Appellants make no contention that the evidence is insufficient to support the findings that defendants Preciado were bona fide purchasers for value, but appellants do contend most earnestly that under section 1214 of the Civil Code said defendants could not become bona fide purchasers because the deed to defendant Henry Preciado was recorded subsequent to the time of recording the *lis pendens* in the instant action. Said section 1214 provides as follows:

"Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

The record shows *lis pendens* in this action was recorded on the 12th of May, 1952, the date of commencement of the action. Gough and Sharp conveyed to Preciado by deed dated December 13, 1951, and this deed was not recorded until May 22, 1952. The deed of trust from Preciado to Security Title Insurance & Guarantee Company was dated December 13, 1951, and recorded the same date. The evidence indicates that plaintiffs spoke and read little or no English and had no advice or help outside their own immediate family, and that Gough and Sharp took the initiative generally, i. e., opened negotiations, had the deed prepared, obtained the notary, transported plaintiffs to the notary, etc. It further indicates that plaintiff Jose Torrez showed Gough and Sharp where Lot 25, which was the parcel for sale, lay on the ground, that they all walked around it and looked at it, but that communications at that time were all by pantomime as Torrez did not speak English and they did not speak Spanish. There was no dispute in the record that Gough and Sharp sold the land actually conveyed in the deed to Preciado for about \$4,000, or about five times the price paid to plaintiffs for it. Several unrecorded contracts of sale of various portions of the land in dispute were shown to have been executed by plaintiffs some time prior to the deed to defendants. A contract of sale of the Sandoval parcel, which as noted before was part of the land actually conveyed by plaintiffs to Gough and Sharp, and then to Preciado, was dated August 5, 1949, and was apparently recorded August 10, 1949, although the record is not explicit on that. The record does show that the deed from appellants to defendants Gough and Sharp was recorded on November 27, 1951, in Volume 532 of Official Records, and the Sandoval contract was recorded in Volume 472, and so it may be assumed that the date of recording the Sandoval contract was prior to the Torrez deed recording and so prior to any deed to Preciado.

[1] It is apparent that the evidence makes a *prima facie* case for reformation or rescission of the deed from appellants to Gough and Sharp on the ground of mis-

representation and/or mistake, but the primary question with which we are confronted upon this appeal is: When a grantor brings suit to set aside or reform his conveyance to his grantee after the latter has conveyed to a third party for value without notice, and grantor knows of this second conveyance, but grantor records his notice of *lis pendens* prior to the recording of the second conveyance, and both grantee and the third party are joined as defendants, is the second conveyance void as against judgment affecting title obtained by grantor based on his rights to set aside or reform his prior conveyance?

Appellants cite a number of authorities in support of their contention. They first cite the case of *Moore v. Schneider*, 196 Cal. 380, 238 P. 81, in which the court had occasion to consider the amendment to Civil Code, section 1214. *Sophie Schneider* had been granted certain real property by William Schneider, her husband, without giving value therefor, by a recorded deed. Subsequently, a conveyance of the property was made by William Schneider and one Miller to Moore as assignee for benefit of creditors, but this conveyance was not recorded. *Sophie* sued William and filed a notice of *lis pendens*, and judgment quieting title in her and against him was entered. Moore then sued *Sophie* to have his equitable interest in the property established. The trial court held that the judgment in the prior quiet title action was not a bar to the subsequent suit brought by Moore. Upon appeal the judgment was reversed and in the course of its opinion our Supreme Court said, 196 Cal. at pages 390, 392, 238 P. at page 84:

"Section 1214 of the Civil Code, *supra*, was amended in 1895, by adding thereto the provision that every conveyance of real property is void 'as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.' Stats.1895, p. 50. The context indicates very clearly that the added portion, defining the effect of judgments obtained after record of notice of action, is unrelated to subsequent purchasers, questions of good faith,

valuable consideration, or those who have notice. For this reason, it becomes unnecessary to discuss the authorities cited by respondent which hold that section 1214, *supra*, and section 1217, *supra*, should be construed together. [Citing cases.] They deal with situations which do not arise under the provision of section 1214 applicable to the facts in this case. Cases, such as *Warnock v. Harlow*, 96 Cal. 298, 31 P. 166, 31 Am.St.Rep. [200] 209, decided before section 1214, *supra*, was amended in 1895, are not in point on the question here under consideration.

* * * * *

"The particular language of the New York statute, that the holder of an unrecorded title or incumbrance is 'bound by the proceedings to the same extent as if he was a party to the action,' has led the courts of that state to suggest that the rule might not have the same application in cases where a plaintiff has actual notice of the unrecorded incumbrance at the time of the commencement of the action. *Kursheedt v. Union Dime Sav. Institution*, *supra* [118 N.Y. 358, 23 N.E. 473, 7 L.R.A. 229]; *Lamont v. Cheshire*, 65 N.Y. 30. The California statute has made the rule more stringent in its application than it is in New York, by declaring that a conveyance which is not of record when the *lis pendens* is filed is 'void' as against the judgment affecting the title to the property. The provision was added to section 1214 in 1895, long after section 1217, providing that an unrecorded instrument is valid as between the parties and those who have notice thereof, based on an older enactment (Stats.1850, p. 249), was incorporated in our present Code. It was enacted by the Legislature, we may assume, to stimulate and bring about the prompt recordation of all conveyances of real property. Its purpose is to prevent fraud through the withholding of notice of transactions affecting titles, to the detriment of subsequent purchasers in good faith and for a valuable consideration, and those who may

seek to confirm their claims to real property by judgments affecting the title. It constitutes a most salutary rule. Whether or not it should apply in a case in which a prior grantee is not made a party to the action, or in which it appears that a plaintiff has actual knowledge or notice of the unrecorded claim of title at the time of the commencement of the action, we are not prepared to say. Neither situation is presented here. The findings do not support the contention of the respondents that Mrs. Schneider knew of the assignment to respondent Moore when she brought her action to quiet title. There is nothing in the findings to show that she took with notice of his claim. We are satisfied that the contention of the appellant is the correct one, and that the judgment rendered in the quiet-title action is a bar to the present action."

Appellants also cite the case of *Holman v. Toten*, 54 Cal.App.2d 309, 128 P.2d 808, in which plaintiff failed to record a *lis pendens*. The court said, 54 Cal.App.2d at page 317, 128 P.2d at page 812:

"The provision of section 1214 of the Civil Code making a conveyance of real property void 'as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action' is not operative here. It is limited by its terms to cases where a notice of action is recorded (see *Moore v. Schneider*, 1925, 196 Cal. 380, 392, 238 P. 81; *Taylor v. Chapman*, 1936, 17 Cal.App. 2d 31, 61 P.2d 476) and the record here does not show the recording of such a notice by defendant. Hence the case remains subject to the rule that 'An unrecorded deed takes precedence over a subsequent judgment against the grantor.' *Davis v. Perry*, 1932, 120 Cal.App. 670, 676, 8 P.2d 514, 517."

Appellants place their principal reliance upon the recent case of *Evarts v. Jones*, 127 Cal.App.2d 623, 274 P.2d 185, which was decided since the instant case was tried, and in which a hearing was denied. In that case respondent Jones had contracted

to sell certain real property to E. F. Evarts. On September 15, 1950, Jones brought a quiet title action against E. F. Evarts and recorded *lis pendens*. Judgment was entered for Jones February 20, 1952. Appellant E. K. Evarts had taken a deed to this real property from E. F. Evarts on January 1, 1950; it was acknowledged April 14, 1952; and it was recorded April 15, 1952. E. K. Evarts then brought this action to quiet title. The trial court held that the judgment in the earlier action of *Jones v. E. F. Evarts* was *res adjudicata* as to the title of Evarts and gave judgment in favor of Jones. Upon appeal the court said, 127 Cal.App.2d at page 625, 274 P.2d at page 187:

"* * * Although Section 1214 is not mentioned in the briefs, it furnishes an answer to the question.

"Prior to 1895, judgments were not mentioned in the section. In that year the portion in italics was added. Before the amendment one who obtained a judgment quieting his title in an action instituted subsequent to the acquisition of an earlier hostile conveyance was not protected as a bona fide purchaser or encumbrancer. Unless his judgment ran against the holder of the earlier conveyance, it would not have been binding upon the latter. The purpose of the amendment, of course, was to afford a means for strengthening titles to real property. The effect was to encourage the recordation of instruments affecting title and thereby give greater protection to those who in all matters concerning title might rely upon the public records. The amended section is comprehensive. It relates to all conveyances whether made before or after the recording of a notice of the action. If it had not been the intention to make it applicable to prior conveyances, there would have been little if any necessity for the amendment."

An interesting case in which the effect of said section 1214 was considered is the case of *Taylor v. Chapman*, 17 Cal.App.2d 31, 61 P.2d 476. In that case Miss Taylor had purchased two lots for the price of

\$3,800, receiving her deeds in 1929 and 1930. These deeds were not recorded until April 30, 1934. The lots were unimproved and there were no buildings upon them. She inadvertently failed to pay two lighting assessments amounting to the sum of \$6.24. The defendant claimed to have purchased these two lots at a tax sale for the delinquent assessments and to have received deeds from the city. On February 8, 1934, the defendant filed an action to quiet title against the grantor of Miss Taylor, and recorded a notice of *lis pendens*. At this time the defendant was unaware of the unrecorded conveyance; he did not join Miss Taylor as a defendant, nor did she intervene in his action. Shortly thereafter, the defendant became aware of Miss Taylor's title and communicated with her. On May 12, 1934, Miss Taylor commenced action to quiet her title against the defendant. On May 24, 1934, the defendant obtained a consent judgment in his action against Miss Taylor's grantor. He defended in the action brought by Miss Taylor solely on the grounds of his judgment in the prior action and did not introduce his tax deeds into the record. He claimed that Miss Taylor's deeds were void under section 1214, as against his judgment "affecting title," since they were not recorded "prior to the record of notice of action"; or, in other words, that the plaintiff's unrecorded deeds became ipso facto void when the notice of *lis pendens* was recorded in an action which subsequently resulted in a judgment quieting title. In affirming a judgment in favor of Miss Taylor the court refused to give a literal interpretation to section 1214 and stated at page 35 of 17 Cal.App.2d, at page 478 of 61 P.2d:

"The appellants' interpretation of section 1214, if accepted, would lead to strange results which might often constitute a travesty on justice. Suppose, for instance, that the appellants had taken a quitclaim deed from some one who had owned these lots fifty years before, although there had been a dozen intervening owners, and had brought a quiet title action against that grantor who, consenting to judgment, had ob-

viated the necessity of any real proof. By filing a *lis pendens* ahead of the deed of a *bona fide* purchaser a judgment thus obtained would render void the title of the real owner, without any hearing as to his rights and regardless of any lack of equities in the other claim. Again, a man purchasing a property for cash and recording his deed within an hour might find that he had no title because some one was sharp enough to file notice of *lis pendens*, a few moments before, in an action to quiet title against a fictitious owner. The case at bar furnishes another illustration which speaks for itself.

"We are unable to believe that it was the intention of the Legislature to make section 1214 applicable to such a situation as that here presented, where the grantee in the unrecorded conveyance was not a party to the action referred to in the notice of *lis pendens*, and where the party securing the judgment obtained any rights he has through a tax sale, and not through the affirmative acts of the grantee in the unrecorded conveyance or of any of his predecessors." (A hearing was denied by the Supreme Court.)

We do not believe that the authorities relied upon by appellants compel the construction of said section 1214 that appellants have placed upon it. In *Moore v. Schneider*, supra, the court declined to pass upon the question of whether section 1214 would apply where a prior grantee was not made a party to the action, or where it appeared that a plaintiff had actual knowledge of the unrecorded claim of title at the time of the commencement of the action. And in *Evarts v. Jones*, supra, the title of defendant was clearly superior to that of plaintiff and it was unnecessary to rely upon section 1214, and, as stated by the court, said section was not even mentioned in the briefs on appeal. We believe that the case of *Taylor v. Chapman*, supra, bears a closer analogy on the facts to the instant case than do *Moore v. Schneider* or *Evarts v. Jones*.

[2, 3] It was no doubt the primary purpose of section 1214, and of the 1895 amendment thereof relating to judgments affecting the title, to protect those who in good faith acquire an interest in real property in reliance upon the record. But where, as in the instant case, a person has by deed conveyed certain real property to another, and his said grantee has conveyed said property to a bona fide purchaser for value, and the original grantor, with knowledge of the conveyance to said second grantee, commences an action against his grantees and the grantees of his grantees seeking to reform his deed upon the ground that it described more property than was intended to be conveyed, and records a lis pendens before the deed to the second grantee is recorded, we do not believe that section 1214 will avail the original grantor to defeat the right of the bona fide purchaser.

The portion of section 1214 upon which appellants rely reads:

"Every conveyance of real property * * * is void as against * * * any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

[4] This means no more than that such unrecorded conveyance will be subordinate to a judgment affecting, i. e., cutting down or voiding, the title which the grantor in the unrecorded conveyance purported to convey. It has no application to a judgment which creates a new title in the judgment holder which before judgment he did not have; or which merely adjudicates good a title which he got after the unrecorded conveyance.

In the instant case the appellants had no title to the parcel they want reconveyed to them because conveyed away by fraud or mistake. They had a right to compel such reconveyance by suit and judgment. But such title as such reconveyance would give them could not stand against or affect the

title which the defendant had conveyed out because they would take by it only what defendant then had—nothing, unless they are to be classed as being themselves bona fide purchasers, which cannot be so here since before getting any title, before even recording lis pendens, they knew of respondents' interest. Under the facts here the only relief they could get by their action was by way of damages against their alleged fraudulent grantees.

[5, 6] We therefore conclude that there is substantial support in the record for the finding that defendants Preciado were bona fide purchasers and that in so far as the judgment quiets the title of said defendants Preciado to said real property it must be affirmed. However, as hereinbefore set forth, the complaint alleged false and fraudulent representations by defendants Gough and Sharp as a result of which appellants Torrez conveyed more property than was orally agreed upon. There was evidence which supported these allegations and when the court determined that defendants Preciado, to whom defendants Gough and Sharp had conveyed the real property deeded to them by appellants, were bona fide purchasers, we believe that the court should have proceeded to determine the issues as to said alleged fraudulent representations. While the complaint did not specifically pray for damages for said alleged fraudulent representations, it did include a prayer for general relief and therefore the court could and should have proceeded to a determination of said remaining issues.

The judgment is affirmed in so far as it quiets the title of defendants Preciado to the property described therein, but in so far as it fails to determine the remaining issues hereinbefore set forth it is reversed with directions to the trial court to proceed in accordance with the views herein expressed.

VAN DYKE, P. J., and PEEK, J., concur.

137 Cal.App.2d 125

In the Matter of the ESTATE of Donna
Norine SCHUSTER, Deceased.

Daniel D. SCHUSTER, Leonora G. Caldwell,
George S. Tuttle, Petitioners and
Respondents,

v.

John B. SCHUSTER, Louise Schuster Greer,
Contestants and Appellants.

Civ. 21173.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1955.

Proceeding to determine heirship and construe will. The Superior Court, Los Angeles County, Clyde C. Triplett, J., entered judgment, and contestants appealed. The District Court of Appeal, Fox, J., held that, under will which, after disposing of certain realty and personalty stated that rest of testatrix' effects were given to testatrix' mother to "distribute as she deems wisest," such disposition was intended by testatrix to be a bequest of the residuary estate, rather than disposition of other purely personal items not specially bequeathed.

Judgment affirmed.

1. Wills ⇨587(1)

Under will which, after disposing of certain realty and personalty stated that rest of testatrix' effects were given to testatrix' mother to "distribute as she deems wisest," such disposition was intended by testatrix to be a bequest of the residuary estate, rather than disposition of other purely personal items not specially bequeathed.

2. Wills ⇨439

In interpretation of will, ascertainment of testator's intention is fundamental rule of construction to which all others are subordinate.

3. Wills ⇨440

In ascertaining testator's intention, court naturally first looks to language used in the will.

4. Wills ⇨559

Primary meaning of "effects" is personalty, but it is a very general term and may include realty where that appears to be testator's intent, and whether it includes realty depends upon context of will in which term is used and the surrounding circumstances.

See publication Words and Phrases, for other judicial constructions and definitions of "Effects".

5. Wills ⇨458

Word or phrase which occurs more than once in a will is presumed always to be used in the same sense, but such rule is not applicable where context clearly manifests an entirely different meaning.

6. Wills ⇨449

In absence of controlling language in will to the contrary, it is presumed that testator intends to dispose of all his property.

7. Wills ⇨449

In construing will, trial court properly took into consideration the presumption against partial intestacy.

8. Wills ⇨858(1)

Where testatrix expressed intention to leave her property "to my loved ones," and then proceeded to enumerate them, leaving something to each of the named relatives, and ended her will by bequeathing "Any and all the rest" of her property to her mother, her estate would go to such of her "loved ones" as were mentioned in her will and as were still alive and none would go by intestacy to others.

9. Wills ⇨601(8), 612(4), 675, 689

Where last clause of will read, "Any and all the rest of my effects I give to my mother to distribute as she deems wisest", such language did not create a trust or power of appointment, did not limit outright and absolute character of gift, and did not require finding that testatrix did not intend that all her undisposed property should not be included in such residuary clause.

10. WILLS Ⓒ706

Where trial court's construction of will appears to be reasonable and consistent with testatrix' intent, reviewing court will not substitute a different interpretation, even though it might seem equally tenable.

George Bouchard, Los Angeles, for appellants.

Daniel W. Gage, Los Angeles, for respondents.

FOX, Justice.

Decedent left a will, which she wrote, that reads as follows:

"August 31, 1929
 "2672 Glendower Ave.
 "Los Angeles, Calif.

"This is my one and only will in existence. Being of sound health and mind, but wishing to bequeath my effects in case of my death, to my loved ones, I hereby give to my Mother—Nora D. S. Danford—my house and lot at 2672 Glendower Ave. Los Angeles, my lot on West Third Street near the corner of Fairfax Ave. L. A. and any cash I may have at the time of my death.

"I hereby give to my sister—Helena K. S. Tuttle of Ontario Calif. my cottage and lot at Laguna Beach, Calif., and any pictures she may desire of my painting. I give to my niece—Leonora G. Tuttle my diamond and pearl ring and any pictures she may desire of mine. I give to my nephew George S. Tuttle—my turquois and diamond ring and any pictures he may desire of mine. I give to my brother Daniel D. Schuster of Milwaukee Wis.—my two diamond stone ring. Any and all the rest of my effects I give to my mother to distribute as she deems wisest.

"Signed—Donna Norine Schuster
 Aug 31, 1929 Los Angeles, Calif."

[1] The basic question is, considering the entire will of Miss Schuster, was the

last sentence thereof, "Any and all the rest of my effects I give to my mother to distribute as she deems wisest," intended to be a bequest of the residuary estate, rather than a disposition of clothing, furniture, paintings and other purely personal items not specifically bequeathed? The trial court answered this question in the affirmative. We have reached the conclusion that the decision is correct.

At the time of her demise, Miss Schuster left surviving the following heirs at law:

(1) Daniel D. Schuster—a full brother;

(2) George S. Tuttle and Leonora G. [Tuttle] Caldwell, a nephew and niece, respectively, children of Helena K. S. Tuttle, who was a full sister of decedent and who predeceased her;

(3) Louise Greer, a half sister;

(4) John B. Schuster, a half brother.

The decedent, Daniel D. Schuster, and Helena K. S. Tuttle, are the children of George Schuster and his first wife, Nora D. S. Danford; Louise Greer and John B. Schuster are the children of George Schuster by his second wife.

Both George Schuster and Nora D. S. Danford predeceased their daughter, Donna Norine Schuster.

Prior to her passing Miss Schuster had sold the lot, mentioned in her will, on West Third Street. She still owned the other two pieces of real property. She had \$7,438.45 in the bank. She also had certain of the jewelry and pictures specifically bequeathed. Since making her will in 1929 she had accumulated stocks valued at \$11,684 and postal savings certificates amounting to \$1,527. At the time of her passing there was salary due her from the Los Angeles Board of Education amounting to \$216. Her furniture in the Laguna Beach property was valued at \$80 and her two cars were appraised at \$60. There is also in the estate the proceeds of insurance resulting from a fire which destroyed the major portion of the house on Glendower Avenue (and most of the furniture) where Miss Schuster lived. She perished in this fire. She also had some additional jewelry valued at \$165.

Under the trial court's decision Miss Schuster's estate goes to her brother, and to her nephew and niece,—children of her deceased sister. This appeal is taken by her half brother and half sister.

[2,3] In the interpretation of a will, ascertainment of the testator's intention is the fundamental rule of construction, to which all others are subordinate. In re Estate of Salmonski, 38 Cal.2d 199, 209, 238 P.2d 966; In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893; In re Estate of Klewer, 124 Cal.App.2d 219, 221, 268 P.2d 544, 41 A.L.R.2d 941; Probate Code, § 101. In ascertaining such intention we naturally first look to the language used in the will. Here, at the very outset, Miss Schuster expressed an intention to dispose of her property by the will she was writing for she said she wished to bequeath her "effects" in case of her death to her loved ones, whom she proceeded to name. The first-mentioned of her "effects" was undoubtedly her most cherished piece of property, her home. She gave that to her mother. The second item of her "effects" was a lot she then owned on West Third Street in Los Angeles. She gave that to her mother, too. The third item of her "effects" to be disposed of was "any cash I may have at the time of my death." That also went to her mother. The second paragraph of her will opens with a gift to her sister of the fourth item of her "effects," a cottage at Laguna Beach. This is coupled with a gift of any of her pictures her sister may desire. Then follow gifts of jewelry and "desired pictures" to her niece and nephew, and a gift of a diamond ring to her brother. In the final sentence of this paragraph she said: "Any and all the rest of my effects I give to my Mother to distribute as she deems wisest." It thus appears that in the first sentence of her will the testatrix used the same expression, "my effects," that she used in the concluding sentence.

[4] While the primary meaning of "effects" is personal property, it is a very general term and may include real property where that appears to be the intent of the testator. Whether it includes the latter

class of property depends on the context of the will and the surrounding circumstances. Annotation 80 A.L.R. 941.

[5] When Miss Schuster first used the expression "my effects" she obviously intended it in a broad sense—to include all her property,—for in the same sentence she proceeded to dispose of two pieces of real property and whatever cash she might have at the time of her death, and in the very next sentence she gave her sister her "cottage and lot at Laguna Beach" and any of her paintings her sister might desire. When she used the same expression, "my effects," in the concluding sentence of her will it is a reasonable inference that she intended to use it in the same sense in which she had previously used it, for "a word or phrase occurring more than once in a will is presumed always to be used in the same sense." Comstock v. Corwin, 111 Cal.App.2d 770, 772, 245 P.2d 654, 656; In re Estate of Vogt, 154 Cal. 508, 511, 98 P. 265. Of course, "this rule is not applicable where the context clearly manifests an entirely different meaning", Comstock v. Corwin, *supra*, but a reading of this two-paragraph, holographic will does not disclose any indication that the testatrix used the expression—"my effects" in different senses. The trial court, therefore, was justified in concluding that in the use of the words "my effects" in the last sentence of her will the testatrix did not intend, as appellants argue, to include merely her clothing, furniture, paintings and other purely personal items not specifically bequeathed but, in fact, intended to dispose of her remaining property regardless of its character. That the testatrix intended to include all her undisposed of property is clearly indicated by the comprehensive language she used, viz.: "*Any and all the rest of my effects* * * *" (Emphasis added.)

[6,7] There is a presumption that a testator intends to dispose of all of his property in the absence of controlling language in the will to the contrary. In re Estate of Akeley, 35 Cal.2d 26, 28-29, 215 P.2d 921, 17 A.L.R.2d 647; In re Estate of

O'Brien, 74 Cal.App.2d 405, 408, 168 P.2d 432. In construing the will it was proper for the trial court to take this presumption against partial intestacy into consideration. In re Estate of Akeley, supra; In re Estate of Lawrence, supra.

[8] Also, the testatrix expressed an intention to leave her property "to my loved ones." She then proceeded to enumerate them, leaving something to each of the named relatives and ending her will by bequeathing "Any and all the rest" of her property to her mother. It is significant that the appellants are not mentioned. The interpretation placed on the final sentence gives full effect to the expressed intention of the testatrix. Her estate thus goes to such of her "loved ones," whom she mentioned in her will, as are still alive and none of it goes by intestacy to others.

[9] There is some argument as to the character of the estate that passed under the residuary clause. The trial court took the view, as stated in its findings, that the last sentence of the will "constitutes an outright gift of the entire residue of the estate." This conclusion finds adequate support in the language the testatrix used " * * * I give to my mother * * * " But it is argued the concluding words "to distribute as she deems wisest" in some way limit the unconditional character of the gift. Such language clearly does not create a trust or a power of appointment, because none of the elements of a trust or power of appointment, namely, an expressed intention, a beneficiary, or a purpose, are present. (Civil Code, § 2221.) In re Estate of Cook, 58 Cal.App.2d 376, 136 P.2d 338, is apposite here. In that case the testatrix stated in her will that she gave all of her effects to Ethel, but on her death would like to have her brother and sister get a certain amount. The court stated, 58 Cal.App.2d at page 378, 136 P.2d at page 339, quoting from In re Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071, that "While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not when addressed to

his legatee be construed as a limitation upon the estate or interest which he has given to him in absolute terms." The words, "I give to my mother" are positive and absolute. The language that follows is simply the daughter's way of emphasizing the idea that her mother was free to dispose of such property in whatever way she desired or thought best. Had a lawyer drafted this will he might well have advised that such language was unnecessary but it is understandable that a daughter, speaking to her mother in her last will, might desire to elaborate on this point so that her mother would feel no restraint in any disposition she might consider making of any portion of the residuary estate. In any event, this language does not limit the outright and absolute character of the gift, nor does it require a finding that the testatrix did not intend that all her undisposed of property should not be included in this residuary clause.

Appellants argue that the arrangement of the will indicates that the testatrix intended to dispose only of purely personal items by the last clause. They say that in the ordinary will a testator disposes first of his personal effects, such as clothing and jewelry, and then his more substantial assets, such as stocks and real estate. Under these circumstances, they argue, a residuary clause which has the effect of bequeathing a relatively large portion of the decedent's estate follows naturally. Miss Schuster's will reverses this order of disposition in that she first disposes of her real property and cash before she mentions her jewelry and paintings. From this "reverse order" appellants contend that the testatrix intended by the last clause of her will to dispose of items not previously disposed of such as her remaining paintings and other purely personal possessions not previously mentioned in her will.

Appellants' approach, however, overlooks the fact that this will was written by the testatrix herself. She started out dealing with the things and persons that meant most to her—her home and her mother. Obviously the desire uppermost in her mind

was that her mother should have her most prized possession, viz., her home. She then gave her mother her vacant lot and whatever cash she might have upon her passing. It is thus clear that the testatrix was interested in giving her mother the major portion of her property. Miss Schuster then gave her Laguna Beach cottage to her sister together with such of her paintings as her sister might want. Following these very substantial gifts she bequeathed items of jewelry and pictures to her niece and nephew and to her brother. Then appears the final sentence by which she gave "Any and all the rest of" her effects to her mother. In view of the relationship, and the testatrix' first consideration for her mother and desire to adequately provide for her, it is reasonable and natural she should intend that any property other than that which she had specifically willed should go to her mother. Certainly such an inference is more reasonable than one by which a substantial portion of her property would pass by intestacy to heirs at law whom she did not mention as being among her "loved ones." Thus the inference that appellants would draw from the arrangement of the will is largely, if not entirely, dissipated. Certainly the trial court was not required to draw such an inference. In fact, the arrangement reasonably justifies an inference in support of the trial court's construction of the will.

Appellants also argue that the specific bequests to the mother of the testatrix in the first paragraph of the will negates a residuary bequest to her of assets other than purely personal effects. This does not necessarily follow, particularly when the relationship and the mother's situation are considered. This will was made in 1929. The mother and father had been divorced 30 years previously. The mother had married Mr. Danford, who had passed away eight years before the testatrix made her will. While the mother's age does not appear, it is obvious that she was well along in years. Considering her mother's age and widowhood, it is a reasonable inference that the daughter desired her mother to have all her property except that

which she specifically bequeathed to her brother, sister, niece and nephew. Certainly the trial court was justified in drawing such an inference in view of her mother's situation rather than a contrary inference, and, of course, we must indulge such reasonable inferences as will support the trial court's conclusion.

What we have just pointed out serves to answer appellants' further proposition that the failure of the testatrix to make any other provision for the disposition of the purely personal effects indicates that the residuary clause was intended to dispose only of such items. To sustain appellants' position would result in a considerable amount of her property passing by intestacy. This, of course, is contrary to the presumption against intestacy. In *re Estate of Akeley*, supra. Furthermore, appellants' position is too legalistic and not sufficiently realistic in view of the mother-daughter relationship, the mother's circumstances, and the daughter's obvious desire to provide for her.

Appellants also argue that "the nature of the items bequeathed in the second paragraph indicate an intent to limit the scope of the last clause to purely personal items." They rely on the "*ejusdem generis*" rule which, they point out, simply limits the scope of an ambiguous term by the context in which it is used. They then argue that since the word "effects" is used in connection with the disposition of personal paintings and jewelry of relatively small value it must logically follow that by the use of this word only purely personal items not elsewhere disposed of are included in the residuary clause. The complete answer to this contention is found in the instrument itself. It is twofold: First, as we have previously noted, the word "effects" appears in the initial sentence of the will where the testatrix gave to her mother her home, her lot on Third Street and whatever cash she had at the time of her death. It is thus unmistakably clear that she uses the term in a very broad sense—to include all her assets. Then there is the inference that she used the word in the same sense when she used it again in the

residuary clause. In *re Estate of Vogt*, 154 Cal. 508, 511, 98 P. 265; *Comstock v. Corwin*, 111 Cal.App.2d 770, 772, 245 P.2d 645. The second phase of the answer lies in the character of the property disposed of "in the second paragraph" of the will to which appellants refer. It will be noted that the first item disposed of in that paragraph is the decedent's "cottage and lot at Laguna Beach." Thus the "second paragraph" disposes of both real and personal property. The "*ejusdem generis*" rule, therefore, does not appear to support appellants' conclusion.

Appellants rely on *In re Estate of Sorensen*, 46 Cal.App.2d 35, 115 P.2d 241, and a quotation therein from *Barney v. May*, 135 Minn. 299, 160 N.W. 790, in support of an argument that the language the testatrix here used should not include after-acquired stocks, her claim for unpaid salary and insurance resulting from the fire. There is absent here, however, a very significant word. In the *Sorensen* case the expression by the testatrix was "personal effects." The court there held that this language did not encompass a "large residue of money and securities." The holding was obviously correct for such items would hardly be classed as "personal" effects. The absence of such qualification of the word "effects" renders the decision valueless in the instant matter.

[10] The construction of this will by the trial court appears to be reasonable and consistent with the intent of the testatrix. In such circumstances a reviewing court will not substitute a different interpretation though it may seem equally tenable. In *re Estate of Sullivan*, 86 Cal.App.2d 890, 894, 195 P.2d 894; *Comstock v. Corwin*, *supra*, 111 Cal.App.2d at page 773, 245 P.2d 645; *In re Estate of Lewis*, 91 Cal.App.2d 322, 325, 204 P.2d 898; *In re Estate of Bourn*, 25 Cal.App.2d 590, 600, 78 P.2d 193; *In re Estate of Halsell*, 133 Cal.App.2d 665, 284 P.2d 821.

The judgment is affirmed.

McCOMB, Acting P. J., and ASHBURN, Justice pro tem., concur.

137 Cal.App.2d 117

John C. LEEMHUIS, Jr., Rudolph E. Leemhuis, and Louis J. Leemhuis, Plaintiffs and Respondents,

v.

Ann Margaret LEEMHUIS, Airfloor Company of California, Inc., a California Corporation, John Doe I, John Doe II, Jane Doe I and Jane Doe II, Defendants.

Ann Margaret Leemhuis, Appellant,
Civ. 21098.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1955.

'Action by decedent's sons against decedent's wife and others involving question whether decedent's assignment of his 102 shares in family corporation, amounting to 40% of stock, to himself and his wife in joint tenancy was concomitant with agreement that sons should be owners of such shares after wife had enjoyed life estate in them. The Superior Court, Los Angeles County, Otto J. Emme, J., decreed that wife held the 102 shares as trustee for sons, and wife appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that wife held title of shares in trust for benefit of sons.

Judgment affirmed.

1. Trusts $\S$ 44(2)

In action by decedent's sons against decedent's wife involving question whether decedent's assignment of his 102 shares in family corporation, amounting to 40% of stock, to himself and his wife in joint tenancy was concomitant with agreement that sons should be owners of such shares after wife had enjoyed life estate in them, evidence established that wife held title of corporate shares in trust for benefit of sons.

2. Trusts $\S$ 25(1), 30½(1), 44(3)

Voluntary trust is created as to trustor and beneficiary by any words or acts of trustor indicating with reasonable certainty an intention to create a trust, its subject, purpose and beneficiary, and such

trusts may be proved by parol evidence that is clear, satisfactory and convincing. West's Ann.Civ.Code, § 2221.

3. Trusts ⇨44(2)

Finding of express oral promise to hold in trust may be based solely on inferences from circumstances, behavior and posterior declarations of transferor and transferee without any indication of what was actually spoken between them.

4. Trusts ⇨44(2)

Silent acquiescence on part of grantee is sufficient proof of trust where grantee has knowledge of grantor's intention and understanding of transaction.

5. Appeal and Error ⇨931(1, 3)

Appellate court must accept as true all evidence tending to establish correctness of finding as well as all inferences which might reasonably have been thought by trial court to lead to same conclusion.

6. Trusts ⇨44(2)

In action by decedent's sons against decedent's wife involving question whether decedent's assignment of his 102 shares in family corporation, amounting to 40% of stock, to himself and his wife in joint tenancy was concomitant with agreement that sons should be owners of such shares after wife had enjoyed life estate in them, evidence sustained finding that wife paid no consideration for transfer of shares to herself as joint tenant with her husband.

7. Trusts ⇨35(1)

Where husband, who held 102 shares in family corporation, amounting to 40% of stock, and wife, who held 10 shares, each assigned their shares to themselves in joint tenancy and, in concomitance, agreed that husband's sons should be owners of such shares after wife had enjoyed life estate in them, and husband thereafter died, wife became trustee for husband's sons to extent of husband's contribution to corpus of trust, and her contribution did not defeat trust.

8. Witnesses ⇨185

Privilege against disclosure of confidential communications between husband

and wife is to be strictly construed. West's Ann.Code Civ.Proc. § 1881, subd. 1.

9. Witnesses ⇨222

Burden was on wife asserting privilege against disclosure of confidential communications with her husband to establish that conversations came within purview of statute setting out privilege. West's Ann.Code Civ.Proc. § 1881, subd. 1.

10. Witnesses ⇨188(2)

Test of whether conversation between spouses is admissible is whether testimony elicited entailed a disclosure of any marital communication. West's Ann.Code Civ.Proc. § 1881, subd. 1.

11. Witnesses ⇨219(2)

Inhibitions of statute prohibiting examination of husband or wife as to marital communications may be waived. West's Ann.Code Civ.Proc. § 1881, subd. 1.

12. Witnesses ⇨219(2)

In action by decedent's sons against decedent's wife involving question whether decedent's assignment of his 102 shares in family corporation, amounting to 40% of stock, to himself and his wife in joint tenancy was concomitant with agreement that decedent's sons should be owners of such shares after wife had enjoyed life estate in them, wife waived privilege, if any existed, against disclosure of confidential marital communications by her testimony that letter to corporation commissioner on date of communications had been dictated to her by decedent and that her sister had heard it. West's Ann.Code Civ.Proc. § 1881, subd. 1.

13. Witnesses ⇨188(1)

Rule of privilege as to communications between attorney and client applies to conversations between spouses. West's Ann.Code Civ.Proc. § 1881, subd. 1.

14. Witnesses ⇨192

Where communications between husband and wife are not confidential, they are not privileged. West's Ann.Code Civ.Proc. § 1881, subd. 1.

15. Appeal and Error ⇨1048(2)

In action by decedent's sons against decedent's wife involving question whether

decedent's assignment of his 102 shares in family corporation, amounting to 40% of stock, to himself and his wife in joint tenancy was concomitant with agreement that decedent's sons should be owners of such shares after wife had enjoyed life estate in them, fact that wife was required to testify as to certain allegedly privileged conversations with decedent was not prejudicial error under circumstances. West's Ann.Code Civ.Proc. § 1881, subd. 1.

16. Witnesses ◊190

In action by decedent's sons against decedent's wife involving question whether decedent's assignment of his 102 shares in family corporation, amounting to 40% of stock, to himself and his wife in joint tenancy was concomitant with agreement that sons should be owners of such shares after wife had enjoyed life estate in them, wherein sons asserted no claim to \$23,500 note which had been placed in joint tenancy of spouses, it was not error to require wife to testify with reference to such note.

17. Witnesses ◊263

Requiring party to give her testimony for second time, after she had first denied certain statements attributed to her and wire recording of her conversation had then been played to her, was matter resting in sound discretion of court, and it was proper to allow her to explain her recorded words. West's Ann.Code Civ.Proc. § 2055.

18. Trusts ◊242

In action by decedent's sons against decedent's wife involving question whether decedent's assignment of his 102 shares in family corporation, amounting to 40% of stock, to himself and his wife in joint tenancy was concomitant with agreement that decedent's sons should be owners of such shares after wife had enjoyed life estate in them, memorandum of decedent and his sons dated some four years prior to his death, showing their division of the shares under four different sets of circumstances, revealed in writing decedent's intention as of such date and that such intention was consistent with decedent's avowed intention that stock should remain in men of family, and was admissible in evidence.

D. Chase Rich, Los Angeles, for appellant.

LeSage & Bowman, Pasadena, by Thomas W. LeSage, Pasadena, for respondents.

MOORE, Presiding Justice.

The judgment herein decrees that defendant, Ann Margaret Leemhuis, by certificate 33 holds 102 shares of the capital stock of Airfloor Company of California, Inc., as trustee for plaintiffs, owners in fact; that she transfer title to plaintiffs and do all things necessary to vest ownership of the shares in plaintiffs, subject to a life estate in Ann Margaret. She now appeals on the ground that the evidence does not support the finding of the trust agreement.

Respondents are the sons of Johannes Leemhuis Sr. who in April 1953 at the age of 62 died intestate in Los Angeles County. He was of Dutch descent. In 1938 he migrated to California from South Africa with his wife and five children. Mrs. Leemhuis died in 1944. Her children were all then adults. Johannes met appellant in 1945 and they resided together as husband and wife until his decease. They celebrated a ceremonial marriage in November 1952.

In 1949 Johannes invented a device to aid in the heating of buildings, and applied for a patent. Respondents joined him in perfecting the new invention. In 1950 the four formed a partnership for the manufacture and sale of the device and within a short time they organized Airfloor Company of California and transferred all the assets of the firm to the corporation which thereafter manufactured Johannes' device. Its directors were five, including respondents, one Olafson, and the father who was president. John was the only son who worked actively for the corporation. Rudolph and Louis merely attended the board meetings. At the time of the trial, June 1954, they had issued 440 shares, 102 of which belonged to decedent. Appellant purchased 10 shares for \$1,000. The stock issued to respondents was divided among them on the basis of the amount of work done on the invention, giving Johannes 40 per cent, John 12 per cent, Louis 40 per cent and Rudolph 8 per cent.

On April 20, 1953, Johannes died intestate. As surviving spouse, Ann succeeded to one-third interest in all the assets of his estate. In addition, she had acquired a note for \$23,500 secured by a deed of trust, and other assets. Despite such acquisitions, appellant laid claim to the 112 shares of the corporation which she and decedent had assigned to him and her in joint tenancy. The question for decision is whether that assignment of the 112 shares was concomitant with an agreement that the respondents should be owners of such shares after appellant shall have enjoyed a life estate in them. The evidence appears to give an affirmative answer to such inquiry.

About forty days prior to Johannes' death, he prepared a memorandum at the home of appellant's sister, Mrs. Reed, where he and his wife then resided. Mrs. Reed was present during the discussion of decedent and appellant. At no place in the record do we find any testimony of Mrs. Reed in support of appellant's contention to the effect that at her husband's death she became owner of all the shares. Appellant testified that she took decedent's dictation of his letter to the corporation commissioner; that her notes of the dictation had not been preserved; that Johannes wrote the memorandum in long hand and that she had consigned it to the ash can; that after her letter to the commissioner, a certificate for 112 shares was issued and placed in escrow with Attorney McHaffie; that she gave no consideration for the joint tenancy.

From the testimony of several witnesses, it was established that for many years prior to March 8, 1953, Johannes had announced and adhered to a rule that the stock of the Airfloor Company was to remain in the men of the Leemhuis family. Such rule was repeated among the members of that family until Johannes' death. Appellant declared the rule after her husband's death at a conference with respondents as follows:

"Boys, I want to admit that the stock still does not belong to me. It may be turned over to me but it still belongs to one person, and we are four to see what is going to be done with that stock * * * it is still your daddy's stock * * * he just left

it to me in name only * * * I am going to distribute it * * * the way I want * * *. It is still his stock, it is not mine * * *. Your father didn't want the two girls in on it, just the three boys * * *. I am sticking to your father's rule, the three boys only * * * I am not going to alter it."

She testified, "They were rules made by him and I wanted to abide by them. * * * He made those rules prior to our marriage. It was told to the three boys and myself * * * It was something he would say from time to time at various places." That conference was held September 24, 1953. Her deposition was taken April 10, 1954, when she deposed that at the conference the stock was not discussed; denied her statement that the stock had been given to her "in name only." But a playing of the wire recording established that she had made to respondents all the statements which she repudiated in court.

She admitted that she proposed the conference "for the purpose of discussing certain matters * * *. The conference was at the plant in South Gate." At the trial, she testified that it was a friendly conference, but denied that she had said that she held title to the stock in name only or that she had said, "It is still your daddy's stock; he just left it to me in name only." After the recording had been played, appellant testified, "Well, it pertains to the stock that should be held in the Leemhuis name and that it should go to the boys and the grandchildren."

In addition to the foregoing, Barbara Leemhuis (wife of John) testified that at her home a few days after the passing of Johannes Sr., appellant visited her where she recited decedent's "rule" with respect to the stock of the Airfloor Company and stated that decedent had placed the stock in joint tenancy because he "was undecided as to how to leave the stock" among the three sons and that the joint tenancy was to continue only during his trip to Africa and that decedent knew he could trust appellant to divide the stock fairly among the boys. Also, Barbara testified that on the occasions of the visits she and her husband made to

decendent's home during the three years prior to his death, decedent, at least once a week stated that the Airfloor stock was a "family affair * * * wanted the boys to be sole runners of the business * * and it should not go outside of the family."

[1,2] Such evidence establishes that appellant held the title of the corporate shares in trust for the benefit of respondents. The case of *Grace v. Rodrigues*, 111 Cal.App.2d 131, 243 P.2d 906, 910, supports the contention of respondents. The mother of the litigants, without consideration, conveyed her Elmhurst property to the defendant seven years prior to the mother's decease. At one time, Mrs. Rodrigues stated that when her mother came out of the hospital, she would make everything all right; at another, she said, "My mother said to sell the property and divide it between my brother and I"; subsequently she said to Mrs. Grace (her sister), "I will give you what's coming to you." In a conversation among members of the family, there had been quite a little conversation in reference to the property's being equalized among the three children, and appellant said: "it was no more than right that each one of us should have our share as my mother wanted it." At another conversation among the three children, appellant said she was going to sell it and divide it among the three. To Mrs. Govey who visited appellant at Grace's home, appellant said, "I will sell the property and divide it between you and Louisa and the three of us." Despite the appellant's denials of the above statements, the court found that she held the Elmhurst property in trust for herself and respondents. The judgment was affirmed with the announcement that "'although it is necessary, in order to establish a trust, to offer clear and convincing proof, such proof may be indirect, consisting of acts, conduct, and circumstances'"—citing *Hansen v. Bear Film Co., Inc.*, 28 Cal.2d 154, 173, 168 P.2d 946; *Air-ola v. Gorham*, 56 Cal.App.2d 42, 49, 133 P.2d 78. A voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor, indicating with reasonable certainty an intention to create a trust, its subject, purpose and beneficiary.

Such trusts may be proved by parol evidence that is clear, satisfactory and convincing. Civil Code, sec. 2221; *Kobida v. Hinkelmann*, 53 Cal.App.2d 186, 188, 127 P.2d 657.

[3,4] Whether the finding of a trust is justified, it is necessary to take into consideration all the evidence. (*Ibid.*) Pursuant to such rule, the weight of the evidence in the instant cause preponderates to such extent that any reasonable person must approve of the conclusions derived by the trial court. The finding of an express oral promise to hold in trust may be based "solely on inferences from the circumstances, behavior and posterior declarations of transferor and transferee without any indication of what was actually spoken between them." *Casey v. Casey*, 97 Cal. App.2d 875, 882, 218 P.2d 842, 847. Silent acquiescence on the part of the grantee is sufficient proof of the trust where the grantee has knowledge of the grantor's intention and understanding of the transaction. 89 C.J.S., *Trusts*, § 149, p. 1044; 65 C.J. 472; see *Box v. Box*, 146 Neb. 826, 21 N.W.2d 868.

[5] Inasmuch as the appellate court must accept as true all evidence tending to establish the correctness of a finding as well as all inferences which might reasonably have been thought by the trial court to lead to the same conclusion, *Bancroft-Whitney v. McHugh*, 166 Cal. 140, 142, 134 P. 1157, it must be said that the record in this action abundantly supports the findings and justifies the judgment.

[6] There is no substance in the claim of appellant that she paid a consideration for the transfer of the 102 corporate shares to her name as a joint tenant with her husband. She testified that she gave no consideration therefor. From that and all the evidence bearing upon the subject, the court was justified in finding that she paid no consideration for the transfer of the shares to appellant as a joint tenant with her husband.

[7] The theory now advanced that appellant's transfer of her ten shares to the

joint tenancy was a valuable consideration for the transfer by decedent of his 102 shares to her is not applicable to the facts as found. If appellant held the 102 shares in trust for respondents, then she held her ten shares in trust for herself. She is in the identical position of a resulting trustee who has paid a small fraction of the cost of the corpus of the trust. She is trustee for Leemhuis heirs to the extent of decedent's contribution to the entirety. "If the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party, pro tanto. * * * payment of part of the consideration carries with it a proportional interest in the land." *Gerety v. O'Sheehan*, 9 Cal.App. 447, 449, 99 P. 545, 546. It follows that appellant's transfer of her 10 shares to the joint tenancy does not defeat the trust in which she holds the 102 shares for respondents.

[8-11] Appellant assigns as prejudicial the court's rulings which required her to testify to certain privileged conversations with her husband (a) at the time (March 9, 1953) they authorized the transfer of the 112 shares to the joint tenancy; (b) that the husband desired his shares to go to his sons; (c) with reference to the note of March 9, 1953, for \$23,500. The record contains nothing to indicate that such conversations were intended to be confidential. The privilege is to be strictly construed. The burden was on appellant to establish that the conversations came within the purview of Code of Civil Procedure, section 1881, subdivision 1. *Tanzola v. De Rita*, 45 Cal.2d 1, 285 P.2d 897, 900. The test of whether a conversation between spouses is admissible is whether the testimony elicited "entailed a disclosure of any marital communication." *Ibid.* The inhibitions of subdivision 1 of section 1881 may be waived. *In re Strand*, 123 Cal.App. 170, 172, 11 P.2d 89.

[12-14] Appellant waived the privilege, if it existed, by her prior testimony that the letter of March 9, 1953, had been dictated to her by her husband and that her sister Mrs. Reed heard it. The rule of

privilege as to communications between attorney and client, *Sharon v. Sharon*, 79 Cal. 663, 677, 22 P. 26, 131; *Mitchell v. Towne*, 31 Cal.App.2d 259, 265, 87 P.2d 908, applies to conversations between spouses. Where communications between husband and wife are not confidential, they are not privileged. *Horowitz v. Sacks*, 89 Cal.App. 336, 344, 265 P. 281. Also, prior to any objection to the admission of the conversations, the letter of March 9 had been received on stipulation. Moreover, before appellant made her objections to the conversations, she had freely and duly given her deposition whereby she testified that she had had no conversations with decedent with reference to the transfer of the shares. By her silence, her acquiescence and her active participation in conversations and events, appellant waived such privilege as she might have enjoyed.

[15] But if the objections by appellant had been valid on all other grounds, the court committed no prejudicial error by reason of the circumstance that (1) the facts adduced by such conversations were proved by other testimony and (2) in each instance appellant either denied the statement specified in the question or gave evidence favorable to her own contention. Inasmuch as all alleged confidential communications in support of appellant's theory were rejected by the court, there could have been no prejudice suffered by appellant.

[16] It was not error to require appellant to testify with reference to the \$23,500 note which had been placed in the joint tenancy of the spouses. No claim is asserted to that note by respondents.

[17] Requiring appellant to give her testimony for the second time under 2055, Code Civil Procedure, was a matter resting in the sound discretion of the court. She first denied certain statements attributed to her. After the wire recording of her conversation had been played to her, it was proper to allow her to explain her recorded words.

[18] It was not error to admit into evidence the memorandum of the agreement of respondents and decedent dated July 8,

1949, showing their division of the corporate shares under four different sets of circumstances. It reveals in writing the intention of decedent some four years prior to his decease and that such intention was consistent with his "rule" and his avowed intention in his lifetime.

Judgment affirmed.

FOX, J., and ASHBURN, J. pro tem.,
concur.



137 Cal.App.2d 167

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

R. C. TABB, Defendant and Appellant.
Cr. 3131.

District Court of Appeal, First District,
Division 2, California.

Nov. 21, 1955.

Hearing Denied Dec. 21, 1955.

Defendant was charged with unlawful selling, furnishing or giving away narcotics in violation of statute and with prior conviction under the same statute. He admitted the prior conviction, and a jury in the Superior Court, Alameda County, Chris B. Fox, J., found him guilty. He appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that proof of conviction for similar offense was evidence bearing on defendant's knowledge of nature of substance with which he dealt, and trial court did not err in refusing to give an instruction limiting to impeachment the evidence as to prior conviction.

Affirmed.

1. Witnesses Ⓒ337(5), 350

It is proper to impeach a defendant by showing that he has been convicted of a felony, and questions may be asked to

ascertain nature of offenses involved in previous convictions. West's Ann.Code Civ.Proc. § 2051.

2. Witnesses Ⓒ350

In prosecution for sale of narcotics, wherein defendant denied he had been previously convicted of a felony, it was proper and necessary to ask further questions to elicit fact that defendant had pleaded guilty and had been sentenced on felony charges, and questions calling for nature of counts on which convicted, i. e., narcotics charges, were proper. West's Ann.Code Civ.Proc. § 2051; West's Ann. Health and Safety Code, § 11500.

3. Poisons Ⓒ9

In prosecution for sale of narcotics, one element of offense to be proved by prosecution was defendant's knowledge that substance with which he dealt was a narcotic, and it was proper to bring out facts to show that defendant was familiar with marihuana. West's Ann. Health and Safety Code, § 11500.

4. Witnesses Ⓒ350

When defendant's answers, in prosecution for sale of narcotics, to questions as to prior conviction were evasive and defendant said he had served time because marihuana cigarettes were found on his porch, it was proper to ask defendant if he knew various terms used in parlance of narcotics trade. West's Ann. Health and Safety Code, § 11500; West's Ann.Code Civ.Proc. § 2051.

5. Criminal Law Ⓒ1036(2)

Objections to questions, asked in prosecution for sale of narcotics, as to defendant's prior conviction and as to his familiarity with narcotics, could not be raised for first time on appeal. West's Ann. Health and Safety Code § 11500; West's Ann.Code Civ.Proc. § 2051.

6. Poisons Ⓒ9

In prosecution for sale of marihuana, burden was on prosecution affirmatively to establish elements of the crime charged. West's Ann. Health and Safety Code, § 11500.

7. Criminal Law ☞ ☞673(5)

In prosecution for sale of marihuana, proof of prior conviction for similar offense was evidence bearing on defendant's knowledge of nature of substance with which he dealt, and trial court did not err in refusing to give instruction limiting to impeachment the evidence as to prior conviction. West's Ann. Health and Safety Code, § 11500; West's Ann.Code Civ.Proc. § 2051.

8. Criminal Law ☞1037(1)

Absence of objection will not prevent reversal where misconduct of prosecuting attorney is of such character as to have produced an effect which, as reasonable probability, could not have been obviated by any instructions to jury.

9. Criminal Law ☞1171(1)

In prosecution for sale of narcotics, wherein defendant characterized as an "ex-addict" a man with whom defendant had been living, prosecutor's argument, which was not objected to at trial, that prosecutor didn't think there was such a thing as an ex-addict, did not warrant reversal. West's Ann. Health and Safety Code, § 11500.

10. Criminal Law ☞1171(3)

In narcotics prosecution, prosecutor's remark that sale in question was "just one piece or one link in the whole operation in West Oakland," if it was erroneous, was not prejudicial in view of direct and positive evidence of guilt. West's Ann. Health and Safety Code, § 11500.

11. Criminal Law ☞1037(2)

In narcotics prosecution, if defendant's counsel was not satisfied that judge's admonition to prosecutor "to confine himself to the record" was sufficient to cure any error in prosecutor's remark to jury, defendant's counsel should have asked that remark be stricken or that jury be asked to disregard it or that district attorney be reproved for misconduct. West's Ann. Health and Safety Code, § 11500.

12. Poisons ☞9

In prosecution for sale of marihuana, evidence was sufficient, even with respect to matter of identification of defendant, to

sustain conviction. West's Ann. Health and Safety Code, § 11500.

Totton P. Heffelfinger, II (appointed by court), San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty. of the County of Alameda, Robert L. Anderson, Deputy Dist. Atty., Oakland, for respondent.

KAUFMAN, Justice.

Defendant appeals from a judgment of conviction after jury verdict on a charge of violating § 11,500 of the Health and Safety Code, the unlawful selling, furnishing or giving away narcotics. He was charged also with a prior conviction of the same section. A plea of not guilty was entered, but the prior conviction was admitted.

On September 2, 1954, an agent of the State Bureau of Narcotic Enforcement, Major W. McBee, was introduced to appellant by Trosclair, an informer and a heroin addict. They met opposite 3219 Filbert Street in Oakland, which was the address of appellant Tabb's art shop. Appellant was introduced as "Candy". Trosclair had informed the agent that he thought appellant's last name was Yates. At this meeting Trosclair told appellant that McBee wanted to get some marijuana. Appellant indicated that the price would be \$15. McBee then gave appellant \$15 and drove him to the vicinity of 37th and West Streets in Oakland. Appellant left the car and was gone for a few minutes. On his return he told McBee that the man he was looking for was not there. They returned to 3219 Filbert Street, and appellant gave back to McBee the \$15. Appellant crossed the street to a phone booth, and apparently made a telephone call. On returning he told McBee that he was "all wasted away" and didn't have anything himself, that if McBee wished he would "hold out a can for him on the following day." This, according to the agent, in the parlance of the narcotics trade, meant that the person didn't have anything, that anything he had was gone at that time.

On the following day, September 3, 1954, McBee contacted appellant opposite the art shop at approximately 12:50 p. m. Trosclaire was present. Appellant entered McBee's automobile where he handed a paper bag to McBee. McBee asked him if it was \$15 and appellant said "yes". McBee gave him the money. Appellant asked McBee if he wanted to look at it to see if it was any good. McBee opened the bag and saw a green leafy substance. This proved to be a one-half ounce of marijuana, which was introduced as People's Exhibit No. 1.

McBee, at the trial, positively identified appellant Tabb as the person with whom he had negotiated the narcotics purchase. He stated that appellant's appearance had changed since the date of the transaction in that he no longer had the "distinctive" goatee which he was wearing at the time of the sale. After the transaction McBee had gone through the photographic files of the Oakland Vice Squad, located appellant's picture therein as the party from whom he had made the purchase. Appellant was apparently not arrested until sometime in October. The informer, Trosclaire, at the time of trial, was in a federal hospital for narcotic addicts.

Appellant testified that he had never had any contact with McBee prior to the preliminary hearing, and denied all of the incidents related by McBee concerning the narcotic transaction. He admitted that Trosclaire, a heroin addict, had been living with him for about two weeks prior to September 3, at 3219 Filbert Street, Oakland. He said that he first learned of Trosclaire's addiction about a week and half after he came to live with him, and that he then asked him to move out, but since Trosclaire had no money, appellant could not turn him out in the cold. When asked if he had been previously convicted of a felony, appellant said that he had not, but on advice of counsel had pleaded guilty to a similar action. He admitted pleading guilty to two counts under § 11,500, Health and Safety Code for which he had spent two years in San Quentin and two years on parole.

Appellant contends that the questions asked by the prosecuting attorney and the statements made by him in argument con-

stituted prejudicial misconduct and deprived him of a fair trial. The questioning which appellant assigns as prejudicial was as follows:

"Q. This was not your first brush with a narcotic, was it, Mr. Tabb? A. No, it was not.

"Q. Now, Mr. Tabb, have you ever been convicted of a felony? A. I have never been convicted of a felony, although on advice of counsel, I have pleaded guilty to a similar action.

"Q. Isn't it a fact, sir, that on April 8 of 1948, you were convicted in the Superior Court of the State of California in this County for two counts of 11,500 of the Health and Safety Code? A. I wasn't convicted. My attorney advised me to plead guilty.

"Q. Didn't you go to San Quentin, sir? A. Yes, I did. I spent two years in San Quentin and did two years on parole successfully.

"Q. And this 11,500 had to do with possession and furnishing of marijuana, didn't it? A. It did not.

"Q. It did not? A. It had to do with three marijuana cigarettes found on my front porch.

"Q. Possession of marijuana, is that correct? A. One count of possession, yes.

"Q. And a second count of furnishing marijuana, wasn't that true? A. That is what they said.

"Q. You, before listening to Major McBee on the stand here knew what marijuana was then, didn't you? A. I was slightly acquainted with it, yes.

"Q. And you also knew some of the terms we have been speaking of like pot and bread and things of that nature? A. I am afraid I haven't been in that element for quite a while."

It is to be noted that during this questioning no objections were interposed by appellant's counsel.

[1-4] There is, of course, no question of the propriety of impeaching a defendant by showing that he has been convicted of a felony. § 2051, Code of Civ.Proc. Further-

more, questions are permitted to ascertain the nature of the offenses involved in the previous convictions. *People v. Peete*, 28 Cal.2d 306, 320, 169 P.2d 924; *People v. Garrow*, 130 Cal.App.2d 75, 278 P.2d 475; *People v. Gardner*, 128 Cal.App.2d 1, 7, 274 P.2d 908. Since, at first, appellant denied he had been convicted, further questioning was necessary to bring out the fact that he had actually been adjudged guilty of a felony. There can be no objections to the questions which call for the nature of the counts on which he was convicted. Was there, then, anything objectionable about the three remaining questions which were asked to determine whether or not he was familiar with the narcotic marijuana? His answers to the prior questions were rather evasive, tending to create the impression that he may not really have known anything about marijuana, but that he was unfortunate enough to be caught with it on his premises. Therefore, since one element of the offense to be proved by the prosecution was appellant's knowledge that the substance which he dealt with was a narcotic, it was proper to bring out facts to show that he was familiar with marijuana. In *People v. Sykes*, 44 Cal.2d 166, 280 P.2d 769, it was said that in circumstances where appellant had repeatedly denied the commission of the crime, it was within the permissible scope of cross-examination to ask if appellant had ever had narcotics in his possession. The court said that "The evidence that at prior times he had narcotics in his possession was admissible to show familiarity with them."

Appellant contends that the question of the district attorney went beyond the permissible purpose and tended to elicit testimony which in the minds of the jurors tended to prove that appellant had criminal tendencies and was likely to have committed a crime involving narcotics. He cites *People v. Musumeci*, Cal.App., 284 P.2d 168, 173, which holds that "testimony tending only to prove inclination of an accused toward crime, thereby rendering more probable his guilt of the charge for which he is on trial is inadmissible." The cited case cannot be said to parallel the situation here involved, for there defendant was question-

ed at great length to bring out the fact that he was a sex pervert, and the only purpose of doing so would be to show that he was inclined to commit a crime of the type with which he was then charged. Here appellant admitted to only a *slight* acquaintance with marijuana, and the prosecutor asked him but one more question concerning certain terms used in reference to the narcotic in order to show that his acquaintance therewith was something more than slight.

[5] It may also be noted that since no objections were raised at trial to these questions, appellant cannot raise them for the first time on appeal. *People v. Wissenfeld*, 36 Cal.2d 758, 766, 227 P.2d 833; *People v. Simeone*, 26 Cal.2d 795, 806, 161 P.2d 369; *People v. Farrell*, Cal.App., 284 P.2d 29. In *People v. Newson*, 37 Cal.2d 34, 230 P.2d 618, cited by appellant, the testimony was received over objection of defendant's counsel.

[6,7] It is contended that an instruction should have been given limiting the purpose of the evidence regarding appellant's prior conviction, on the court's own motion. There appears to have been no error in the failure to give such an instruction in this case, since, as determined above, the burden was on the prosecution to affirmatively establish the elements of the crime charged, hence knowledge of the nature of the narcotic on the part of appellant had to be proved. Proof of conviction for a similar offense was evidence bearing on appellant's knowledge of the nature of the substance with which he dealt. The court was therefore correct in not giving an instruction limiting this evidence to impeachment of appellant.

The district attorney in his argument to the jury, when discussing the informer, Kerry Trosclair, characterized by appellant as an ex-addict, said: "I don't think there is such a term as an ex-addict." At least, I have never heard it. It is an unfortunate thing about narcotics, once you've got it, and there isn't a case on record where anybody has ever been cured permanently. And it was elicited from McBee that Trosclair is presently in a Federal hospital for treatment. Therefore, it certainly casts

some doubt on Tabb's classification of Trosclaire as an ex-addict. That only goes to show knowledge on the part of Tabb here."

[8, 9] No objection was raised to this portion of the argument at the trial. In *People v. Codina*, 30 Cal.2d 356, 362, 181 P.2d 881, it was held that alleged improprieties must be opposed at the time they are made and the court requested to admonish the jury concerning them, if they are to be made a ground of appeal. See, also, *People v. Sutic*, 41 Cal.2d 483, 496, 261 P.2d 241; *People v. Sampsell*, 34 Cal.2d 757, 763, 214 P.2d 813. It is true, however, that the absence of objection will not prevent reversal where misconduct of the prosecuting attorney is "of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury". *People v. Robarge*, 111 Cal.App.2d 87, 244 P.2d 407, 413.

Appellant says that the district attorney by the language quoted above, sought to link appellant in some way with Trosclaire's plight. Apparently the only purpose of the passage was to cast doubt on appellant's credibility when he classified Trosclaire as an ex-addict. The argument appears to be that since everyone should know that there are no ex-addicts, appellant was not truthful in thus characterizing Trosclaire. There is nothing in the language that could lead the jury to believe that appellant was an addict. In *People v. Duvernay*, 43 Cal. App.2d 823, 111 P.2d 659, cited by appellant, a case in which it was concluded that defendant had not had a fair trial, the prosecuting attorney in argument had stated that he didn't know whether this defendant was a user or not, and that defendant had many of the characteristics of a user.

[10, 11] The district attorney, some time later in his argument, discussed the fact that the state agent, McBee had no interest in sending an innocent man to jail, and went on to say that the jury must look to the motives of the witnesses, that admittedly it is difficult when there are so few witnesses, "but that is the nature of a narcotics case. Some narcotics cases are bigger than others where you get the large operators which,

unfortunately, we can't lay hands on as often as we would like. You have a much more elaborate setup with stakeouts, continuous buys, or rather one buy right after another, and a good many witnesses that can be presented. *But this is just one piece or one link in the whole operation in West Oakland.*" The italicized language was objected to as prejudicial and the court told the prosecutor that he ought to confine himself to the record. Any error in making this remark was not prejudicial in view of the direct positive evidence of appellant's guilt. Also, appellant's counsel at the trial was satisfied that the judge's admonition to the prosecutor to "confine himself to the record" was sufficient, since he did not ask that the remark be stricken or request that the jury be asked to disregard it, or request that the district attorney be reproofed for misconduct. See, *People v. Sutic*, 41 Cal.2d 483, 496, 261 P.2d 241.

[12] There is no merit in the contention that the evidence is insufficient to warrant a verdict of guilty. Appellant's principal argument is directed at McBee's identification of Tabb. Much is made of the fact that McBee didn't know that appellant's name was Tabb at the time of the alleged transaction, that the informer had told McBee appellant's name was Candy Yates, but that McBee never made any investigation to determine whether there was such a person as Candy Yates. Furthermore, it is argued that the person McBee dealt with wore a goatee, whereas appellant was clean shaven at the time of trial. McBee identified a photograph, Plaintiff's Exhibit 2, as that of appellant as he looked on September 2 and 3, 1954. Appellant at the trial admitted that it was his photograph, and that on the aforementioned date he wore a mustache, goatee and beard which had later been shaved off in the County Jail.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

136 Cal.App.2d 904

Max I. BLACK, Petitioner and Appellant,
v.

STATE PERSONNEL BOARD of The State of California, Ford A. Chatters, President and member thereof, Emery Olson, Wilmer W. Morse, Robert D. Gray and Benjamin E. Mallary, members thereof, California Aeronautics Commission, Bernard M. Doolin, Director Aeronautics, Robert C. Kirkwood, Charles G. Johnson, First Doe and Second Doe, Defendants and Respondents.

Civ. 20873.

District Court of Appeal, Second District,
Division 1, California.

Nov. 14, 1955.

Mandamus proceeding to review an order of the State Personnel Board dismissing petitioner from his position as field representative for the California Aeronautics Commission. The Superior Court, Los Angeles County, Arnold Praeger, J., denied an alternative writ of mandate, and the petitioner appealed. The District Court of Appeal, Ashburn, J., pro tem., held that there was sufficient evidence to sustain finding that employer had been guilty of conduct justifying discipline.

Affirmed.

1. Mandamus ⇨172

Any finding of State Personnel Board which was not specifically attacked in administrative mandamus proceeding would have to be accepted as true. West's Ann. Code Civ.Proc. § 1094.5.

2. Mandamus ⇨172

In an administrative mandamus proceeding, court is limited, so far as sufficiency of evidence is concerned, to determination of whether substantial evidence is produced in support of challenged findings, and it may not weigh evidence or make independent findings as to effect thereof. West's Ann.Code Civ.Proc. § 1094.5.

3. Evidence ⇨83(1)

Mandamus ⇨154(7)

In an administrative mandamus proceeding, ruling of administrative tribunal comes before court attended by strong pre-

sumption that official duty has been regularly performed, and such presumption must be overcome by factual allegations; mere conclusions being insufficient. West's Ann.Code Civ.Proc. § 1094.5.

4. Mandamus ⇨154(7)

In administrative mandamus proceeding, petitioner's charge, that there was no "substantial evidence" to support challenged phases of administrative findings, was but a conclusion and could not be treated as equivalent to indispensable facts necessary to overcome strong presumption, that official duty had been regularly performed, which attended ruling of administrative tribunal. West's Ann.Code Civ.Proc. § 1094.5

5. Mandamus ⇨169

Unless petitioner avers, in administrative mandamus proceeding, facts sufficient to make a prima facie case, court is justified in denying petition out of hand. West's Ann.Code Civ.Proc. § 1094.5.

6. Officers ⇨72(1)

Conviction of violation of vehicle code as result of incident would not, if standing alone, be sufficient sustaining evidence of driving-while-intoxicated charge made against state employee in dismissal proceeding, but it was competent for purpose of supplementing and explaining evidence of fact of driving while intoxicated. West's Ann.Gov.Code, § 19572 (c, d, f, p, s); Vehicle Code, § 502.

7. Officers ⇨66

Driving a vehicle while intoxicated and running through signal light constituted failure of good behavior outside of duty hours incompatible with or inimical to public service within government code section rendering such conduct cause for discipline of government employee. West's Ann.Gov. Code, § 19572 (c, d, f, p, s); Vehicle Code, § 502.

8. Officers ⇨72(2)

What constituted any other failure of good behavior or acts either during or outside of duty hours which were incompatible with or inimical to public service, within government code section making such conduct cause for discipline of government employee, was essentially question for deter-

mination by Personnel Board. West's Ann. Gov.Code, §§ 19572 (c, d, f, l, p, s), 19574.

9. Officers ⇨69.7

Evidence sustained State Personnel Board's finding that field representative for Aeronautics Commission had been guilty of insubordination, in making unauthorized disclosure of information relating to work of Commission, within the purview of government code section making insubordination cause for discipline of government employee. West's Ann.Gov.Code, § 19572 (f, p, s).

10. Administrative Law and Procedure

⇨303

Determination of penalty to be imposed by administrative agency lies with agency and not with court.

Karl F. Geiser, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Delbert E. Wong, Deputy Atty. Gen., for respondents.

ASHBURN, Justice pro tem.

Appeal from order denying alternative writ of mandate in a proceeding brought under § 1094.5, Code of Civil Procedure, to review an order of the State Personnel Board dismissing petitioner from his position as Field Representative for the California Aeronautics Commission. It appears from the petition that certain charges were filed against petitioner under § 19574 Government Code, same being set forth in a Notice of Punitive Action, the vehicle prescribed by statute. Answer having been filed and hearing had, the board found against petitioner and ordered his dismissal. Rehearing was denied and thereupon petition for mandate was filed in the superior court.

The Notice of Punitive Action contained allegations which summarized state these grounds for dismissal: inefficiency, inexcusable neglect of duty, insubordination, conviction of a misdemeanor involving moral turpitude, wilful disobedience, and acts during and outside of duty hours which are

incompatible with and inimical to the public service within the meaning of subdivisions (c), (d), (f), (l), (p) and (s) of § 19572 of the Government Code. That code section provides that: "Each of the following constitutes cause for discipline of an employee, * * * (c) Inefficiency. (d) Inexcusable neglect of duty. * * * (f) Insubordination. * * * (l) Conviction of a felony or conviction of a misdemeanor involving moral turpitude. * * * (p) Wilful disobedience. * * * (s) Any other failure of good behavior or acts either during or outside of duty hours which are incompatible with or inimical to the public service. * * *"

The board's finding IV stated in substance that petitioner had failed, neglected, and refused, in approximately 65 instances to transmit copies of correspondence emanating from the Burbank office to the Sacramento office as required of him by Staff Memorandum No. 1, of which he had knowledge; that in approximately 44 instances he violated the said memorandum by failing and refusing to sign correspondence in the prescribed manner; that he informed the Director of Aeronautics that there was no official correspondence in the Burbank files which had not been previously transmitted to Sacramento, when in fact there were approximately 64 copies of official correspondence falling in that category; that these failures and refusals were incompatible with and inimical to the public service within the meaning of subdivisions (c), (d), (f), (p) and (s) of said § 19572.

The board's finding V was: "That on or about May 22, 1953, the said Max I. Black drove a vehicle in the City of Los Angeles while intoxicated and ran through a signal light"; that on or about May 25, 1953, he was convicted in the municipal court of Los Angeles county of a violation of § 502 of the Vehicle Code, driving a vehicle upon a highway while under the influence of intoxicating liquor; and that such conduct constituted failure of good behavior and acts outside of duty hours, incompatible with and inimical to the public service, within the meaning of subdivision (s) of § 19572.

Finding VI was to the effect that on or about February 6, 1953, petitioner was instructed by the Director of Aeronautics to refrain from revealing to persons not officially connected with the California Aeronautics Commission any information relating to the work of the commission without prior approval of the Director of Aeronautics, unless the release of such information pertained directly to specific and designated activities of the said Black with the said commission; that on or about August 4, 1953, said Black received from the Director's office a copy of a letter from the Director to one Major General Vanaman, relating to the establishment of a Sacramento Air Traffic Council, which letter is set forth in the finding; that the subject of the letter did not relate to Black's duties or activities, that he received it in the ordinary course of official business, that in violation of his instructions he forwarded a copy of same to Vice Admiral C. E. Rosendahl, together with a letter from himself to Vice Admiral Rosendahl which is set forth in the finding; that petitioner concealed from the Director the transmittal of said letter to Vice Admiral Rosendahl, who was not connected with the California Aeronautics Commission and had no right to receive the information contained in the letter from the Director to Major General Vanaman; that such conduct on the part of petitioner constituted insubordination, wilful disobedience and failure of good behavior and acts during business hours which are incompatible with and inimical to the public service within the meaning of subdivisions (f), (p) and (s) of § 19572.

The board further found in paragraph X: "That the causes, and each of them, for which the punitive action was imposed and found to be true in Paragraphs IV, V and VI hereof are sustained by the evidence; that each of said causes, separately and severally, so found to be true is sufficient to support the punitive action taken." And it was ordered that petitioner be dismissed from the service.

[1] No copy of petitioner's answer to the Notice of Punitive Action is included in his petition for mandate. But the speci-

fications of insufficiency of evidence therein contained do not challenge the support for finding V with respect to the fact of driving while intoxicated and running through a signal light, or the fact of conviction of violation of § 502, Vehicle Code. Nor does the petition specify any insufficiency of the evidence to support that portion of finding VI which sets forth a copy of the letter to Major General Vanaman, or that portion setting forth the copy of the letter to Vice Admiral Rosendahl. Other portions of that finding are attacked upon the basis of "no substantial evidence" to support the same. Any finding which is not specifically attacked is to be accepted as true. *Stuck v. Board of Medical Examiners*, 94 Cal.App. 2d 751, 754-755, 211 P.2d 389.

[2] The State Personnel Board is an agency having adjudicating power derived directly from the constitution and under settled rules the court in an administrative mandamus proceeding under § 1094.5, Code of Civil Procedure, is limited, so far as sufficiency of evidence is concerned, to determination of whether substantial evidence was produced in support of a challenged finding. It may not weigh the evidence or make independent finding as to the effect thereof. *Boren v. State Personnel Board*, 37 Cal.2d 634, 637-638, 234 P.2d 981; *Genser v. State Personnel Board*, 112 Cal. App.2d 77, 80, 245 P.2d 1090; *Nelson v. Department of Corrections*, 110 Cal.App.2d 331, 336, 242 P.2d 906.

[3,4] In such a proceeding the ruling of the administrative tribunal comes before the court attended by a strong presumption that official duty has been regularly performed, *Drummev v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 85, 87 P.2d 848; *Sipper v. Urban*, 22 Cal.2d 138, 144 (concurring opinion), 137 P.2d 425; *De Luca v. Board of Supervisors*, 134 Cal.App.2d 606, 286 P.2d 395, which presumption must be overcome by factual allegations; mere conclusions will not suffice. In the present instance the stenographic record of the proceedings before the board was not attached to or filed with the petition. Petitioner repeatedly charges that there was no

"substantial evidence" to support the challenged phases of findings IV, V and VI. That is but a conclusion, and cannot be treated as the equivalent of the indispensable facts. See *Perry v. Chatters*, 121 Cal.App.2d 813, 815, 264 P.2d 228; *Cross v. Tustin*, 111 Cal.App.2d 395, 399, 244 P.2d 731; *Kelley v. Kingsbury*, 210 Cal. 37, 39, 290 P. 885.

[5-8] Unless petitioner avers facts sufficient to make a prima facie case, the court is justified in denying the petition out of hand, as was done at bar. In *Wilson v. Los Angeles County Civil Service Com.*, 103 Cal.App.2d 426, 430, 229 P.2d 406, 408, this court said: "The practice is to present the petition to the court with a request that the alternative writ be issued ex parte. But a petitioner is not entitled as a matter of right to the issuance of that writ. He must make a proper showing by the allegations of his petition. If his petition fails to state a prima facie case entitling him to the issuance of the alternative writ, it is within the power of the court to deny it out of hand. This is familiar practice in all courts having original jurisdiction in mandamus. Furthermore, the power of the court is not without a discretion, wisely exercised, to grant or deny either the alternative or the peremptory writ. *Wiedwald v. Dodson*, 95 Cal. 450, 30 P. 580; *Betty v. Superior Court*, 18 Cal.2d 619, 116 P.2d 947; *Bartholomae Oil Corp. v. Superior Court*, 18 Cal.2d 726, 117 P.2d 674." See also *Dare v. Bd. of Medical Examiners*, 21 Cal.2d 790; *Sipper v. Urban*, supra, 22 Cal.2d 138, 141, 137 P.2d 425. The judge of the superior court ruled, and we agree, that the admitted fact of driving a vehicle while intoxicated and running through a signal light, amounts to substantial evidence supporting finding V, and, as already observed, the court was not authorized to weigh the evidence or go further than to find the presence of substantial support for the finding. Although the conviction of violation of the Vehicle Code as a result of that incident, if standing alone, would not be sufficient sustaining evidence of the charge of driving while intoxicated, *Manning v. Watson*, 108 Cal.

App.2d 705, 711-712, 239 P.2d 688, it was competent for the purpose of supplementing and explaining the evidence of the fact of driving while intoxicated. This is recognized in the *Manning* case and in §§ 11513 (c) and 19578, Government Code.

Counsel for petitioner argues that as subdivisions (h), (i) and (l) of § 19572, Government Code, specify drunkenness on duty, intemperance and conviction of a misdemeanor involving moral turpitude, as grounds for disciplinary action, the driving of a vehicle while off duty, though under the influence of liquor, does not constitute a basis for a penalty. The board ruled, however, that it falls within subdivision (s): "Any other failure of good behavior or acts either during or outside of duty hours which are incompatible with or inimical to the public service." The trial court took the same view, and we agree because the question is essentially one for determination by the Personnel Board, and that determination manifestly was not an unreasonable one.

[9] The letter from petitioner to Vice Admiral Rosendahl is of itself sufficient substantial evidence of the fact of insubordination which is embraced by finding VI. It forwards to Admiral Rosendahl a copy of the letter from the Director to Major General Vanaman, and the pertinent portions of petitioner's letter are as follows: "Upon my return to the office yesterday I found a letter from Mike Doolin to a General Vanaman, which I think should be of interest to you. *I am forwarding this letter to you and would request that you keep it confidential since Mr. Doolin has been very critical of me in releasing information.* However, I feel that you should know about this since I believe that the subject would definitely come within the purview of what your organization is set up to do. I am also going to forward to you some of the information concerning meetings which have been held in the Los Angeles area in the past regarding the noise problems at Los Angeles International Airport.

"This morning I made a flight with Fred Stoeffler, who is Hill and Knowlton's repre-

sentative on Captain Lee Webb's AIA Staff, and briefly discussed your organization with him. He seemed quite familiar with it but stated that in the past he thought that your organization had not been particularly effective. *I am going to see Captain Webb tomorrow and get his thinking in the matter and would also ask that this be kept confidential between you and I. I will attempt to do a little 'bird-dogging' for you and send you such information as I may be able to pick up in regard to your program.* I would appreciate it very much if you will let me know the results of your meeting on August 11th and might add, incidentally, that *I am very much interested in a spot with your organization if one should develop. I am pretty sure that I have gone just about as far as I can go with the organization for which I am now working and I think that the sooner I make a change the better off I will be.* In any case, I will certainly keep in touch with you." (Emphasis added.) It could not well be said that this letter reflects anything less than insubordination and an intention to conceal the same from petitioner's superiors. The argument that it pertained directly to specified and designated activities of appellant and that this is established by uncontradicted and "qualified" evidence, also that uncontradicted evidence showed that petitioner did not conceal the transmittal of said letter from petitioner to Admiral Rosendahl, rests upon allegations of the petition such as these: "That there is no substantial evidence to support the finding in Finding VI. * * * that in violation of said request and instructions of February 6, 1953, and without requesting or obtaining the approval of the Director * * * the said Max I. Black forwarded a copy of said letter of the Director of Aeronautics to Major General Vanaman to one Vice Admiral C. E. Rosendahl" or "[t]hat the said Max I. Black concealed from the Director of Aeronautics the transmittal of said letter to said Vice Admiral Rosendahl," also, "in this connection the uncontradicted, *qualified* evidence discloses that the release of such information *pertained directly* to specific and designated

activities with said Commission; that the uncontradicted evidence discloses that petitioner did not conceal from the Director the transmittal of said letter to Rosendahl." (Emphasis added.) These allegations of the petition contain merely a series of conclusions and are not sufficient, as appellant argues, to establish a prima facie case of insufficiency of the evidence to support the finding.

[10] The trial judge, observing that the Board had specifically found in paragraph X above quoted that each of the causes for punitive action set forth in paragraphs IV, V and VI, "separately and severally, so found to be true is sufficient to support the punitive action taken," concluded that it was unnecessary to determine whether substantial evidence existed in support of finding IV. There was no error in this, for having found that paragraphs V and VI of the findings are supported by substantial evidence, paragraph IV could be of consequence only with respect to the penalty imposed, and the Board having declared each offense covered by V and VI to be sufficient ground for dismissal, it had left no opening for the trial judge to inquire into that matter. Indeed, appellant's brief does not discuss the sufficiency of the evidence to support finding IV. This seems to be a tacit recognition of the established rule that the determination of the penalty to be imposed by an administrative agency lies with the agency and not with the court. *King v. Board of Medical Examiners*, 65 Cal.App.2d 644, 652, 151 P.2d 282; *Fuller v. Board of Medical Examiners*, 14 Cal. App.2d 734, 737, 59 P.2d 171.

This case does not fall within the ambit of *Cooper v. State Bd. of Medical Examiners*, 35 Cal.2d 242, 252, 217 P.2d 630, 18 A.L.R.2d 593, and *Nelson v. Department of Corrections*, supra, 110 Cal.App.2d 335, 242 P.2d 906, cases in which the court, having found one charge unsupported, remitted the matter to the administrative agency for the purpose of reconsidering the amount of the penalty. We have no finding here of absence of substantial evidence to support finding IV, and as above indicated

counsel for appellant presents no discussion of same. We find no error in the rulings of the trial judge.

The order denying alternative writ of mandate is affirmed.

WHITE, P. J., and DORAN, J., concur.



137 Cal.App.2d 106

Marlon E. DE BOYNTON, Plaintiff
and Appellant,
v.

Curtis Sherman DE BOYNTON,
Defendant and Respondent.
Civ. 20617.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1955.

Rehearing Denied Dec. 9, 1955.

Hearing Denied Jan. 5, 1956.

Proceeding on divorced husband's petition to have wife show cause why she had refused to permit child to visit with husband outside wife's presence. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered order directing wife to permit husband physical custody at certain periods, and wife appealed. The District Court of Appeal, Moore, P. J., held that under evidence, trial court's order awarding father physical custody at certain periods, without supervision, was not abuse of discretion.

Order affirmed.

1. Infants ☞19

In child custody proceeding, an investigator's report, which was in evidence, could properly be considered in making order.

2. Divorce ☞299

Divorced husband had right to visit reasonably with his child at, and away from, mother's residence, and such right could not be denied without cause.

3. Divorce ☞303(1)

Where divorce decree granted custody of child to mother, with visitation rights in father, order directing that husband should have physical custody of child on alternate weekends and on alternate Christmas holidays did not modify, but merely defined, the decree, and could be entered without a showing of substantial benefit to child.

4. Divorce ☞303(2)

It is not always necessary that a change of circumstances be shown as a prerequisite to modification of a custody decree, and a situation may arise in which welfare of child might require a change of former order.

5. Parent and Child ☞2(3.1)

Paramount concern in awarding custody as between parents is welfare of child.

6. Evidence ☞570

The opinion of an expert is not of such quality as to compel its acceptance by trier of fact.

7. Appeal and Error ☞1011(1)

Where there is a conflict in evidence, finding of trial court is final.

8. Parent and Child ☞2(4)

Under evidence adduced in child custody proceeding, trial court's order awarding father physical custody at certain periods, without supervision, was not abuse of discretion.

Robertson, Harney, Drummond & Dorsey, Los Angeles, for appellant.

Iverson & Hogoboom, by Wm. P. Hogoboom, Los Angeles, for respondent.

MOORE, Presiding Judge.

The question for decision is whether the trial court abused its discretion in modifying the interlocutory decree of divorce by so interpreting its provision with respect to custody as to confirm the father's right to visit with his child beyond the limitations imposed upon him by the mother.

By such decree, entered August 8, 1952, "the custody of the minor child of the par-

ties, Elizabeth Joan De Boynton, be and the same is hereby awarded to plaintiff, subject to the right of reasonable visitation by defendant." Dissatisfied with the conduct of appellant in refusing "to allow defendant to take the minor child * * * outside the residence occupied by plaintiff" and because she has "at all times denied defendant his right of reasonable visitation," by petition, filed October 6, 1953, respondent caused appellant to be ordered to show cause why she had refused to permit the child to visit with respondent outside the presence of appellant. Pursuant thereto, a series of hearings was held by the trial court. On October 27, 1953, the matter was referred to Commissioner Brock for "findings and recommendation" and an investigator was appointed, "his report to be received in evidence, subject to the right of both parties to offer additional evidence." Pending further hearing, without prejudice, defendant was allowed to take the minor child away for Christmas Eve night, to be returned at 10:30 a. m. on Christmas day. Three other hearings were held on January 26, May 26, and June 15, 1954. A final order was entered on June 21, 1954, whereby "the defendant shall have rights of reasonable visitation with the minor child and the defendant shall have physical custody of said child on alternate weekends" from 6 p. m. Friday to 7:30 p. m. on Sunday and "shall have physical custody of said minor child on alternate Christmas holidays from December 20 to December 26 of alternate years."

Despite the fact that respondent at no time sought any substantial change in the original provision for custody, at the hearing on January 26, 1954, appellant for the first time accused respondent of degenerate acts toward his 30-month-old daughter. Basing her accusation upon what she declared to have been the statement of the infant, appellant made her charges first to the court's investigator and later to the court. By reason of such asserted behavior, appellant demands that the father's visits with the child should be wholly forbidden or be allowed only under strict su-

pervision. After hearing the complaint of appellant, the investigator interviewed Dr. Simms, a child psychologist whom appellant had consulted with the result that Dr. Simms, after two hourly visits with the child "found nothing to indicate evidences of degenerate behavior by the father." The investigator's report contains the statement that "the home in which he would lodge the child on weekends is of adequate size and comfortably furnished and proper care and supervision is available." He recommended action substantially as that embraced within the court's final order.

Notwithstanding the denials of respondent, the testimony of his wife, and the opinions of the investigator, appellant insists that the testimony of Dr. Lobb, a psychiatrist, should have been the court's guidance. From the tests made by the witness, she derived the opinion that "this child shows evidence of having been psychologically disturbed and profoundly disturbed by some exposure to male sexuality * * * subjected to precocious sexual stimulation." While from such tests the psychiatrist opined that the infant had been molested by the father, yet the witness concludes that "the best program for the child would be a situation in which we do not have an abrupt breaking off with this man * * *. But if she saw him only in the presence of a responsible person, not so identified with him as to be unreliable, but a responsible person, either an impartial female, or the mother or someone of that type, then I think for the best interests of the child that visitation should be allowed."

The court was not overwhelmed by the suspicions of the mother or the theory and tests of her psychiatrist. It adopted the testimony that was contradictory to that of Dr. Lobb, including the report of Dr. Simms who was not brought into court. Mrs. Barbara De Boynton, present wife of respondent, testified that she always accompanied respondent when he brought his daughter to their home; she was never alone with her father; he was never undressed in the child's presence; she, alone, accompanied the infant to the bathroom;

"at all times" in our home "there has always been someone with her other than the father"; she plays with other children of about her own age; she appears to love her father very much and tells him so about every 20 minutes; has her nap from 2:00 to 4:00 p.m.; she never displayed interest in or knowledge of her genitals in the presence of women or men. Mrs. De Boynton considers the daughter a lovely child, "very intelligent and well mannered." Respondent denied the charges of appellant and the implications of Dr. Lobb. He testified that the child had long been subject to chafing and diaper rash; that she had complained about it to her mother who applied a remedy. Numerous neighbors testified to the happy relations between father and daughter and of his kindness to and care for her.

[1] After all the evidence had been introduced, the Commissioner received the investigator's report by stipulation, interviewed the child alone and then made his recommendations to the court. After appellant's objections and exceptions to the Commissioner's findings and conclusions had been duly considered, the order of June 21, 1954, was entered. It was not based solely upon the investigator's report, but since that document was in evidence, its contents were properly considered. *Exley v. Exley*, 101 Cal.App.2d 831, 836, 225 P.2d 662.

[2] The motion of respondent was not for a modification of the interlocutory decree. Neither does the order appealed from modify the judgment. Respondent's petition merely sought the aid of the court to effect definite terms for the enforcement of his rights under the decree. The order defines in concrete terms the extent of the father's right to visit with his child and requires appellant's compliance. *Gury v. Gury*, 219 Cal. 506, 507, 27 P.2d 758. Respondent had the right to visit reasonably with his child at, and away from, the mother's residence. Such right ensues from parenthood and should not be denied without cause. *Exley v. Exley*, *supra*, 101 Cal.App.2d at page 839, 225 P.2d 662.

[3] Appellant contends that the custody provisions of the decree should not have been modified without first showing the child would gain a substantial benefit. As above observed, his visitation rights were not substantially modified, but were merely interpreted. *Smith v. Smith*, 126 Cal. App.2d 65, 271 P.2d 178, does not support appellant. That decision merely reports the attempt of a father to effect an actual change of custody in order that he might remove his child's residence to Arkansas. To grant his request would have deprived California courts of custodial control.

[4, 5] Appellant contends that before making a change in the provision for custody, it was incumbent upon the court first to determine that there had been a change in conditions that would affect the child. The "change of circumstance" rule is not ironclad. A situation may arise in which the welfare of the child might require a change of the former order as to custody. *Foster v. Foster*, 8 Cal.2d 719, 728, 68 P.2d 719, 723. The paramount concern in awarding custody as between parents is the welfare of the child who is not property, but is a person with rights. *Juri v. Juri*, 69 Cal.App.2d 773, 779, 160 P.2d 73.

[6-8] Appellant complains that the trial court abused its discretion in failing to require custody by the father to be supervised. She quotes the testimony of Dr. Lobb as the basis for her contention. In the first place, the court was not obliged to and did not adopt that doctor's conclusions. Evidently they were not based upon all the known facts. In the second place, other testimony was received which, in the reasoning and opinion of the trial judge, was of more persuasive force than that of the learned doctor. The opinion of an expert is not of such quality as to compel its acceptance by the trier of fact. *Rose v. State*, 19 Cal.2d 713, 733, 123 P.2d 505. Its purpose is merely to add to the light projected by the other proof. *Ibid.* Where there is a conflict in the evidence, the finding of the trial court is final. Nothing in the record indicates an abuse of discretion in making the order. The evidence already reviewed is sufficient to warrant the implied

finding of the father's fitness to have his daughter's physical custody and to justify the order defining with exactness the extent of his visitation rights. He has a comfortable home, a refined wife who has a high regard for the child and supervises her diet, her activities and her rest in a bedroom of her own. Not a hostile witness was produced from among the friends who visited respondent while his baby was there.

Order affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; McCOMB, J., not participating.



137 Cal.App.2d 112

ESTATE of Della E. WAMACK, aka Della E. Womack, Deceased.

Samuel WAMACK, Petitioner-Appellant,
v.

Joseph A. CHESNUTT, Contestant-Respondent.
Civ. 21026.

District Court of Appeal, Second District,
Division 2, California.
Nov. 18, 1955.

Proceeding by surviving husband to revoke letters of administration previously granted deceased wife's nephew, and to obtain appointment of himself as administrator of wife's estate. The Superior Court, Los Angeles County, Clarence M. Hanson, J., denied the petition, and from the ensuing judgment, the surviving husband appealed. The District Court of Appeal, Moore, P. J., held that where surviving husband had executed prenuptial agreement waiving all claims to wife's estate, and did not appear at hearing of which he had notice, and at which nephew was appointed administrator of wife's estate, surviving husband was not entitled to appointment as administrator, and that the agreement barred his claim to a family

allowance, and to a share in his wife's estate.

Judgment affirmed.

1. Executors and Administrators Ⓒ19

The court may, in its discretion, refuse to grant letters of administration to any person who had actual notice of a previous application for letters of administration by another person, and had an opportunity to contest the previous appointment. Probate Code, § 453.

2. Executors and Administrators Ⓒ19

Where surviving husband, who had executed prenuptial agreement waiving all claims to wife's estate, had due notice of hearing on nephew's petition for letters of administration of wife's estate, and failed to appear at hearing, husband abandoned such priority to letters of administration as he might have asserted as surviving husband, and was not entitled to appointment as administrator. Probate Code, § 453.

3. Executors and Administrators Ⓒ32(2)

Burden of establishing an abuse of discretion of court in appointing nephew as administrator of wife's estate was on surviving husband, and in absence of clear showing thereof, the reviewing court would not disturb the judgment denying the husband's petition to revoke the nephew's appointment. Probate Code, § 453.

4. Executors and Administrators Ⓒ32(2)

In proceeding by surviving husband to revoke letters of administration of wife's estate, previously granted nephew at hearing of which husband had notice, and at which he failed to appear, court did not abuse discretion in denying husband's petition for letters of administration. Probate Code, § 453.

5. Executors and Administrators Ⓒ17(2)

Relatives who have a clear right to succeed to some share of a decedent's personal estate, are entitled to administer the estate, but when they have no such right, they are not entitled to administer the estate. Probate Code, § 422.

6. Husband and Wife ⇨29(4)

Consideration for prenuptial agreement, by which surviving husband had agreed to waive all claims to deceased wife's property and estate, was the decedent's promise to marry, and the fact that the parties were subsequently married.

7. Descent and Distribution ⇨62

Where surviving husband had executed prenuptial agreement waiving all claims to wife's estate, surviving husband was deprived of inheritance from decedent.

8. Executors and Administrators ⇨185

Where surviving husband had executed prenuptial agreement waiving all claims to wife's estate, surviving husband was not entitled to a family allowance.

9. Descent and Distribution ⇨62**Executors and Administrators** ⇨19, 185

If surviving husband had been deceived by deceased wife's alleged oral promise of an inheritance, he had duty to allege promise constituting such deceit, and, absent such allegation, prenuptial agreement waiving all claims and interest in wife's estate barred husband from obtaining letters of administration, family allowance, and share in estate. Probate Code, §§ 422, 453.

10. Evidence ⇨443(2)

In proceeding by surviving husband for letters of administration of wife's estate, where husband had executed prenuptial agreement waiving all claims and interest in wife's estate, offer of proof that, as inducement to contract, wife had orally promised to provide for husband by will, and had reiterated such promise after marriage, was properly excluded. West's Ann.Civ.Code, §§ 178, 1624, subd. 6; West's Ann.Code Civ.Proc. §§ 1856, 1880, subd. 3, 1973, subd. 6.

11. Evidence ⇨441(1), 433(6), 437

All prior conversations or writings with respect to contents of a written agreement are deemed to be merged in such writing, and no evidence of prior conversations or memoranda is admissible except to prove a mistake in the writing or its invalidity. West's Ann.Civ.Code, § 178; West's Ann.Code Civ.Proc. § 1856.

12. Evidence ⇨443(3)

Where prenuptial agreement itself showed that promise of marriage was the consideration for the agreement, trial court properly excluded proof by parol of another consideration, consisting of prior, oral promise allegedly inducing prenuptial agreement, to provide for husband by will. West's Ann.Civ.Code, § 178; West's Ann.Code Civ.Proc. § 1856.

13. Evidence ⇨419(11)**Husband and Wife** ⇨29(4)

Mutual promises to marry constitute contractual consideration for prenuptial agreement, and cannot be varied by parol. West's Ann.Civ.Code, § 178; West's Ann.Code Civ.Proc. § 1856.

14. Evidence ⇨443(2)

In proceeding by surviving husband for letters of administration of wife's estate, where husband had executed prenuptial agreement waiving all claims and interest in wife's estate, offer of proof that as inducement to agreement decedent had orally promised to make will in husband's favor in return for husband's selling out his interest in other state, adopting wife's religion, and coming to state, was properly rejected, as varying terms of written agreement. West's Ann.Civ.Code, §§ 178, 1624, subd. 6; West's Ann.Code Civ.Proc. §§ 1856, 1880, subd. 3, 1973, subd. 6.

15. Contracts ⇨152

Where language of contract is intelligible and explicit, and does not involve an absurdity, the language itself must govern its own interpretation.

Paul T. Erskine, Jack R. Tyrell, Alhambra, for appellant.

Proctor K. Perkins, T. G. Dalton, Los Angeles, for respondent.

MOORE, Presiding Justice.

Two questions for decision are (1) whether a surviving husband who by an intelligible, prenuptial agreement covenanted not to lay claim to any portion of his wife's estate after her decease may now recover same and (2) whether he may obtain letters of administration of her estate,

despite (a) his failure to claim such right after due notice of another's application, and (b) his having no legacy or share in the estate.

On August 8, 1952, exactly one month prior to his marriage to decedent, appellant, with complete understanding of its contents, executed an ante-nuptial agreement with decedent. It provided that decedent should retain ownership of all her property with the "exclusive right to dispose of any and all property" she "now owns" or "may hereafter acquire or receive, as her own absolute and separate property without interference or claim" by Mr. Wamack, "and in like manner as if said marriage had not taken place."*

Mrs. Wamack deceased on July 30, 1954. On August 17, her nephew, Joseph Chesnutt, filed his petition for letters of administration and caused notice of the hearing thereon to be served upon appellant. But the latter did not appear at the hearing on September 7, 1954, when letters of administration were issued to Mr. Chesnutt. On the following October 4th, appellant filed his petitions for letters of administration and for revocation of letters already issued to Chesnutt and for a family allowance of \$400 per month. Such petitions having been put at issue by the administrator, the court made findings of fact against appellant, to wit, that he had agreed not to claim any portion of decedent's estate, had relinquished all interest in and to her property and the right to succeed thereto, concluded accordingly and denied his petition for letters of adminis-

tration. From the ensuing judgment comes this appeal.

[1-4] Appellant did not duly assert his right to be administrator. The court may, in its discretion, refuse to grant letters to any person who had actual notice of the first application and had an opportunity to contest the same. (Probate Code, § 453.) Having had due notice of the hearing on Chesnutt's petition and having failed to appear, appellant thereby abandoned such priority to letters as he might have asserted as surviving husband. No serious attempt was made to prove an abuse of discretion in the court's denial of appellant's petition. The burden was on him to establish such abuse and in the absence of a clear showing thereof the reviewing court will not disturb the judgment. *Silver v. Shemanski*, 89 Cal.App.2d 520, 529, 201 P.2d 418. That the court's discretion was wisely exercised will appear as the story is unfolded.

[5] Appellant had no contractual basis for claiming to be administrator. The antenuptial agreement divested him of all interest in decedent's property. He was to make no claim of "any nature whatsoever" to the estate of the lady he was about to wed. That agreement was a serious arrangement and appellant must observe its terms. He alleges neither fraud, undue influence nor any other vice that invalidates an agreement and which attended its execution. Now, if it is to be binding, according to its terms, appellant is not entitled to administer decedent's estate. Relatives of decedent are

* "Now, therefore, it is mutually agreed as follows:

1. That the Second Party shall keep and retain the sole ownership, control and enjoyment of, and, during her life, or by her Last Will and Testament, or by other testamentary disposition, shall have the exclusive right to dispose of any and all property, real, personal or mixed, which she now owns and all income and profits therefrom which she may hereafter acquire or receive, as her own absolute and separate property, without interference or claim thereon by the First Party, and in like manner as if said marriage had not taken place.

2. And First Party agrees that if he shall survive Second Party he will not make, nor will his heirs, executors, administrators or assigns make any claim to any distributive share or to any interest of any nature whatsoever in or to any part of said estate of Second Party of any kind or character to which he, as Second Party's surviving husband, might be or become entitled but for the execution of this agreement, so that all of the property of the Second Party not effectually disposed of by her during her life, or by testamentary disposition, shall devolve in the same manner as if First Party had predeceased her."

entitled to administer his estate when they have a clear right to succeed to some share of his personal estate (Probate Code, § 422) and where they have no such right they may not administer the decedent's estate. In re Estate of Cover, 188 Cal. 133, 138, 204 P. 583; In re Estate of Walker, 169 Cal. 400, 403, 146 P. 868; In re Davis' Estate, 106 Cal. 453, 455, 39 P. 756.

[6,7] Appellant contends that the agreement of August 1952 is not binding for the reason that it lacks consideration. The court found, in effect, that there was a consideration for the agreement and that it has not failed; that the consideration for the writing was decedent's promise to marry appellant, and that they were married. That a promise of marriage subsequently performed is a sufficient consideration for a prenuptial contract cannot be questioned. *La Liberty v. La Liberty*, 127 Cal.App. 669, 674, 16 P.2d 681. It follows that his written contract waiving all claims to decedent's property not only defeats his claim to letters of administration but deprives him of inheriting from decedent.

[8] Neither is appellant entitled to a family allowance. Such income is specifically mentioned in the agreement, and is clearly comprehended among the benefits to be anticipated by a prospective husband. By reserving the "exclusive right" to dispose of all her property and income, decedent could have meant nothing other than that she was keeping all she had for herself and would bequeath it to anyone she might choose. Having by contract renounced all interest in and right to decedent's property, appellant has no basis for demanding a family allowance. In re Estate of Yoell, 164 Cal. 540, 550, 129 P. 999. In *In re Estate of Schwartz*, 79 Cal. App.2d 308, 179 P.2d 868, where each contracting party had waived all claims to inherit, it was held that the right to a family allowance had been waived.

[9] If appellant had been deceived by decedent's alleged oral promise of an inheritance, it was incumbent upon him to allege the promises constituting such deceit. Such allegations absent, the prenuptial agreement stands for all its language de-

notes. In re Estate of Yoell, *supra*, 164 Cal. 546, 129 P. 999. Its terms are simple and if any other provision had been lacking, appellant should have caused it to be inserted previous to its execution.

[10] Appellant offered to prove that (1) as an inducement for appellant to sign the agreement, decedent promised that she would by her will adequately take care of him for his natural life and there is no such will; (2) subsequent to marriage, he and decedent on several occasions discussed her will and at each time she stated that she was going to take care of him because he had signed the antenuptial agreement.

[11-13] The court's exclusion of such testimony was correct. All prior conversations or writings with respect to contents of a written agreement are deemed to be merged in such writing and no evidence of such prior conversations or memoranda is admissible except to prove a mistake in the writing or its invalidity. (Code Civ.Proc. § 1856.) No pleading alleged or evidence introduced suggested either mistake or fraud in the execution of the agreement. The only basis indicated as a ground for the invalidity of the agreement is that it does not declare a consideration for appellant's promise to waive inheritance from his intended spouse. In the light of the fact that the agreement itself shows that the promise of marriage was the consideration for the prenuptial agreement, the claim of error in excluding his proof of another consideration is without merit. The mutual promises to marry constituted a contractual consideration and cannot be varied by parol. *Harding v. Robinson*, 175 Cal. 534, 542, 166 P. 808. Proof of a marriage settlement otherwise than in writing is expressly forbidden. (Civ.Code, § 178.)

[14,15] Moreover, appellant's offer to prove that decedent orally promised to make a will in his favor in return for his selling out his interests in Arkansas, adopting her religion and coming to California was properly rejected. (Code Civ. Proc. §§ 1880, subd. 3; 1856; 1973, subd. 6; Civ.Code, § 1624, subd. 6.) Where the

language of a contract is intelligible and explicit and does not involve an absurdity, it must govern its own interpretation. No question has been raised as to the quality or propriety of the phraseology or diction of the antenuptial agreement.

Judgment affirmed.

FOX, J., and ASHBURN, J. pro tem., concur.



137 Cal.App.2d 181

Michael BOGNER, Plaintiff and
Respondent,

v.

Isaac Gordon EUBANKS and C. W. Driver,
Inc., a corporation, Defendants
and Appellants.

Civ. 21183.

District Court of Appeal, Second District,
Division 2, California.

Nov. 21, 1955.

Action for injuries to a pedestrian struck by defendants' truck at a street intersection. From a judgment of the Superior Court of Los Angeles County, Henry M. Willis, J., on a jury's verdict for plaintiff, defendants appealed. The District Court of Appeal, Ashburn, J. pro tem., held that trial court's giving of plaintiff's requested instruction to jury that pedestrian crossing street in marked crosswalk has right to assume that operators of motor vehicles entering intersection will exercise proper degree of care was not prejudicial error because of failure to incorporate condition that plaintiff must have exercised ordinary care in relying on presumption that defendant truck driver would exercise reasonable care to yield right of way to plaintiff, where instructions in aggregate left to jury fact question whether plaintiff was negligent in such reliance.

Judgment affirmed.

1. Automobiles ⇨206

The nature and extent of necessary reliance by traveler, whether motorist or pedestrian, on care of others, is one of elements entering into question whether traveler exercised ordinary care.

2. Negligence ⇨136(14)

Whether a person exercised degree of care required of him is ordinarily question for jury.

3. Negligence ⇨68

A person has right to presume that every other person will perform his duty and obey law and is not negligent in assuming that he is not exposed to danger arising only from another person's violation of law or duty, in absence of reasonable ground to think otherwise, but must himself use reasonable care to observe other person's conduct so far as it may affect his own safety.

4. Negligence ⇨136(26)

Whether a person used reasonable care under circumstances in relying on presumption that another person would perform his duty and obey law is question for jury.

5. Appeal and Error ⇨1064(1) Trial ⇨228(1)

Generally, failure to include all elements of given doctrine in single instruction to jury is not prejudicial or erroneous.

6. Appeal and Error ⇨1064(1)

Whether giving of instruction to jury that pedestrian crossing street in marked crosswalk has right to assume that operators of motor vehicles entering intersection will exercise proper degree of care constitutes reversible error depends on whether it has effect of leading jury to ignore issue of pedestrian's contributory negligence.

7. Trial ⇨252(2)

A requested instruction to jury as to effect of depositions was properly refused as inappropriate, where no depositions were used or offered.

3. Trial ⇨260(8)

In action for injuries to pedestrian struck by defendants' truck at street intersection, refusal of defendants' requested instruction setting forth part of Vehicle Code section concerning compliance with automa-

tic traffic signals, but omitting subsection thereof concerning obedience to red or stop signal, was not error, in view of plaintiff's given instruction incorporating pertinent portion of such subsection. Vehicle Code, § 476(c).

9. Trial ☞295(7)

In action for injuries to pedestrian struck by defendants' truck at street intersection, giving of plaintiff's requested instruction to jury that a pedestrian crossing street in marked crosswalk has right to assume that operators of motor vehicles entering intersection will exercise proper degree of care was not prejudicial error, though it failed to incorporate condition that plaintiff must have exercised ordinary care in relying on presumption that defendant truck driver would obey law and exercise reasonable care to yield right of way to plaintiff, where instructions in aggregate left to jury fact question whether plaintiff was negligent in such reliance.

Veatch & Thomas and Henry F. Walker, Los Angeles, for appellants.

Vaughan & Brandlin and Thomas G. Baggot, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Defendants appeal from a judgment entered upon a jury's verdict in favor of plaintiff in a personal injury action. They do not question the sufficiency of the evidence to support the verdict, nor do they claim excessive damages. But one point is made, error in giving an instruction concerning plaintiff's right to rely upon the exercise of care by another.

The accident occurred at the intersection of Broadway and Slauson in the city of Los Angeles on a sunny afternoon of August 10, 1953. Broadway runs north and south, and Slauson east and west. Slauson had three lanes for traffic in each direction, with the customary double line in the center. Plaintiff alighted from a southbound street car on Broadway and went to the northwest corner of the intersection. There were four tri-light signals at that place, one on each

corner, and they displayed green, amber and red lights, in the sequence just stated, indicating respectively "Go," "Caution" and "Stop." There was a marked crosswalk, 17 feet wide, on the west side of the intersection running across Slauson. Plaintiff went to the curb on the northwest corner, and according to his testimony started across the street when the signal turned green or "go" for southbound traffic. He said that he was within the crosswalk and that as he stepped from the curb, or just before leaving it, he looked to the east and saw no automobiles at all; that when he got some 5 steps or 12 feet into the intersection, still being within the crosswalk, and about the center of same, defendants' westbound truck collided with him. He never saw the truck and did not look again to the east after leaving the curb, confining his attention to the green light and three lines of eastbound cars on the south half of Slauson which had stopped for the red light. He has no recollection of the impact and, as stated, does not recall having seen the truck. It does not appear whether there was any other westbound traffic in the vicinity; there may have been one westbound car in the curb lane and near the truck. There were no pedestrians beside plaintiff or in front of him; there were some behind him. In the main, the foregoing constitutes plaintiff's version of the accident.

Defendant Eubanks testified that he was driving a truck with a five-ton load of sand and cement, going west on Slauson in the center of the middle lane at a speed of about 25 miles per hour; that the signal for traffic on Slauson was green until he got up to the one on the northeast corner; that it turned to amber just as he passed it; that he continued on across the intersection, saw plaintiff as he stepped from the curb, and that the truck was then crossing the west crosswalk; that plaintiff was west of that crosswalk, some 25 to 30 feet west of it; that plaintiff was in an awful hurry and jumped or lunged from the curb into the right front fender of the truck; that he, the driver, had no chance to put on his brakes; that he stopped the truck in 30 feet and at the curb and then went back to plaintiff who

was lying on the street outside the crosswalk.

Mario Prado testified that he saw the accident; that plaintiff was in the crosswalk and some five to six feet south of the curb at the time of the impact; that plaintiff had the "Go" signal and the light was red for Slauson traffic; that he, the witness, saw the truck but did not notice plaintiff until he hit the right side of the truck, the fender or bumper; that at the time of the impact, plaintiff was in the crosswalk but landed some 25 to 30 feet west of it.

Defense witness, Eleanor C. Peoples, said she was driving a southbound automobile on Broadway and had stopped for a red light; that she saw the amber signal displayed for east and west traffic, started slowly forward, ready to turn, and before she got the "Go" signal saw plaintiff falling; that he was about five feet from the curb and she was not sure whether he was in the crosswalk; that she saw him falling during the interval between the display of the amber and green lights; that she paid no attention to the truck and was not aware of it.

There were no other eye witnesses. It is apparent that the evidence was in substantial conflict, especially upon the question of whether plaintiff was contributorily negligent.

[1] Defendants complain of the giving of this instruction at plaintiff's request: "A pedestrian crossing a street in a marked crosswalk has a right to assume that operators of motor vehicles entering the intersection will exercise a proper degree of care." The instruction is correct as far as it goes. Every traveler, motorist or pedestrian, must rely somewhat upon the care of others and must do so innumerable times a day. Without such reliance travel would slow down almost to a standstill. The nature and extent of such reliance is one of the elements entering into the question of whether a given traveler has in fact exercised ordinary care.

[2-4] Mr. Justice Vallée puts the matter clearly in *Shivers v. Van Loben Sels*, 109 Cal.App.2d 286, 289, 240 P.2d 635, 637:

"White was driving his equipment at a lawful rate of speed. The brakes on his equipment were in good condition. He knew he was traveling on a through highway protected by stop signs. Under these circumstances, he had a right to assume that a driver on a street intersecting the through highway would obey the stop signs and yield the right of way. In making such assumption, White was acting wholly within his rights, and he cannot be charged with negligence in acting thereon. He can only be charged with negligence under such circumstances from the time he had knowledge, or in the exercise of ordinary care should have known, that the Pontiac was going to disregard the stop sign and enter the highway. After such knowledge, he was bound to use the care of an ordinary prudent person. [Citing cases.] Whether a person exercises the required degree of care is ordinarily one for the jury." The matter is stated thus in *Harris v. Johnson*, 174 Cal. 55, 58, 161 P. 1155, 1156, L.R.A. 1917C, 477; "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person." 29 Cyc. 516; *Medlin v. Spazier*, 23 Cal.App. 242, 137 P. 1078. Such person must, of course, himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time. The plaintiff had the right to assume that the defendant's automobile, or any other vehicle coming westerly on Seventh street, would confine its travel to the right-hand side of the street as provided in the ordinance aforesaid, unless and until, in the reasonably careful use of her faculties, she had reasonable cause to believe otherwise." The first sentence of the language just quoted is repeated in *Leo v. Dunham*, 41 Cal.2d 712, 715, 264 P.2d 1. *Hendricks v. Pappas*, 82 Cal.App.2d 774, 778, 187 P.2d 436, 438, points out that: "Whether or not reasonable care is used under the circumstances, in relying

upon this presumption, is a question for the jury.”

Notwithstanding the principle enunciated in the cases just cited, instructions such as the one now under consideration have been repeatedly condemned because of failure to incorporate therein the condition that the plaintiff (or defendant, as the case may be) himself must be in the exercise of ordinary care when relying upon such presumption. The cases are quite numerous and are exemplified by *Gilbert v. Pessin Grocery Co.*, 132 Cal.App.2d 212, 224, 282 P.2d 148; *Carlson v. Shewalter*, 110 Cal.App.2d 655, 658, 243 P.2d 549; *White v. Davis*, 103 Cal. App. 531, 545, 284 P. 1086; *Angier v. Bruck*, 56 Cal.App.2d 55, 58, 131 P.2d 876, and *Angel v. Los Angeles Gas & Elec. Corp.*, 5 Cal.App.2d 270, 271, 42 P.2d 690.

[5, 6] These cases must be considered in connection with the settled general rule that failure to include all elements of a given doctrine in a single instruction is not ordinarily prejudicial or erroneous. *Dennis v. Gonzales*, 91 Cal.App.2d 203, 210, 205 P. 2d 55; *Perbost v. San Marino Hall-School*, 88 Cal.App.2d 796, 801, 199 P.2d 701; *Larson v. Holland*, 118 Cal.App.2d 520, 524, 257 P.2d 1014; *Hoy v. Tornich*, 199 Cal. 545, 552, 250 P. 565; *Yack v. Tiffin*, 69 Cal. App.2d 226, 230, 158 P.2d 620. In *Forrest v. Pickwick Stages System*, 101 Cal.App. 426, 434, 281 P. 723, 726, it is said, with respect to an instruction such as the one under consideration: “Whether the giving of the instruction constitutes reversible error depends upon whether it has the effect of leading the jury to ignore the issue of contributory negligence.” And in *Angel v. Los Angeles Gas & Elec. Corp.*, supra, 5 Cal.App.2d 270, 271, 42 P.2d 690, 691: “It will be seen that the instruction given omits all reference to the question of contributory negligence and is in itself an incomplete and inadequate statement of the law. Other instructions to which we shall later refer were given at the request of defendant, which stated the law sufficiently to inform the jury as to the defense of contributory negligence. If we can say with assurance

that the jurors must have understood that such other instructions qualified the specific instruction and that the instructions as a whole were understood by the jurors with the same effect as if the specific instruction had been complete in itself, then the error must be held to have resulted in no prejudice to the defendant. If, on the other hand, we are unable to say that the instructions as a whole were clear and not subject to misconstruction by an untrained and inexperienced mind, then the error was prejudicial to the defendant and the judgment should be reversed.”

In the instant case plaintiff's requested instructions were served in advance, as required by statute, defendants had ample opportunity to propose amendments, did in fact request instructions upon the subject of the challenged instruction, and their proposals were adopted by the court. BAJI¹ 138 was requested by both sides and given as follows: “A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: The rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.” It does not conflict with the one now under attack, but merely supplements it. Counsel do not claim that it omits any element of the applicable rule, or that it falls within the rationale of the *Gilbert v. Pessin Grocery Co.* case, supra, 132 Cal. App.2d 212, 282 P.2d 148, and like cases above cited.

The trial judge, at plaintiff's request, also instructed concerning contributory negligence and the right of way of a pedestrian

1. Book of Approved Jury Instructions, Los Angeles Superior Court.

who crosses a roadway within a marked crosswalk. At defendants' instance the court gave the additional instructions which are set forth in the margin.² The jurors were also advised that the instructions should be considered as a whole and each regarded in the light of all the others. Also, that the order in which the instructions are given has no significance as to their relative importance.

[7, 8] The court refused only two of defendants' requests. One related to the effect of depositions. It was inappropriate because there were no depositions used or offered. The request was BAJI 31 and it was probably requested inadvertently when 31a was desired. The other rejected instruction of defendants set forth a part of the text of Vehicle Code sec. 476 concerning the matter of compliance with automatic traffic signals, but it omitted subsection (c) concerning obedience to a red or "stop" signal. The subject is covered by an instruction proposed by plaintiff and given, which does incorporate the pertinent portion of subsection (c)

2. "It is the duty of every person using a public highway, whether a pedestrian or the driver or operator of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to exercise ordinary care at all times to avoid a collision.

"The law imposes upon the operator of any vehicle using a public highway, and upon a pedestrian, the same duty, each to exercise ordinary care to avoid causing an accident from which injury might result. This duty continues even when one has the right of way over the other.

"Neither does the fact of having the right of way, if such be the fact, excuse one from the exercise of ordinary care to avoid causing an accident.

"The fact that one has the right of way, if such be the fact, does not excuse him from the exercise of ordinary care to avoid causing an accident.

[9] The instructions in the aggregate left to the jury the question of fact whether plaintiff was negligent in such reliance, if any, as he may have placed upon the presumption that the defendant Eubanks would obey the law and exercise reasonable care to yield the right of way to him. Read in conjunction with the other quoted instructions we can say, with respect to the one which appellants challenge, and "with assurance that the jurors must have understood that such other instructions qualified the specific instruction and that the instructions as a whole were understood by the jurors with the same effect as if the specific instruction had been complete in itself", *Angel v. Los Angeles Gas & Elec. Corp.*, supra, 5 Cal.App.2d 270, 271, 42 P.2d 690, 691; that the giving of the instruction in question resulted in no prejudicial error. In effect, the trial judge so ruled in denying defendants' motion for a new trial.

The judgment is affirmed.

McCOMB, Acting P. J., and FOX, J., concur.

"Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him; to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage; and to try to make a sensible decision whether it is reasonably safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect: it does place upon him the continuing duty to exercise ordinary care to avoid an accident.

"The Court instructs you that it is a pedestrian's duty, in the exercise of reasonable care, to look in the direction of anticipated danger."

137 Cal.App.2d 138

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ellen BROWN, Defendant and Appellant.
Cr. 5383.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1955.

Prosecution for forgery of indorsement of checks by servant of payee whose name was allegedly forged. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and the defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to support the implied finding of lack of authority in defendant to sign the name of payee and also was sufficient to show that defendant had intention to defraud payee.

Judgment and order affirmed.

1. Criminal Law ⚭1159(2)

Where trial court has found defendant guilty and finding is supported by substantial evidence, the reviewing court is powerless to reverse the judgment by reason of sworn denials of accused and will not reweigh the evidence.

2. Forgery ⚭44

In prosecution for forgery of indorsement of checks by servant of payee, payee's testimony that payee did not authorize servant to endorse payee's name on checks was substantial evidence and was sufficient to support implied finding of lack of authority in servant to sign payee's name to checks. Pen.Code, § 470.

3. Forgery ⚭35

In prosecution for forgery of indorsement of checks by servant of payee, an intention to defraud was implied from endorsement of checks without authority. Pen.Code, § 470.

4. Forgery ⚭34(1)

Intent to defraud, if an essential element of crime of forgery, must be proved

affirmatively, but such proof may consist of reasonable inferences drawn from affirmatively established facts. Pen.Code, § 470.

5. Witnesses ⚭269(2)

In prosecution for forgery of payee's indorsement of checks, objections to payee's cross-examination, which was designed and directed to establishment of defense that defendant assisted payee in signing latter's name on checks, were properly sustained, where direct examination of payee had single purpose of proving that payee had never authorized defendant to sign payee's name to any document. Pen.Code, § 470.

6. Witnesses ⚭269(15)

A party who has not yet offered evidence for his own cause may not, under guise of cross-examination, inquire of the witness as to matters not relevant to the subject of the direct examination.

7. Forgery ⚭37

In prosecution on six counts of forgery of indorsement of payee's name on checks, permitting payee to testify that she never gave defendant authority to sign any document instead of requiring payee to answer as to each count was proper, and if defendant was displeased with general denial it was incumbent on defendant to cross-examine payee as to each count. Pen.Code, § 470.

8. Forgery ⚭44

In prosecution for forgery of indorsement of checks, wherein it was shown defendant had no authority to sign the checks in question, and that defendant possessed intent to defraud at time she forged signatures, all elements of corpus delicti had been proven. Pen.Code, § 470.

9. Criminal Law ⚭938(1)

Alleged newly discovered evidence that guardian had been appointed for payee whose indorsement had allegedly been forged on checks by defendant accused of forgery, was insufficient to warrant granting new trial, where appointment was a matter of public record and therefore known to defendant, and payee testified, thereby enabling court to determine payee's capacity. Pen.Code, § 470; Probate Code, § 1460.

10. Witnesses $\S$ 41

Even an insane person may be a witness where he has sufficient understanding of the obligation of an oath.

11. Witnesses $\S$ 41, 327

Whether a witness was insane at time of the occurrence referred to in his testimony goes to his credibility, not his competence.

Henry Grivi, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of six counts of forgery of endorsement of checks. Penal Code, sec. 470. She demands a reversal of the judgment on the grounds of (1) insufficiency of evidence to the effect that she had no authority to endorse the payee's name; (2) insufficiency of proof of intent to defraud; (3) prejudicial error in sustaining "objections by People to questions on cross-examination of Mary Hile," the payee of the checks. She also appeals from the order denying motion for new trial. The judgment ordered appellant to be imprisoned in the county jail, the sentences to run concurrently for one year.

Ellen Brown, a widow, was employed by Mary Hile and her husband Harvey in 1951 for compensation on a daily basis. Soon thereafter, the Hiles employed her to reside in their home and take care of them for the rest of their lives in return for a remainderman's interest in their home. They delivered her an agreement on the bases proposed and Harvey executed a will bequeathing a life estate to his wife, and at her death his share to go to appellant. To that plan Mary agreed. The accused performed her promises through the last illness of the husband prior to October 2, 1951, and continued to serve the widow. In December 1952, Mary deeded the home to appellant, reserving a life estate. In April 1954, Mrs. Hile visited a friend at Lake Elsinore. Thence, she was taken by her grand niece, Hazel Hahn, to visit the latter's mother at San Bernardino.

In July 1954, a complaint was filed by the district attorney accusing appellant with three forgeries and a grand theft involving some of the checks in evidence in the instant action, and the deed of Mrs. Hile to appellant in December 1952. At the hearing of the matter, the municipal court dismissed the complaint for the reason that Mrs. Hile could not deny that the endorsements on the checks were her own, but "it looks like my writing." On September 7, 1954, the indictment of appellant on seven counts of forgery was filed in the superior court.

1.

[1,2] Mrs. Hile as a witness before the grand jury testified in September that she never, at any time, authorized anyone to sign her name on the backs of the checks involved in this action. At the trial of the cause in the superior court, Mrs. Hile testified that she never gave appellant permission or authority to sign any documents of any nature whatsoever. Notwithstanding such testimony, appellant regales us with the extended cross-examination of Mrs. Hile whereby it is shown that she had a very poor memory of events of the preceding two years; could not recall the case against Ellen Brown in the municipal court, or that Mrs. Brown had been charged with theft of the witness' home, or that she had been in court in July 1954; that she had no recollection of having appeared before the Los Angeles County Grand Jury. In respect to numerous other matters, Mrs. Hile had no memory, and by reason thereof, appellant would have this court weigh Mrs. Hile's testimony and determine that because she was 83 years of age and had a poor memory concerning recent events, the finding of appellant's guilt should be set aside.

Such contention is without legal support. Mrs. Hile was clearly emphatic that she did not endorse her name on the several checks involved; did not authorize appellant to endorse "Mrs. Hile" or "Mary Hile" on any check. The evidence shows that the \$25 check (count I) payable to Mrs. Hile was paid to appellant through the teller, Mrs. Hudson, at the Bank of

America, September 4, 1953; that the \$25 check (count II) was paid to appellant by a teller of the Bank of America; that the check for \$4.80 dated January 25, 1954, (count IV), payable to Harvey Hile was endorsed "Harvey Hile," "Mary Hile," "Mrs. Ellen Brown," and stamped "J. T. O'Neill." Don Mire, the expert on questioned documents, testified that both "Harvey Hile" and "Mary Hile" had been written by appellant as determined from comparison with a specimen of her penmanship; that the check for \$1.50 by the American Trust Company (count V) payable to Mrs. Mary Hile bore the endorsement of that lady in the handwriting of appellant; that the check for \$50 (count VI) in favor of Mrs. Mary Hile drawn on American Trust Company by Associated Cooperatives, was cashed at the Citizens National Bank March 5, 1954, that the endorsement of "Mrs. Mary Hile" was made by appellant; that the check drawn by Associated Cooperatives, Inc. on American Trust Company for \$160 (count VII) in favor of Mrs. Mary Hile bears the endorsement of the payee in the handwriting of appellant. Appellant denied having signed Mrs. Hile's name on any check; insisted that while Mary asked her several times to do so, but "as far as I know I never signed a check. * * * I tried to make her reliant on herself. Mrs. Hile never did one thing for herself. * * * She said, 'Ellen, Harvey wanted you to have the checks and you have to help me sign them,' which I did."

Appellant's rehearsal of her own testimony in detail can serve no useful purpose here. It was weighed by the trial court along with the evidence on behalf of the prosecution and the ultimate fact of her guilt was determined by that tribunal. That appellant had no authority to endorse Mrs. Hile's name on the checks was proved by the emphatic testimony of Mrs. Hile. That the forged endorsements are in the handwriting of appellant was established by the positive testimony of an expert on questioned documents. That each of the checks was of the value evidenced by its face is not disputed. When a trial court has found the defendant guilty and the finding

is supported by substantial evidence, the reviewing court is powerless to reverse the judgment by reason of the sworn denials of the accused. We cannot reweigh the evidence. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. Mrs. Hile's testimony that she did not authorize appellant to endorse her name on the checks is substantial evidence and is sufficient to support the implied finding of lack of authority in appellant. *People v. Kabakoff*, 45 Cal.App.2d 170, 173, 113 P.2d 760; *People v. Braun*, 14 Cal.2d 1, 5, 92 P.2d 402.

Appellant's authorities with respect to lack of authority, *People v. Maioli*, 135 Cal.App. 205, 26 P.2d 871; *People v. Cullen*, 99 Cal.App.2d 468, 221 P.2d 1016; *Kickhoefer v. United States National Bank*, 2 Cal. 2d 98, 39 P.2d 807, 96 A.L.R. 1244; *Sutherland v. State*, 136 Neb. 809, 287 N.W. 614, are not persuasive. The Maioli decision holds that to prove lack of authority to sign a check, the testimony of him whose name was forged is necessary. The Kickhoefer case is clearly distinguishable. The party accused of grand theft by forging the checks involved had a general power of attorney to act for the alleged victim. In *Sutherland v. State*, the uncle whose name was allegedly forged had authorized the boy to sign the check.

2.

[3] Appellant contends that there was no proof of a fraudulent intent in her endorsing Mrs. Hile's name on the checks. But there was evidence of her intention to defraud her benefactress. She endorsed the checks without authority and that implied an intention to defraud. *People v. Platt*, 124 Cal.App.2d 123, 134, 268 P.2d 529. She used the proceeds for herself; she neither made an accounting to Mrs. Hile nor spent the moneys for the lady's benefit. She positively denied to the investigator for the district attorney that she had signed Mrs. Hile's name on any check. The handwriting expert testified that the endorsements would not have been produced by appellant's holding the arm of Mrs. Hile. Also, appellant's guilty purpose in endorsing Mrs. Hile's name was indicated

by her failure to endorse any government check payable to Mrs. Hile. Her explanations were: (1) She would avoid trouble with the government and (2) she wished to make Mrs. Hile self-reliant. She testified that she borrowed some of the money that came from the checks from Mrs. Hile. Furthermore, the greed of appellant and her zeal to impose upon Mrs. Hile was evidence of her fraudulent purpose in taking the money. While there to take care of the aged couple for which they were to give her a remainderman's interest in their home, she began to operate there a home for elderly women. She had four boarders at one time paying from \$65 to \$100 monthly, besides her own two sons, and kept all the income for herself. If intent to defraud is an essential element of the crime of forgery, *People v. Platt*, supra, 124 Cal.App.2d at page 134, 268 P.2d at page 536; *People v. Horowitz*, 70 Cal.App.2d 675, 687, 161 P.2d 833, the guilt of appellant is augmented by the evidence of her zeal to deprive her friend of property rights which neither Mrs. Hile nor her aged spouse ever intended to grant to her. *People v. Crowder*, 126 Cal.App.2d 578, 272 P.2d 775, is not support for appellant's thesis. When Mr. Crowder drew a check on Mrs. Crowder's account, the couple were living together. He had no intention of cheating her but used her small sums of money for family expenses. Finally, although at all times prior to the trial appellant constantly denied having written Mrs. Hile's name on any check, yet in giving her testimony in court she confessed that she had held Mrs. Hile's arm as the lady was endorsing the checks described in the indictment.

[4] Appellant contends that intent to defraud must be proved affirmatively, citing *People v. Russell*, 90 Cal.App. 266, 265 P. 826. No court would hold otherwise. But such proof may consist of reasonable inferences drawn from affirmatively established facts.

3.

[5,6] Appellant claims to have been prejudiced by the court's rulings in sustaining objections to the cross-examination of Mrs. Hile. Such rulings were not errone-

ous. Her direct examination was for the single purpose of proving that the witness had never authorized appellant to sign Mrs. Hile's name to any document. The cross-interrogatories were designed for, and directed to, the establishment of the defense by showing that appellant assisted the witness in signing the latter's name on the checks. Such procedure is violative of the rule that a party who has not yet offered evidence for his own cause may not, under the guise of cross-examination, inquire of the witness as to matters not relevant to the subject of the direct examination. *People v. Donnelly*, 143 Cal. 394, 399, 77 P. 177; *People v. Dole*, 122 Cal. 486, 55 P. 581; 27 Cal.Jur., sec. 77, page 101.

4.

[7] Appellant claims that she was prejudiced by the court's allowing Mrs. Hile to testify that she never gave appellant authority to sign any document for her instead of requiring the witness to answer as to each count. On the contrary, the method pursued was correct. If appellant was displeased with a general denial that the witness had ever given appellant such authority it was incumbent upon appellant to cross examine as to each count.

[8] The court denied appellant's motion for a dismissal of the action at the conclusion of the People's case on the ground that not all the elements of the corpus delicti had been proved. Such ruling was correct. The recitals above dispose of such contention.

[9-11] Finally, appellant advances the claim that error was committed by the court's denial of her motion for a new trial on the ground of newly discovered evidence. The new evidence referred to was that a guardian had been appointed for Mrs. Hile September 14, 1954. In the first place, such fact was a public record and therefore known to appellant. Secondly, guardians are appointed for persons of advanced years, or for those likely to be deceived by designing persons. Probate Code, sec. 1460. Hence, such fact of the guardianship did not of itself, establish Mrs. Hile's incompetency. At any rate, she was

before the court to give her testimony and her powers of memory, recall, accuracy of perception and reasoning were exposed to the trial court. The court was enabled to determine the capacity of the witness and there is no showing of abuse of its discretion. Even an insane person may be a witness where he has sufficient understanding of the obligation of an oath. *People v. Tyree*, 21 Cal.App. 701, 706, 132 P. 784. Whether a witness was insane at the time of the occurrence referred to in his testimony goes to his credibility, not to his competency.

Judgment and order denying motion for new trial affirmed.

McCOMB and FOX, JJ., concur.



137 Cal.App.2d 175

Gustave J. ERDE, Plaintiff and Appellant,
v.

The CITY OF LOS ANGELES, a Municipal Corporation; The Department of Water and Power of the City of Los Angeles; James Black and David White, individually and as co-partners doing business under the name and style of Black & White Company, a co-partnership; First Corporation, a corporation; First Doe, Second Doe, Third Doe and Fourth Doe, Defendants,

The City of Los Angeles, a Municipal Corporation, and The Department of Water and Power of the City of Los Angeles, Respondents.

Civ. 20943.

District Court of Appeal, Second District,
Division 1, California.

Nov. 21, 1955.

Rehearing Denied Dec. 12, 1955.

Hearing Denied Jan. 18, 1956.

Claimant's action against city for injuries received when he was struck by glass fixture maintained by city. The Superior Court of Los Angeles County, J. T. B. Warne, J., granted city's motion for nonsuit and claimant appealed. The District

Court of Appeal, Nourse, J. pro tem., held that fact that city clerk instructed claimant to fill out triplicate claim form and claimant failed to insert date of accident on city's copies and clerk told claimant that there was nothing more to do, city was not estopped from asserting that action could not be maintained since proper statutory claim had not been first filed, as the date of accident was not inserted in city's copies of claim form.

Affirmed.

See also 116 Cal.App.2d 565, 254 P.2d 110.

1. Estoppel ⇐56, 58

In order for there to be an estoppel *en pais*, party claiming estoppel must show that in reliance on the act or representations of the other party, he acted or failed to act to his detriment.

2. Estoppel ⇐62(5)

Where city clerk instructed injured claimant to fill out triplicate claim form and claimant failed to insert date of accident on city's copies of claim, and clerk told claimant that there was nothing more for him to do, city was not estopped from asserting that claimant's action could not be maintained, since proper statutory claim had not been first filed with city as no date of accident appeared on city's copies of claim. *West's Ann.Gov.Code*, §§ 53051, 53053.

3. Municipal Corporations ⇐741(2)

Claim against city for personal injuries which failed to state the date of the accident did not comply with provisions of statute, and could not constitute a proper basis for action against city. *West's Ann.Gov.Code*, § 53053.

4. Records ⇐7

An instrument is only filed in contemplation of law when it is deposited with proper officer in the proper place with the purpose that it be retained by that officer and deposited with the papers in his office.

5. Records ⇐7

Where injured claimant filled out triplicate claim form and the triplicate form contained an essential statement lacking in

the original and duplicate, and triplicate was marked as the claimant's copy, depositing of all three forms with city officer could not be considered as a deposit of triplicate with the intent that it become a part of the officer's record. West's Ann.Gov.Code, § 53053.

Arthur Garrett, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Gilmore Tillman, Chief Asst. City Atty. for Department of Water and Power, Wallace J. Manley, Desmond J. Bourke, Deputy City Attys., Los Angeles, for respondents.

NOURSE, Justice pro tem.

By his complaint in this action plaintiff sought to recover judgment for personal injuries which he alleged he sustained when struck by a glass light fixture which fell from an ornamental light standard maintained by defendant City.

The trial court granted defendants' motion for a judgment of non-suit and from its order granting the motion plaintiff appeals.

The motion was granted upon the grounds that the plaintiff had failed to comply with provisions of Section 53053 of the Government Code, in that the verified claim filed by him with the City Clerk failed to state the date of the accident. While appellant, by his opening brief, poses four questions, the tenor of his argument is that the trial court erred in refusing plaintiff the right to amend his complaint so as to plead certain facts which he maintains show that the defendants are estopped to assert the invalidity of the claim for damages filed by the plaintiff, and erred in rejecting the plaintiff's offer to prove the facts alleged in the proffered amendment, and that the facts alleged and which he offered to prove would estop the defendants from asserting the validity of said claim.

The facts which are the basis of appellant's claims of error are:

On September 9, 1949, plaintiff while working on a building project, was struck

and injured by glass that fell from a light standard maintained by defendant City. Thereafter, appellant obtained from the City Clerk forms printed by the City for the filing of claims against it. These forms were in triplicate; the first is on yellow paper and is entitled,

"Claim for Damages

Original for File";

the second copy is on orange paper and entitled,

"Claim for Damages

Duplicate for City Attorney";

the third copy is on white paper and entitled,

"Claim for Damages

Triplicate for Claimant".

Each copy contains the following question and directions:

"When did damage or injury occur? Give full particulars, date, time of day: _____." Plaintiff, with the aid of some third person, filled in the forms with the exception of the answer to the question quoted above. On November 10, 1949, he took them to the office of the City Clerk and signed and verified the original and duplicate and left them with the Clerk. The Clerk placed his filing stamp on the original and triplicate copies and stamped the duplicate "Received" with the date of receipt. The appellant took the triplicate, which was neither signed nor verified, with him.

On September 8, 1950, he filed his complaint in this action. In paragraph VI of the complaint he alleges that on November 10, 1949, he "served" a "claim for damages" on the City Clerk in duplicate and that a true copy of the claim was attached to the complaint as Exhibit A. He attached as Exhibit A a copy of the unsigned, unverified triplicate copy which he had retained. The copy so attached to the complaint contained the following answer to the quoted question: "Sept 9th 9:45 A M."

Respondents, by their answer, admitted that an instrument, of which Exhibit A attached to the complaint was a true copy, was filed with the City Clerk, but denied

the remaining allegations of the paragraph. Early in the trial it was discovered that Exhibit A attached to the complaint was not a true copy of the original and duplicate filed by the plaintiff with the City Clerk, and the defendants were permitted to amend their answer so as to enter a general and special denial of all allegations in paragraph VI of the complaint.

Plaintiff offered in evidence the unsigned and unverified triplicate copy of the form of claim which he had retained. The trial court sustained the defendants' objection that the copy was not the best evidence. The defendants offered in evidence the original and duplicate of the claim for the limited purpose of showing what instruments were in fact filed by the plaintiff, and they were admitted over plaintiff's objection.

Appellant then asked leave to amend the complaint so as to allege certain facts which he asserts estopped the defendants from asserting the invalidity of the claim. The court refused to permit the amendment to be filed. The facts alleged in the proffered amendment are in substance:—

That on November 10, 1949, at the time that the plaintiff filed his claim with the Clerk, the Clerk advised plaintiff to fill in the date of the accident in longhand; that the plaintiff did this, and that the Clerk then advised plaintiff that said claim was properly and completely filled out and that there was nothing further for plaintiff to do with respect to the claim or to complete the filing thereof; that the Clerk then swore the plaintiff to the truthfulness of the claim and filled out the jurat on the verification and placed the stamp and seal of the Clerk upon the claim; that said statements and acts were intentionally and deliberately done by the defendant (City) for the purpose of leading plaintiff to believe his claim was completely and properly filled out and that the plaintiff relied thereon. The plaintiff then offered to prove by his own testimony the facts alleged in the proffered amendment. Defendants' objections to the offer of proof were sustained.

Appellant contends that the provisions of section 53053 of the Government Code are

procedural in character and that therefore the defendants may be estopped through the acts of their agents and officers from asserting the failure of claimant to substantially comply with them. The respondents contend that these provisions are not procedural, but are conditions placed by the Legislature upon the liability created by Section 53051, Government Code, and that the defendant City cannot waive substantial compliance nor can it be estopped.

While there seems to be substantial merit to appellant's claim that the provisions of Section 53053 of the Government Code are procedural in character, and therefore subject to waiver or estoppel, it is unnecessary to decide that question here. We are satisfied that the facts alleged in the proffered amendment, and which the plaintiff offered to prove, were insufficient to constitute an estoppel *en pais*. That they were insufficient appears from the very statement of them. In substance these facts amount to nothing more than that the City Clerk told plaintiff that he must state in his claim the date of the accident; that plaintiff did so (apparently on the copy retained by him only), and that the Clerk then took plaintiff's oath to the verification and told him he had nothing more to do.

[1,2] There is nothing in these facts that show that plaintiff was, by any act or statement of the Clerk, caused to do or omit to do anything to his detriment. What the Clerk told him was true and if plaintiff had done as he alleges he was directed to do, the original claim and the duplicate filed with the Clerk would have been sufficient in form. It was not the duty of the Clerk to fill out the form or to advise the appellant or to see to it that the appellant followed the advice given him. In order for there to be an estoppel *en pais*, the party claiming the estoppel must show that in reliance on the acts or representations of the other party, he acted or failed to act to his detriment. In re Estate of Jackson, 112 Cal. App.2d 16, 18, 245 P.2d 684; Safway Steel Products, Inc., v. Lefever, 117 Cal.App.2d 489, 491, 256 P.2d 32. There is no allegation nor offer to prove that the Clerk did anything to cause the plaintiff to leave the

date of the accident out of the original and duplicate or to cause plaintiff not to sign and verify the triplicate copy. The most that can be said of the allegations is that they show that the plaintiff negligently failed to follow the truthful advice given to him by the Clerk.

[3] The original and duplicate claims having failed to state the date of the accident, did not comply with the provisions of the statute, and therefore did not constitute a proper basis for plaintiff's action. *Hall v. City of Los Angeles*, 19 Cal.2d 198, 202, 120 P.2d 13; *Spencer v. City of Calipatria*, 9 Cal.App.2d 267, 268-269, 49 P.2d 320; *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353; *Farrell v. County of Placer*, 23 Cal.2d 624, 630, 145 P.2d 570, 153 A.L.R. 323.

[4, 5] In the oral argument before this court, appellant's counsel, for the first time, asserted that the evidence received and that contained in his offer of proof established that all three copies of the claim were filed with the Clerk; that, therefore, inasmuch as the original and duplicate copies were verified and the unsigned and unverified triplicate copy contained the date of the accident, that there was a substantial compliance with the statute. There is no merit in this contention. The forms themselves show that it was not the intent of the parties that the triplicate be retained by the Clerk, for that copy states, as we have heretofore shown, that it is to be retained by the claimant. There was no evidence received and none offered that the plaintiff ever delivered the triplicate to the Clerk with the intention that the Clerk should retain it. An instrument is only filed in contemplation of law, when it is deposited with the proper officer in the proper place with the purpose that it be retained by that officer and deposited with the papers in his office. In *re Estate of Sankey*, 199 Cal. 391, 396, 249 P. 517; *Hoyt v. Stark*, 134 Cal. 178, 180, 66 P. 223; *Cox v. Tyrone Power Enterprises*, 49 Cal.App.2d 383, 395, 121 P.2d 829; *Harris v. Superior Court*, 82 Cal.App. 88, 90, 255 P. 229; *Tre-gambo v. Comanche Mill & Mining Co.*, 57

Cal. 501, 506. In the case at bar, the triplicate was not deposited with the Clerk nor left there with the intent that it become a part of his records.

The order is affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.

Hearing denied; CARTER, J., dissenting.



137 Cal.App.2d 153

**Arthur B. THOMPSON and Marcella
Thompson, Plaintiffs and
Appellants,**
v.

**Ernest GOUBERT and Anna Goubert,
Defendants and Respondents.**

Civ. 5089.

District Court of Appeal, Fourth District,
California.

Nov. 18, 1955.

Action by lessors against lessees for declaration of rights under lease and for damages. The Superior Court, Riverside County, John G. Gabbert, J., granted the lessees' motion to vacate default judgment, and lessors appealed. The District Court of Appeal, Barnard, J., held that the granting of the motion was a matter within discretion of trial court, and it did not clearly appear the trial court abused its discretion in granting motion.

Order affirmed.

1. Appeal and Error ☞957(1)

Legal controversies should be tried upon their merits, and unless it can be determined as a matter of law that a trial court has abused its discretion in setting aside the default of a party and permitting an answer to be filed, the court on appeal will not reverse such an order. *West's Ann.Code Civ. Proc. § 473.*

2. Appeal and Error ⇨948, 957(1)

There must be a clear showing of abuse of discretion before an order setting aside the default of a party and permitting an answer to be filed will be reversed, and the burden of showing such abuse of discretion is on the appellant. West's Ann.Code Civ. Proc. § 473.

3. Judgment ⇨163

Any doubt as to the propriety of setting aside a default should be resolved in favor of the application, to the end that a trial on the merits may be had. West's Ann. Code Civ.Proc. § 473.

4. Appeal and Error ⇨957(1)

Appellate Court listens more readily to an appeal from an order denying relief from default judgment than to one granting relief. West's Ann.Code Civ.Proc. § 473.

5. Judgment ⇨143(3)

The granting of a motion to vacate default judgment on ground of mistake and excusable neglect is matter within discretion of trial court. West's Ann.Code Civ. Proc. § 473.

6. Judgment ⇨143(16)

In action by lessors against lessees for declaration of rights under lease and for damages, where lessees, who had had no legal experience, had been told that they would be personally contacted with view of settlement when amount of damage claimed was ascertained, they asked process server what the paper meant and were informed that he did not know and they were told by others that they would receive notice of a date certain when they were expected to appear in court, and they acted immediately upon learning that a judgment had been entered, vacating the default judgment was not an abuse of discretion. West's Ann. Code Civ.Proc. § 473.

Harmon C. Brown, Riverside, for appellants.

Neblett, Walker & Sullivan, LeMoyne S. Badger, Riverside, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order vacating a judgment following a motion made under section 473 of the Code of Civil Procedure.

A complaint for declaratory relief and damages was filed on September 13, 1954, alleging that the plaintiffs had leased 85 acres to the defendants; that the defendants, in farming said premises during 1953, had done or failed to do certain things "against the wishes" of the plaintiffs; that on October 27, 1953, written notice was given the defendants telling them that damage was claimed, that the plaintiffs would later contact them in anticipation of a settlement, and that they would thereafter be expected to do three things which were not specifically named in the lease; that during 1954 the defendants failed to do one of these things; and that a controversy had arisen in that the defendants claimed a right to do certain things, while the plaintiffs asserted that said things were contrary to the terms of the lease. In a second cause of action it was alleged that the plaintiffs had been damaged in the sum of \$7,800.

The default of the defendants was entered by the clerk on September 24, 1954, and on October 11, 1954, a judgment was entered decreeing that the plaintiffs are entitled to cancel the lease and awarding them a judgment for \$7,800. An execution was issued on October 20, 1954, and levied on the defendants' bank account. The defendants first learned of the judgment and the levy on October 21, and on the same day consulted an attorney.

On October 22, 1954, the defendants filed a motion and notice of motion to set aside their default and to vacate the judgment on the ground of mistake or excusable neglect, and also filed a proposed answer setting forth facts which, if true, would be a complete defense to the action. In support of the motion they filed an affidavit stating that they are farmers and unfamiliar with legal proceedings; that they had never before sued or been sued; that they asked the process server who served them what the "papers" were for, and he replied "I don't know"; that the summons was at-

tached to the rear of the complaint and was never read in full, and its import was not realized by them until they consulted counsel; that they were told by others that they had to be ordered to appear in court on a date certain before they had to do anything in regard to the law suit; that because of these things they failed to answer the complaint in the time required; that they first learned of the default taken against them on October 21, and immediately employed attorneys to take proceedings to have the default and judgment vacated; and that they had been advised by their counsel and believed that they had a valid defense to the action upon its merits. In a supplemental affidavit filed on October 27, the defendants alleged that they had spent their childhood in a home in which the English language was not spoken; that by reason thereof, and in spite of certain schooling they had had, their ability to read and understand the English language was limited; that their business experience had been limited to farming, and neither of them had ever consulted or used an attorney prior to their learning of the levy of this execution; that at the time summons was served they were engaged in the peak of the harvest season, when a delay would have caused them irreparable damage; and that by reason of their inexperience and ignorance neither of them knew or realized that a judgment could be thus obtained against them.

The plaintiffs filed affidavits in opposition to the motion alleging that the defendants had voted in San Bernardino County some six times; that the father of the defendant husband owned certain property in San Bernardino County; that the defendants had had considerable schooling; that when a dispute arose in 1953 the plaintiffs told the defendant husband to seek advice from his banker or his lawyer; and that after the close of the 1953 growing season the plaintiff, on numerous occasions, told the defendant husband that he was going to sue him for damages. In addition, the affidavit of an outside person was filed alleging that during September, 1954, the defendant husband told the affiant that he had been served with legal papers by the plaintiffs but that he wanted to save money by

not hiring an attorney. At the hearing of the motion to set aside the default it was stipulated that the defendant husband, if sworn as a witness, would deny having made any such statement as the one just referred to, and that the court should consider this stipulation in reaching a decision on the motion.

After a hearing the court entered an order granting the motion to set aside the default and default judgment, recalling and quashing the levy of execution, and permitting the defendants to file their answer. This appeal followed.

[1-3] "It is the well-settled policy of the law to have legal controversies tried upon their merits, and unless it can be determined as a matter of law that a trial court has abused its discretion in setting aside the default of a party and permitting an answer to be filed, the court on appeal will not reverse such an order." *Kalson v. Percival*, 217 Cal. 568, 20 P.2d 330. There must be a clear showing of abuse of discretion before such an order will be reversed, and the burden of showing such abuse of discretion is on the appellant. *Stub v. Harrison*, 35 Cal. App.2d 685, 96 P.2d 979. Because of the purpose of the statute and the policy of applying it liberally in order to permit the presentation of a substantial defense, the appellate court listens more readily to an appeal from an order denying relief than to one granting relief. *Brill v. Fox*, 211 Cal. 739, 297 P. 25. Any doubt as to the propriety of setting aside a default should be resolved in favor of the application, to the end that a trial on the merits may be had. 14 Cal.Jur., p. 1076, and cases there cited.

The appellants do not question these rules but contend that an abuse of discretion here appears, because the excuses offered by the respondents were not sufficient to show any mistake or neglect which could be found to be excusable. They rely on *Weinberger v. Manning*, 50 Cal.App.2d 494, 123 P.2d 531; *Fink & Schindler Co. v. Gavros*, 72 Cal. App. 688, 237 P. 1083; *Elms v. Elms*, 72 Cal.App.2d 508, 164 P.2d 936; and *Gilio v. Campbell*, 114 Cal.App.2d Supp. 853, 250 P. 2d 373. In the *Weinberger* case [50 Cal.

App.2d 494, 123 P.2d 534], the defendant disregarded repeated warnings from attorneys, the clerk and a friend; took no action for 83 days after entry of the default; and displayed "an attitude of contemptuous disregard for legal process." In the Fink & Schindler case the defendant consulted an attorney before the time to answer, but relied on an unwarranted assumption that this attorney represented another party and would also protect his interest. In the Elms case, the defendant intentionally defaulted and then changed his mind, and, although he knew the date of the trial eight days ahead, declared that he did not intend to appear at the trial. In the Gilio case the defendant was warned by the constable who served the summons and by the attorney for the plaintiff, after judgment was entered, and still took no action until a month later.

[4-6] In the instant case, the respondents had had no legal experience; they had been told that they would be personally contacted with the view of a settlement when the amount of damage claimed for 1953 was ascertained; they asked the person who served the summons what the "papers" meant, and were told that he did not know; and they were told by others that they would receive notice of a date certain when they were expected to appear. It is not entirely unreasonable that people of such limited experience would not grasp the full and legal meaning of the summons at the back of the copy of the complaint, especially in view of the other circumstances which here appear. Aside from one matter of hearsay and one matter which was directly contradicted by other evidence, the affidavits filed by the appellants contain nothing material to the question before the court, and no showing was made that any prejudice would be suffered by the slight delay. The respondents acted immediately upon learning that a judgment had been entered, and the motion was heard by the same judge who entered the judgment. In view of the nature of the case, one for declaratory relief and for damages based on one party's interpretation of the lease, the ends of justice naturally called for a hearing on the merits. While some negligence on the part of the respondents may appear, it cannot be

said as a matter of law that their neglect and mistake were inexcusable. The matter was one within the discretion of the trial court, and it does not clearly appear that such discretion was abused. *Hambrick v. Hambrick*, 77 Cal.App.2d 372, 175 P.2d 269.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



137 Cal.App.2d 134

In the Matter of the ESTATE of Lee Roy
RAYMOND, Deceased.

William L. RAYMOND, Loren E. Raymond,
Executors, Contestants, Appellants,

v.

Soledad RAYMOND, Petitioner, Respondent.
Civ. 21229.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1955.

In the matter of a decedent's estate. From an order of the Superior Court, Los Angeles County, Clyde C. Triplett, J., setting apart a homestead for decedent's widow out of decedent's separate property, the executors of the estate appealed. The District Court of Appeal, Moore, P. J., held that the trial court exercised sound discretion in setting apart as such homestead a seven-room, two-story frame house, constituting separate property of husband, with whom wife lived therein during their seventeen and one-half years of married life, instead of three-room apartment in bungalow court owned by them as tenants in common.

Order affirmed.

I. Executors and Administrators §194(1, 7)

The probate court has wide discretion in selecting probate homestead, and its or-

der will not be disturbed, in absence of abuse of such discretion. Probate Code, § 661.

2. Executors and Administrators ¶178

The probate court will give decedent's family a homestead of as great value as possible considering amount and condition of decedent's estate. Probate Code, § 661.

3. Executors and Administrators ¶181

In selecting probate homestead, probate court's duty is to provide place where decedent's family and its surviving members may reside and enjoy comforts of home free from anxiety that it may be taken from them against their will either because of their own necessity or improvidence or because of their creditors' importunity. Probate Code, § 661.

4. Executors and Administrators ¶194(1)

While probate court must be governed by sound discretion in selecting probate homestead, it must consider value thereof, financial status of decedent's estate, and rights of creditors. Probate Code, § 661.

5. Executors and Administrators ¶194(6)

A probate court order, selecting homestead for decedent's widow from decedent's separate property, must prescribe limited period for such homestead, not exceeding widow's lifetime. Probate Code, § 661.

6. Executors and Administrators ¶181

The Superior Court exercised sound discretion in setting apart as probate homestead for decedent's widow a seven-room two-story frame house, constituting separate property of husband, with whom wife resided therein for their 17½ years of married life, instead of three-room apartment in bungalow court owned by spouses as tenants in common. Probate Code, § 661.

Eugene Kelly, Los Angeles, for appellants.

Tobias G. Klinger and Paul Fitting, Los Angeles, for respondent.

MOORE, Presiding Justice.

The executors of the estate of Lee Roy Raymond appeal from an order setting

apart a probate homestead for petitioner, Mrs. Soledad Raymond, widow of decedent, out of decedent's separate property. They contend that it was error to select such homestead when there was suitable, residential property owned by petitioner and decedent as tenants in common.

Decedent had been married to petitioner for seventeen years. He had had a former wife with whom he had reared his family in the home on El Molino Street in Alhambra. When he married petitioner, he took her to live in the same residence. Decedent left an estate appraised at \$203,887.17. One asset of the estate is an undivided one-half interest in a court consisting of ten three-room apartments. The property consists of three buildings. Two of the buildings are one-story frame construction. They occupy the sides of the lot; each has four apartments. The third building is at the rear. It contains garages for all the apartments on the ground. Over them are two other apartments, each of which has a bedroom, bathroom, combination kitchen, dinette and living room. Petitioner was the cotenant with decedent in the ownership of such court. The El Molino property has a two-room apartment carved out of the home, but it is under the same roof.

[1-5] In selecting a probate homestead, the probate court has wide discretion and its order will not be disturbed unless there has been an abuse of such discretion. *In re Walkerly*, 81 Cal. 579, 583, 22 P. 838, 889. The court will give the family "a homestead of as great a value" as possible considering the amount and condition of the estate. *Ibid*. It is the court's duty to provide a place "for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors." *In re Estate of Kachigian*, 20 Cal.2d 787, 791, 128 P.2d 865, 867. There is no absolute rule to control the court in the selection of a homestead. But while it must be governed by a sound discretion, yet it must consider the value of the homestead, the es-

tate's financial status and the rights of creditors. In re Estate of Claussenius, 96 Cal.App.2d 600, 611, 216 P.2d 485. The statute governing the selection of homesteads suggests no variation from the foregoing rule. It requires the probate court to designate and set apart a homestead for the use of the surviving spouse (1) out of the community property, (2) out of real property owned in common by decedent and his wife, or (3) if there be neither community property nor property so owned in common, then out of the separate property of decedent. If selected for the widow from the separate property of decedent, the order must prescribe a limited period for such homestead not to exceed the lifetime of the widow. Such provision is a part of the order herein.

[6] That the court acted with a sound discretion and within the purview of section 661, Probate Code, appears from a glimpse at the facts shown by the record. There was no community property appropriate for petitioner's homestead. Neither does the bungalow court owned by decedent and his wife as tenants in common fill the requirements for a woman who had been decedent's wife for seventeen and a half years and with him had during that period occupied the El Molino home. It is a seven-room, two-story frame house, worth only \$11,000 including a three-room apartment which is a part of the building "constructed by blocking off a doorway to some existing room." If it was an appropriate residence for petitioner when she was, almost two decades previously, carried over its threshold to abide there with her husband, should she today be driven from it, now that he is gone and she is left with her memories? No good reason appears why she should be penalized by being forced from the shelter provided by her husband and driven to a humbler abode merely because she owns a half interest in the court. The fact that the El Molino home was occupied by decedent and petitioner in his lifetime and could have been declared a homestead by decedent is a fair test of the appropriateness of its selection for petitioner. In re Estate of Levy, 141 Cal. 646, 649, 75 P. 301. To compel her to go from

her established seven-room residence and live in a three-room apartment would be to deprive her of an economic status established for her by her husband, reduce her enthusiasm and diminish her power for service to her community. Decedent never lived in the court although his half interest was worth \$18,300.

Moreover, the estate does not need the El Molino property. Its assets exceed \$185,000 besides the home and no indebtedness is suggested by the executors.

Whether petitioner should be awarded a court building instead of one of its apartments as a homestead is not germane. She was awarded the El Molino property and that shall be her home.

Order affirmed.

McCOMB and FOX, JJ., concur.



137 Cal.App.2d Supp. 854

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Thelma GARRIGAN, Defendant and
Appellant.

Cr. A. 28.

Appellate Department, Superior Court,
San Bernardino County,
California.

Nov. 8, 1955.

Defendant was convicted of selling intoxicating beverages to a minor. The Justice Court, Twentynine Palms Judicial District, San Bernardino County, John W. Allen, J., after trial without jury entered judgment against defendant and defendant appealed. The Appellate Department of the Superior Court, Hilliard, J., held that where defendant sold beer to a person who had allegedly produced evidence of his majority at previous sales but defendant required no evidence of majority at time of

sale in question, defense of identification by documentary evidence of majority was not available to the defendant.

Affirmed.

1. Criminal Law ⇨1043(1)

In prosecution for selling intoxicating beverages to a minor, where the trial judge after trial, in response to request for finding, stated in effect, that in his opinion the defense of identification by documentary evidence of majority applied only to suspension and revocation of license and was not applicable in case at bar, the point of law as to whether such defense was available was properly before appellate court. West's Ann.Bus. & Prof.Code, § 25660; Pen.Code, § 1469.

2. Intoxicating Liquors ⇨176

Statutory defense of identification by documentary evidence of majority is available to a defendant in prosecution for selling beverage to a minor. West's Ann.Bus. & Prof.Code, §§ 25658(a), 25660.

3. Intoxicating Liquors ⇨176

Statute authorizing proof that defendant demanded and was shown, before furnishing any alcoholic beverage to a minor, documentary evidence of majority as defense to prosecution for selling intoxicating beverage to a minor applies to each individual sale and seller must demand showing of identification upon occasion of each sale, even though seller had previously examined documentary evidence of identity and age, and any seller acting in violation of such requirement does so at his own risk. West's Ann.Bus. & Prof.Code, §§ 25658(a), 25660.

4. Intoxicating Liquors ⇨176

In prosecution for selling intoxicating beverage to a minor, defense of identification by documentary evidence of majority was not available to defendant who did not require evidence of majority from buyer on occasion of sale involved, notwithstanding defendant had at time of prior sale examined documentary evidence of identity and age of the buyer. West's Ann.Bus. & Prof.Code, §§ 25658, 25660.

5. Criminal Law ⇨1165(1)

In prosecution for selling intoxicating beverage to a minor, trial judge's erroneous ruling that defense of identification by documentary evidence of majority was not available to defendant did not affect any substantial rights of the defendant who had made sale in question without demanding the showing of identification although defendant had at time of previous sales examined documentary evidence of identity and age of the buyer. West's Ann.Bus. & Prof.Code, §§ 25658, 25660.

Cunningham, Parry & Holcomb and W. R. Holcomb, San Bernardino, for appellant.

Lowell E. Lathrop, Dist. Atty., San Bernardino, and Alfred A. Wells, Deputy Dist. Atty., San Clemente, for respondent.

HILLIARD, Judge.

This is an appeal from a judgment of conviction of violation of Business and Professions Code Section 25658(a) following trial by the court without a jury. There is no substantial conflict in the evidence concerning the transaction which was the basis of the prosecution. It was established that appellant sold 3 six-packs of beer to a minor, aged 17. In defense appellant testified that she had sold beer to the same minor upon four or five previous occasions; that, on each of these occasions the minor had presented a Marine Corps Identification Card with statistical information identical in comparison with his physical appearance, and indicating that he was 22 years of age. Appellant further testified that at the time of the sale in question she did not demand or see any evidence of the minor's identification or age, since she was satisfied of his majority by the previous transactions.

The minor denied ownership or possession of such identification card, or that he had ever displayed such document to appellant.

No objection was made at the trial to the introduction of testimony concerning these prior sales. At the conclusion of the evidence the trial judge stated that there was no dispute as to the sale upon which the

prosecution was founded; that the minor had denied showing an identification card at any time; and that the defendant was guilty as charged.

Thereafter counsel for appellant requested the judge to make a specific finding that the defense of identification by documentary evidence of majority, as provided in Section 25660, Business and Professions Code, was not available to a defendant in a criminal prosecution. Counsel now justifies this rather unusual procedure by asserting that the trial judge had indicated during the trial that he believed such to be the law and had, therefore, disregarded evidence in support of such defense. Counsel further states that, since no objection was made to the introduction of evidence supporting this defense, and no jury instructions were required, such procedure was his only method of creating a record for review of this point upon appeal.

[1] In the post-trial colloquy between counsel and the Court, and following the request for such finding, the trial judge stated that, in his opinion, the defenses available under B. & P. Code Section 25660 applied only to suspension and revocation of license, and were not applicable in the case at bar.

Respondent contends that, with the question presented by the record in this condition, the point of law is not properly before this Court upon appeal, and the remarks of the trial judge are dicta. I find no merit in this contention. Penal Code Section 1469 provides that upon an appeal by a defendant, the court may review "any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the trial court and which affected the substantial rights of the defendant." It was the obvious intent of counsel for appellant, and the trial court, that the request for special finding be considered as an objection, and we shall so treat it.

Originally enacted as Section 61.2(b) of Alcoholic Beverage Control Act, Section

25660 was modified and added to Business and Professions Code in 1953. Although this case is governed by provisions of the Section as it existed in 1953, it is significant to note the 1955 amendments which appear to represent an effort on the part of the legislature to clarify some portions attacked by respondent herein as being ambiguous. Section 61.2(b), Alcoholic Beverage Control Act, St. 1941, p. 1948, § 1, provided as follows:

"In any criminal prosecution, or any proceeding for the suspension or revocation of any license issued under this act and based upon violation of said Section 61, proof that the defendant licensee or his agent or employee demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a registration certificate issued under the Federal Selective Service Act or other bona fide documentary evidence of majority and identity of such person, shall be a defense to such prosecution or proceeding for the suspension or revocation of any license."

In 1953 the legislature reenacted the Section, with some changes, and it was added to the Business and Professions Code in the following form:

"In any criminal prosecution or proceeding for the suspension or revocation of any license based upon violation of Section 25658, proof that the defendant licensee, or his agent or employee, demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a registration certificate issued under the Federal Selective Service Act or other bona fide documentary evidence of majority and identity of the person, is a defense to the prosecution or proceeding for the suspension or revocation of any license."

[2] By this enactment the legislature changed some punctuation and language in the section. In particular, the comma following the word "prosecution" was omitted, and the word "any" preceding the phrase

"proceeding for the suspension" was deleted. The Section, as thus enacted, clearly referred to criminal prosecutions, or to proceedings for suspension or revocation of license resulting from the violation of Section 25658. It follows that the trial court was in error in its ruling that such section was not available as a defense by appellant, who was prosecuted for violation of the section to which express reference is made in Section 25660.

Further remarks of the trial judge before pronouncement of judgment indicate that he had considered the testimony of the minor to the effect that he had "never at any time shown any identification of any kind". Such statement, however, when considered with the remarks immediately preceding, leads us to the conclusion that the Court limited consideration of such evidence to its corroborative effect in support of the prosecution.

[3] Appellant also contends that Section 25660 does not impose a burden of demanding the showing of identification upon the occasion of each sale if the seller has previously examined documentary evidence of identity and age. If the section was susceptible of such construction, it has now been clarified by the amendments enacted in 1955. The section now specifically requires that the demand and showing of evidence of identity and majority shall be accomplished "immediately prior to furnishing any alcoholic beverage to a person under 21 years of age * * *". St.1955, c. 627. Although the section, as existing at the time of this prosecution, did not specifically require such demand and showing "immediately prior to" the sale, it did require such action "before" the sale. The section should be interpreted to apply to each individual sale, and any seller acting in violation of such requirement must have done so at his own risk.

[4, 5] Since it is conceded that appellant did not so comply with Section 25660 on the occasion of the sale upon which this prosecution was based, it is obvious that appellant could not derive any comfort or protection

from the defense available under such section. The ruling of the trial court, although an erroneous statement of the law, did not affect any substantial rights of the appellant.

COUGHLIN, P. J., and MITCHELL, J., concurred.



137 Cal.App.2d Supp. 843

Marvine L. IRVINE, Jr., and Patricia M. Irvine, Plaintiffs,

v.

Georgla L. WILSON, Carl R. Wilson, Gertrude Pollard and Does 1 to 5, Inclusive, Defendants.

Marvine L. IRVINE, Jr., and Patricia M. Irvine, Plaintiffs, Appellants and Respondents,

v.

Carl R. WILSON, Georgla Wilson and Gertrude Pollard, Defendants, Appellant and Respondents.

C. A. 196356.

Appellate Department, Superior Court,
San Diego County,
California.

Oct. 31, 1955.

Action against legal owner of automobile and against automobile dealer to whom owner had delivered automobile for purposes of sale for damage arising out of accident which occurred while automobile was being driven by person who was owner's daughter and dealer's wife. The Municipal Court, San Diego Judicial District, Madge Bradley, J., rendered judgment in favor of owner but against dealer, and plaintiff and dealer appealed. The Superior Court, Burch, J., held that where automobile dealer, to whom owner delivered automobile for purposes of sale, took title in his own name and borrowed money

on security of automobile, even though not authorized to do so by owner, and thus intentionally represented himself as registered owner, and expressly granted permission to his wife to operate the automobile, dealer was, under permissive use provision of statute relating to liability of private owner, liable for damage caused by wife in course of such operation.

Judgment affirmed.

1. Automobiles ⇨240(1)

In an action under the ownership and permissive use provisions of statute relating to liability of private owners of automobiles, whether an owner grants permission is a question of fact to be proved at trial. Vehicle Code, § 402(a).

2. Automobiles ⇨192(1)

An owner's permission to use is an essential element of proof to establish statutory liability for imputed negligence under permissive use provision of statute relating to liability of private owners of automobiles. Vehicle Code, § 402(a).

3. Automobiles ⇨242(1)

In an action under permissive use provisions of statute relating to liability of private owners of automobiles, burden is on plaintiffs to prove permission. Vehicle Code, § 402(a).

4. Automobiles ⇨192(1)

An owner's knowledge of another's use of automobile is not necessary to establish implied permission to use, for purpose of fixing liability under permissive use provision of statute relating to liability of private owner of an automobile. Vehicle Code, § 402(a).

5. Troyer and Conversion ⇨4

Automobile dealer who took owner's automobile for sale only but who took title in his own name, borrowed money on security of the automobile and loaned automobile to his wife for her personal use, all without authority of owner, was a converter.

6. Automobiles ⇨192(6)

Under permissive use provision of statute relating to liability of private owner

of automobile, when a person to whom an automobile has been entrusted embezzles it, the owner should not be held to have fictionally consented to usage, but when usage which bailee makes of borrowed automobile does not amount to a conversion, his mere disobedience of admonitions as to his personal conduct in operation of automobile within scope of authorized use should not exculpate owner. Vehicle Code, § 402(a).

7. Automobiles ⇨244(22)

In action against legal owner of automobile for damage sustained in collision which involved her automobile, which was at time being driven by owner's daughter, who was wife of used-car dealer, to whom owner had delivered automobile for purpose of sale, evidence sustained finding that operation had not been with owner's implied permission. Vehicle Code, § 402(a).

8. Appeal and Error ⇨1010(1)

A judgment supported by evidence must be affirmed.

9. Automobiles ⇨192(1)

Permissive use provision of statute relating to liability of private owner of an automobile imputes liability to registered owner as against legal owner. Vehicle Code, § 402(a).

10. Automobiles ⇨20

Vehicle Code provisions for registration are not conclusive as to who may be an owner, nor do they control in controversies of adverse claimants of owners. Vehicle Code, §§ 56, 175 et seq.

11. Automobiles ⇨195(1)

Where automobile dealer, to whom owner delivered automobile for purposes of sale, took title in his own name and borrowed money on security of automobile, even though not authorized to do so by owner, and thus intentionally represented himself as registered owner, and expressly granted permission to his wife to operate the automobile, dealer was, under permissive use provision of statute relating to liability of private owner, liable for damage caused by wife in course of such operation. Vehicle Code, § 402(a).

Fitzgerald & Selleck, by Willard M. Sinclair, San Diego, for appellants and respondents Marvina L. Irvine, Jr. and Patricia M. Irvine.

Kaminar & Sorbo, by Myron P. Kaminar, San Diego, for appellant and respondent Carl R. Wilson.

Murphy & Albert, by Harry Albert, Long Beach, for respondent Georgia L. Wilson.

Gertrude Pollard in pro. per.

BURCH, Judge.

The appeals in this action involve the application of the ownership and permissive use provisions of Section 402(a) of the Vehicle Code.

Mrs. Pollard's 1949 Cadillac, while being operated by her daughter, Mrs. Wilson, collided with and damaged plaintiff's automobile. Mrs. Pollard had delivered the Cadillac, together with the registration certificates, duly indorsed, to Mr. Wilson, sales manager of a secondhand automobile sales lot, only for the purposes of sale. Mrs. Pollard gave no express permission to her daughter to operate the Cadillac on the day of the accident, but had, before delivering its possession to Mr. Wilson, authorized her on occasions to drive it only to the grocery store. Mrs. Wilson had express permission from Mr. Wilson to take the Cadillac from the sales lot on the day of the accident.

On this and evidence later stated herein, the trial court found that Mrs. Pollard, though an owner, had not given permission for Mrs. Wilson's use at the time of the accident. Plaintiffs have appealed from this part of the judgment.

Mr. Wilson received possession of the Cadillac and the indorsed certificates of registration and assigned insurance on September 13 or 14. The accident occurred on September 22, 1952. On September 19 he surrendered the certificate of ownership to his bank as security for a loan, after indorsing in the space provided his own name as the transferee and the new owner for the purposes of the registration provisions of the Vehicle Code. Vehicle Code, §§ 56 and 175 et seq.

He collected the insurance and paid for the repairs to the Cadillac after the accident. He expressly granted to his wife permission to take the Cadillac on the day of the accident.

Upon this evidence the court found he was an owner and granted permission for the use. From this portion of the judgment Mr. Wilson appeals.

There is no appeal by Mrs. Wilson from the judgment against her.

[1-4] Whether an owner grants permission is a question of fact to be proved at the trial. *Scheff v. Roberts*, 35 Cal.2d 10, 12, 13, 215 P.2d 925. It is an essential element of proof in order to establish the statutory liability for imputed negligence under Section 402(a) of the Vehicle Code. *Scheff v. Roberts*, supra; *Casey v. Fortune*, 78 Cal.App.2d 922, 923, 179 P.2d 99. The burden is on the plaintiff to prove the permission. *Henrietta v. Evans*, 10 Cal.2d 526, 75 P.2d 1051; *Mucci v. Winter*, 103 Cal. App.2d 627, 230 P.2d 22; *Fountain v. Bank of America*, 109 Cal.App.2d 90, 240 P.2d 414. Here there was no express permission by Mrs. Pollard, and while knowledge on her part is no longer considered necessary to establish implied permission, *Burgess v. Cahill*, 26 Cal.2d 320, 158 P.2d 393, 159 A.L.R. 1304; *Scheff v. Roberts*, supra, and the inference has been drawn from evidence of permission for general use and the surrender of possession to another, *Souza v. Corti*, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861; *Hobbs v. Transport Motor Co.*, 22 Cal.2d 773, 141 P.2d 738; *Davidson v. Ealey*, 69 Cal.App.2d 254, 158 P.2d 1000, or the driver's use of the vehicle on other occasions, *Phillips v. Cuccio*, 5 Cal.App.2d 520, 42 P.2d 1050, the circumstances here present do not demand the finding of implied permission as a matter of law. *Henrietta v. Evans*, supra; *Engstrom v. Auburn Auto Sales Corp.*, 112 Cal.2d 64, 77 P.2d 1059; *Rose v. Porter*, 101 Cal.App.2d 333, 225 P.2d 245.

The authority of Mr. Wilson, so far as the record indicates, was limited to those uses which would promote the sale. Clearly, this did not include the accommodation of Mrs. Wilson's personal needs. Had Mr.

Wilson been present in the Cadillac or himself operating it at the time of the accident, Mrs. Pollard's liability for his negligence would be supported by the fact that she gave him full control of the vehicle, and the use would be that of her permittee. However, as her agent for the limited purposes of sale he acted beyond his bailment. To hold Mrs. Pollard liable would be to hold that a bailor is liable for acts of the bailee outside the contract of bailment. The court, perhaps, might have inferred that Mrs. Pollard would expect her son-in-law to accede to her daughter's demand, but the court did not so infer and was not obliged to do so. Mrs. Wilson, of course, knew the limitation of her husband's right, as did he, and in the circumstances the trial court could have concluded that the express permission sought and obtained implied a willful violation of Mrs. Pollard's accepted right to give or withhold permission.

The case here is not one where a borrower for general uses permits a third person to operate. Instead there is here a question of fact of the owner's permissive use. The principle is illustrated in *Helmuth v. Frame*, 46 Cal.App.2d 381, 115 P.2d 852, and *Barcus v. Campbell*, 90 Cal.App.2d 768, 204 P.2d 65, 68, wherein the Supreme Court denied a hearing. As said by Mr. Justice Griffin in the last cited case: "There is evidence that would justify the belief, by the trial judge, that plaintiff had not met the burden of proof in establishing permissive use of the Plymouth by Campbell at the time and place of the accident involved."

[5] The record indicates that Mr. Wilson had the car in his possession for sale and nothing else. When he took title in his own name, borrowed money on the security of the car, and loaned the car to his wife for her personal uses, all without authority of Mrs. Pollard, he became a converter. See *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 205 P.2d 1037.

[6] As Mr. Justice Schauer pointed out in the concurring opinion in *Souza v. Corti*, 22 Cal.2d 454, at page 462, 139 P.2d 645, at page 649: "When a person to whom an automobile has been entrusted embezzles it,

and converts it to his own use in derogation of the title of the owner, I think the owner should not be held fictionally to have consented to usage which he did not in fact consent to, either expressly or impliedly." The Justice's next sentence points to the distinction between this case and the cases of permission for general use: "But when the usage which the bailee makes of a borrowed vehicle does not amount to a conversion of it, his mere disobedience of admonitions as to his personal conduct in the operation of the automobile *within the scope of the authorized use* [emphasis ours] should not exculpate the owner from the liability otherwise imposed by the statute."

The distinction is emphasized in the case of *Herbert v. Cassinelli*, 73 Cal.App.2d 277, 281, 166 P.2d 377, 379, wherein the court said: "It therefore appears that in this class of cases the significant factor is the fact that the owner has committed the general use of the car to the permittee, and this use is not converted into a special one because the permission may have been accompanied by an express admonition not to permit any one else to drive the car. *Souza v. Corti*, supra, 22 Cal.2d at page 460, 139 P.2d 645, 147 A.L.R. 861; *Haggard v. Frick*, 6 Cal.App.2d 392, 44 P.2d 447; *Herbert v. Cassinelli*, supra, 61 Cal. App.2d [661] at page 665, 143 P.2d 752. See, also, *Burgess v. Cahill*, 26 Cal.2d 320, 324, 158 P.2d 393, 159 A.L.R. 1304."

[7,8] We conclude on this phase of the case that there was substantial evidence that Mrs. Wilson's operation was not, as a matter of law, with Mrs. Pollard's implied permission. A judgment supported by the evidence must be affirmed on appeal. *Pacific Finance Corp. v. Foust*, 44 Cal.2d 853, 285 P.2d 632.

We are also of the opinion that the judgment against Mr. Wilson as an owner should be affirmed.

[9,10] Section 402(a) imputes the liability to the registered owner under the provisions of the act as against the legal owner. *Piacun v. Hexem*, 18 Cal.App.2d 145, 63 P.2d 315; *Bunch v. Kin*, 2 Cal.App. 2d 81, 85, 37 P.2d 744. The Vehicle Code provisions for registration are not con-

clusive as to who may be an owner under 402(a), *Logan v. Serpa*, 91 Cal.App.2d 818, 206 P.2d 70, nor do they control in controversies of adverse claimants of owners.

It has, however, been held that one in Mr. Wilson's position who had possession of the motor vehicle, and held the certificate of ownership as the transferee and who indorses his name thereon and forwards the certificate to the Department of Motor Vehicles, is an owner and subject as such to the statutory liability. *Collard v. Love*, 17 Cal.App.2d 72, 61 P.2d 458.

As the New York court said in the case of *Shuba v. Greendonner*, 271 N.Y. 189, 2 N.E.2d 536, 538. "Whether we call it an

estoppel or whether we decide that the action of the Legislature in regulating the use of such vehicles in this state establishes our public policy makes no difference in the final result."

[11] From the record it is clear that Mr. Wilson intentionally represented himself as the registered owner and expressly granted permission to his wife to operate the Cadillac on the occasion of the accident. He is therefore liable as an owner within the contemplation of Section 402(a) of the Vehicle Code.

The judgment is affirmed.

TURRENTINE, P. J., and GLEN, J., concur.

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45 Cal.2d 538

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ruben Corrales ACOSTA, Defendant
and Appellant.

Cr. 5742.

Supreme Court of California.
In Bank.

Nov. 22, 1955.

Rehearing Denied Dec. 21, 1955.

Defendant was convicted, inter alia, of violating section of the Vehicle Code dealing with unlawful driving or taking of a vehicle. The Superior Court of Los Angeles County, Joe Raycraft, J., entered judgment, and defendant appealed. The Supreme Court, Schauer, J., held that where defendant testified that when driver of taxicab in which defendant was riding, believing that defendant was going to rob him, left moving taxicab, defendant did not drive the taxicab but merely leaned over seat and attempted to steer taxicab, defendant was entitled to instruction as to accident or misfortune, and that refusal of defendant's requested instruction as to accident or misfortune was reversible error.

Judgment reversed.

Opinion, 283 P.2d 73, vacated.

Spence, Edmonds and Shenk, JJ., dissented.

1. Criminal Law Ⓒ741(1)

If there is prosecution evidence, which tends to disprove criminality, and other prosecution evidence, which tends to prove criminality, it is the function of the trier

of fact to determine which version is to be believed.

2. Criminal Law Ⓒ556

Rule that prosecution is bound by defendant's extrajudicial statements, which are introduced by the prosecution, and which are irreconcilable with guilt, is applicable only where there is no other competent and substantial evidence which could establish guilt.

3. Automobiles Ⓒ356

Question whether defendant was guilty of violating section of the Vehicle Code dealing with the unlawful driving or taking of a motor vehicle was for jury. Vehicle Code, § 503.

4. Automobiles Ⓒ357

In prosecution for violation of section of Vehicle Code dealing with unlawful driving or taking of a vehicle, wherein defendant testified that when driver of taxicab, believing that defendant was going to rob him, left moving taxicab, defendant did not drive the taxicab but merely leaned over seat and attempted to steer taxicab, defendant was entitled to instruction as to misfortune and accident. Pen.Code, § 26; Vehicle Code, § 503.

5. Criminal Law Ⓒ1173(2)

In prosecution for violation of section of Vehicle Code dealing with unlawful driving or taking of a vehicle, wherein defendant testified that when driver of taxicab, believing that defendant was going to rob him, left moving taxicab, defendant did not drive the taxicab but merely leaned over seat and attempted to steer taxicab, refusal to give defendant's requested in-

struction on misfortune and accident was prejudicial error. Pen.Code, § 26; Vehicle Code, § 503.

Ellery E. Cuff, Public Defender, William H. Sanson and Noel B. Martin, Deputy Public Defenders, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Marvin Gross, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant was charged by information in count 1 with grand theft of an automobile (Pen.Code, § 487, subd. 3), in count 2 with violation of section 503 of the Vehicle Code,¹ and in counts 3 and 4 with manslaughter (Pen.Code, § 192).² A jury found defendant not guilty of count 1 and guilty of counts 2, 3, and 4. Defendant appeals from the judgment as to count 2.

Defendant contends: (1) the evidence of the prosecution establishes defendant's want of criminal intent; (2) refusal of defendant's requested instruction as to misfortune and accident was prejudicial error; (3) even if defendant had not requested such instruction, it was the trial court's duty of its own motion to instruct on the subject. We have concluded that contention (1) is without merit; that contention (2) requires reversal; and that contention (3) need not be discussed.

Evidence of Guilt.

The events which resulted in this prosecution occurred on April 3, 1954. Defendant, a Mexican agricultural worker legally in the United States, could not speak English. He had been in this country since March 19, 1954. On April 3 defendant went with fellow workers to a cafe in Tor-

rance. Defendant drank five or six bottles of beer. He and an acquaintance then went to a cafe in Redondo Beach. There defendant drank no more. He began to dance by himself. The proprietor, who spoke Spanish, led him out of the cafe. Defendant left politely. However, he returned and again danced by himself. A waitress called the police and the proprietor called a cab for defendant. The proprietor interpreted for the police and defendant. When the cab arrived the police directed the driver to take defendant to the ranch where defendant was employed, and explained that defendant had no money but that the fare would be paid at the ranch or by the proprietor of the cafe.

After the cab driver had driven defendant for a few minutes, defendant spoke to him in Spanish, which the driver did not understand. About a year before a passenger had attempted to rob the driver and the driver had escaped by opening the door and rolling out of the cab; he recalled this incident and it influenced his conduct when defendant began to behave strangely as hereinafter described. Defendant denied any violent conduct and testified that his purposes were innocent; the following description of the events is taken from the testimony of prosecution witnesses.

When the driver did not comprehend defendant's Spanish, defendant reached into the front seat of the cab, seized the driver's clip board and struck the driver. The driver struck at defendant with his flashlight. Defendant pinned the driver's arm back and struck at his neck with defendant's hand. The driver avoided the blow, opened the cab door, and rolled out. He had slowed to 10 or 15 miles an hour and pulled to the left side of the road. He left the car in high gear and did not turn off the ignition switch.

1. Count 2 alleges that defendant "did willfully, unlawfully and feloniously drive and take a certain vehicle * * * without the consent of and with intent to deprive the * * * owner * * * of title to and possession of said vehicle."
2. Counts 3 and 4 allege that defendant "did willfully, unlawfully and feloniously and

without malice, while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, with gross negligence, and while in the commission of a lawful act which might produce death, in an unlawful manner, with gross negligence, kill" two named human beings.

Other persons on the highway observed that the cab slackened speed, the passenger stood over the driver striking him, the driver rolled out of the car, the passenger got from the back seat into the front seat behind the wheel, the cab accelerated to about 60 miles an hour, ran through a red light, and hit another car broadside.

According to defendant's testimony and extrajudicial statements, he did not hit the driver with the clip board and did not get into the front seat of the cab, but attempted to steer it by reaching over the back of the front seat to the wheel. However, a prosecution witness observed that when the cab came to rest defendant was in the front of the car, having been partially thrown to the floor, with his hips on the seat beneath the steering wheel and his head to the right.

Two passengers in the car which was struck by the cab were killed and the driver was seriously injured. Defendant was assisted from the cab. His right arm was injured. He got into another automobile, in which the driver had left the keys, and attempted unsuccessfully to start it. The police then removed defendant from the automobile.

Defendant concedes that if the People's case consisted solely of the testimony of the cab driver and other prosecution witnesses as summarized above, criminal intent could be inferred from defendant's conduct. But, says defendant, the People's case in chief included "primary and direct" proof of defendant's state of mind by a transcript of an extrajudicial statement of defendant to a police officer which assertedly "explicitly disproves criminality."

In the questioning of defendant as to his previous statements to another officer, the following was said: "Captain Ashton: You told Officer Gonzales that the taxi driver was going to rob you.

"The Defendant: I said that but I did not mean that at the time as there are lots of crimes happening in that manner and that as he was going in the wrong direction I thought something might happen to me."

This statement, defendant says, establishes that his intent and purpose during the events leading up to and immediately following the driver's abandonment of the cab were not to deprive the owner of the cab of possession thereof. Defendant relies upon what he considers to be an analogous situation in *People v. Salaz* (1924); 66 Cal.App. 173, 181, 225 P. 777. There defendant, charged with murder, admitted the killing but claimed that it was in necessary self-defense. A jury found him guilty of manslaughter and he appealed. The appellate court said (at page 181 of 66 Cal. App. at page 780 of 225 P.),

"The jury could not have found, from the evidence for the people, that the killing was done by appellant except upon the latter's admissions, which carried, in close and immediate connection with proof of the killing, circumstances of necessary self-defense. Since, therefore, the proof on the part of the prosecution tends to show that the act of appellant was justifiable, there was, at the close of the people's case, no presumption against the accused that he had committed an unlawful homicide. No presumption of guilt weighed against the presumption of innocence. 'Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, *unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.*' (Pen.Code, sec. 1105.) [Italics of the District Court of Appeal.]

"But it does not necessarily follow that appellant's account of the killing, though uncontradicted by direct evidence, should control the jury. If there be any well-established circumstance in the case which may reasonably be regarded as incompatible with the theory of the defense that the killing was justifiable, then the jury, from a consideration of all the evidence, was warranted in finding that the act amounted to an unlawful homicide."

The court concluded (at page 183 of 66 Cal.App. at page 780 of 225 P.) that "if it cannot be said, as a matter of law, that the evidence in this case is insufficient to support the verdict, the question is a close one," and that certain error was prejudicial.

Cited by defendant to the same effect are *People v. Toledo* (1948), 85 Cal.App.2d 577, 580-581, 582, 193 P.2d 953 [where the appellate court concluded that "In the final analysis, defendant's conviction is not supported by the record," which according to the appellate court established justifiable homicide]; and *People v. Estrada* (1923), 60 Cal.App. 477, 482-483, 213 P. 67 [where "The proof on the part of the prosecution (referring now to the statement of the defendant) did * * * show a case of justification, and there is nothing in any of the other evidence presented which tends to contradict or dispute defendant's version of the affair"]. Defendant says, paraphrasing the second sentence quoted above from the Salaz case, that "since the proof on the part of the prosecution shows that the intent in the mind of appellant was non-criminal, there was at the close of the People's case no presumption that appellant had either attempted to rob the cab driver or wrongfully and without his consent taken possession of and operated the cab."

[1-3] The sentence in the Salaz case which, according to defendant, should be applied to the present case, does not stand for a rule of law that a defendant cannot be convicted if the prosecution introduces *some* evidence which tends to prove that defendant did not act in the manner or have the state of mind which is necessary to constitute a crime and there is other evidence sufficient to show guilt. As the Salaz case itself indicates, if there is prosecution evidence which tends to disprove criminality and other prosecution evidence which tends to prove criminality, it is the function of the trier of fact to determine which version is to be believed. (See *People v. Freudenberg* (1953), 121 Cal.App. 2d 564, 575-576, 263 P.2d 875; *People v.*

Rutland (1953), 120 Cal.App.2d 798, 800, 261 P.2d 735; cf. *People v. Howard* (1930), 211 Cal. 322, 329-330, 295 P. 333, 71 A.L.R. 1385; *People v. Holt* (1944), 25 Cal.2d 59, 90-93, 153 P.2d 21.) The courts may sometimes say that the prosecution is "bound by" extrajudicial statements of defendant which are introduced by the prosecution and which are irreconcilable with guilt, but this concept is applicable only where there is no other competent and substantial evidence which could establish guilt. (See *People v. Jacobs* (1952), 111 Cal.App.2d 281, 283, 244 P.2d 500; *People v. Coppla* (1950), 100 Cal.App.2d 766, 769, 224 P.2d 828.)

Failure to Instruct as to Misfortune and Accident.

Defendant relies upon the provision of section 26 of the Penal Code that "All persons are capable of committing crimes except those belonging to the following classes: * * * Six. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." He asserts that "Through the abandonment of the cab, something wholly unforeseen, appellant found himself, suddenly and with no criminal intent, the sole occupant of a vehicle in motion, in gear, with the motor running. All he did was the natural reaction of one unfamiliar with the operating technique of the vehicle." It is defendant's position that the refusal of the following instruction requested by him deprived him of the opportunity to have this important aspect of the evidence properly appraised by the jury: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show no evil design, intention or culpable negligence, he does not thereby commit a crime, although the same act or omission committed under different circumstances and coupled with criminal intent would constitute a crime." (California Jury Instructions—Criminal (1946), No. 71-E.)

[4] The People reply that the theory to which this instruction relates was unsupported by any substantial evidence and therefore that the refusal of the instruction was not error. The People refer to the testimony of prosecution witnesses that after the cab driver rolled out of the cab the vehicle accelerated while it was going up a slight grade and that the vehicle could not have done this had it been simply idling in high gear, as the cab driver left it; this testimony, the People say, refutes defendant's testimony that he did not "drive" the cab but merely leaned over the seat and attempted to steer it. Even if the jury disbelieved defendant's testimony that he did not get into the front seat, they still could have found that what appeared to others to be a "driving" of the car was not with intent to drive or take it but was the mere unintended, confused result of the peculiar situation in which defendant found himself. For example, the jury could have found that defendant tried to stop the car and through ignorance or mistake put his foot on the accelerator instead of the brake. In the state of the evidence defendant was entitled to his requested instruction as to accident or misfortune.

[5] The People urge that in any event the refusal of the instruction was not prejudicial because the jury were fully instructed as to the intent necessary to constitute a criminal taking of a car in violation of section 503 of the Vehicle Code and would not have convicted defendant had they not found that defendant had such intent. However, defendant was entitled to the instruction as to accident and misfortune in the terms or substance in which he requested it so that the jury's attention would be directed to the possible, reasonable view of the evidence urged by defendant. (See *People v. Carmen* (1951), 36 Cal.2d 768, 773, 228 P.2d 281.)

The foregoing discussion and our conclusion make it unnecessary to consider defendant's contention that the trial court of its own motion should have instructed as to accident and misfortune.

For the reasons above stated, the judgment appealed from is reversed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concur.

SPENCE, Justice.

I dissent.

Defendant was convicted of two counts of manslaughter and of one count of violation of section 503 of the Vehicle Code. He appeals only from the judgment relating to the last-mentioned count. The majority opinion holds that the evidence was sufficient to support the judgment as to that count, but reverses solely because of alleged prejudicial error in the failure to give a requested instruction. After a review of the record, including the evidence, I am of the opinion that it cannot be said that the error, if any, in the failure to give the requested instruction "resulted in a miscarriage of justice." Const. art. VI, § 4½.

The information charged that defendant "did wilfully, unlawfully and feloniously drive and take a certain vehicle * * * without the consent of and *with the intent* to deprive the * * * owner * * * of title to and possession of said vehicle * * *." (Emphasis added.) The trial court instructed the jury that "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and *with intent* to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, * * * is guilty of a felony". (Veh.Code, § 503; emphasis added.) The jury was further given the customary general instructions, including those on the presumption of innocence, reasonable doubt, and burden of proof. Upon the evidence and under these instructions, the jury found defendant "guilty of violation of section 503, Vehicle Code, a felony, as charged in count two of the information."

It is clear that the given instructions clearly informed the jury that defendant could not be found guilty unless the jury found from the evidence and beyond a reasonable doubt that defendant drove the automobile with the required criminal intent. Thus, in finding the defendant guilty, the jury necessarily found that defend-

ant had the specific criminal intent mentioned in said section and alleged in the information; and the overwhelming evidence supports that finding.

It is true that defendant told an unusual story concerning the events immediately preceding the fatal accident, but his explanation cannot be reconciled with his great acceleration of the speed of the car and of his traveling at such speed for almost a mile before the accident occurred. Defendant's criminal intent was further indicated by his attempt unlawfully to take another automobile for the purpose of fleeing from the scene of the accident.

The refused instruction reads: "When a person commits an act or makes an omission through misfortune or by accident *under circumstances that show no evil design, intention or culpable negligence*, he does not thereby commit a crime, although the same act or omission committed under different circumstances and *coupled with criminal intent* would constitute a crime." (Emphasis added.)

A reading of the refused instruction shows that it constitutes, in effect, another way of stating the propositions of law relating to intent which were amply covered by the instructions given. By its terms, it could have no application unless it was found that defendant drove the car under circumstances showing no evil "intention" and in a manner not "coupled with criminal intent."

In light of the fact that the given instruction made it entirely clear that defendant could not be convicted unless the jury found beyond a reasonable doubt that he drove the car "with intent to either permanently or temporarily deprive the owner thereof of his title or to possession of such vehicle," I find no prejudicial error in the failure to give the requested instruction.

I would therefore follow the constitutional mandate, Const., art. VI, § 4½, and affirm the challenged judgment.

SHENK and EDMONDS, JJ., concur.

Rehearing denied; **SHENK, EDMONDS and SPENCE, JJ.,** dissenting.

Otis D. BABCOCK, Plaintiff and Appellant,
v.

**Joe KING and Lillian King, Defendants
and Respondents.**

District Court of Appeal, Third District,
California.

Nov. 30, 1955.

Lessee's action to rescind a lease. The Superior Court, Placer County, Lowell Sparks and Ralph McGee, JJ., on second trial of the action, rendered a judgment from which the lessee appealed. The District Court of Appeal, Peek, J., held that evidence sustained the trial court's finding of rental value, that the lessee was not entitled to credit for sums expended by him in leveling the land in the absence of an allegation that such expenditure enhanced the value of the property, and that interest on rental payments made prior to rescission did not commence to run until date of rescission.

Affirmed.

1. Landlord and Tenant ⇨34(5)

In action for rescission of lease wherein court found lessee was entitled to rescission on payment of sum representing rent and taxes to date of rescission, evidence that agreed rental was \$4,000 per year was evidence which would sustain trial court's finding that rental value was \$3,000 per year, as against lessee's attack upon such finding.

2. Landlord and Tenant ⇨34(5)

Where lessee did not allege, in his action to rescind lease, that his expenditure of money in leveling land enhanced value of the property, and court made no finding thereon, trial court did not err in not crediting lessee with such sum against reasonable rental value of premises.

3. Interest ⇨39(1)

Where restitution of lease is based upon rescission for mutual mistake, interest is allowed only from date of rescission, as distinguished from those situations which

by statute operate to give a party right to interest prior to rescission. West's Ann. Civ. Code, § 3288.

4. Interest § 39(1)

Lessee who rescinded lease on ground of mutual mistake was not entitled to interest on rental payments made before rescission, except from date of rescission. West's Ann. Civ. Code, § 3288.

Thomas W. Olson, Jr., Sacramento, and K. D. Robinson, Auburn, for appellant.

John R. Couzens, Auburn, and Thomas E. Srednik, Roseville, for respondents.

PEEK, Justice.

Plaintiff-lessee sought to rescind a lease agreement whereby he had leased from defendants certain real property located at Lake Tahoe. At the conclusion of the first trial, the court found that through mistake the parties had regarded the property as one unit, while as a matter of fact, it was bisected by a public road which had been dedicated but had never been laid out. The court concluded that plaintiff was entitled to a judgment of rescission upon payment to defendants of a sum representing unpaid rent and taxes to the date of surrender of possession by plaintiff. Thereafter both parties moved for a new trial and the same was granted. By stipulation the matter was retried upon the record of the first trial. The court, in its memorandum of decision, noted an insufficiency in the record on the question of the reasonable rental value of the land and reopened the case for further testimony on that one issue. Again the court found that rescission should be granted to plaintiff and that he should pay to defendants a sum found to be the reasonable rental value of the land. Plaintiff now appeals from that judgment, contending that there is no evidence to support the finding of the court as to the reasonable rental value of the land; that the judgment fails to reflect the reasonable value of improvements he placed on the land; and, that it fails to credit him with interest on rental payments made prior to rescission.

[1] As regards the first contention, the record discloses testimony by defendants

who placed the reasonable rental value of the property at \$4,000 per year which was the agreed rental stated in the lease, and testimony by one expert called by defendants who testified concerning the factors he had considered, including the land value, and placed the rental value in the sum of \$4,200 per year. Even assuming plaintiff's contention that the testimony of defendants' witness was speculative and conjectural, that is not to say that there was therefore no evidence. It is undisputed that the agreed rental was \$4,000 per year which fact the court held, in *Harris v. Bissell*, 54 Cal.App. 307, 312, 202 P. 453, to be evidence of the rental value of the land, but when it is not based on contract it may be greater or less than as provided in the lease. Here the value placed on the property by the court was in the sum of \$3,000, or \$1,000 per year less than the agreed rent.

[2] Plaintiff's next contention, that he should have been credited with the sum of \$600 expended by him in leveling the land, is likewise without merit. It is to be noted that plaintiff did not allege that such expenditure enhanced the value of the property and the court made no finding thereon. Under such circumstances it cannot be said that the court erred.

[3, 4] A like conclusion must prevail as regards plaintiff's final argument that the court erred in failing to allow him interest on the rent paid and on the sum representing the value of the improvements made during the period of his possession. Where as here restitution is based upon rescission for mutual mistake, interest is allowed only from the date of rescission, *Taber v. Piedmont Heights Bldg. Co.*, 25 Cal.App. 222, 143 P. 319, as distinguished from those situations arising under section 3288 of the Civil Code which operate to give a party the right to interest prior to rescission. Hence, since no money was due plaintiff, interest did not commence to run until the date of rescission.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

137 Cal.App.2d 398

**Ernestine SALAZAR, Plaintiff and
Appellant,**
v.

**CHAPULTOPEC GROCERY, a corporation,
Curtiss Candy Company, a corporation,
Defendant,**

**Curtiss Candy Company, a corporation,
Respondent.**
Civ. 21304.

District Court of Appeal, Second District,
Division 2, California.
Nov. 30, 1955.

Action against candy manufacturer and retailer for injuries resulting from eating candy bars. A non-suit was granted in favor of the retailer. The Superior Court, Los Angeles County, Allen W. Ashburn, J., after trial without jury, entered judgment in favor of the manufacturer, and plaintiff appealed. The District Court of Appeal, McComb, J., held that where candy bars when manufactured were pure, wholesome, fit for human consumption and were of a merchantable quality without presence of any worms, and were in same condition when manufacturer parted with possession, control and right to control of candy bars, manufacturer was not liable to person becoming sick and nauseated after eating candy bars.

Judgment affirmed.

1. Appeal and Error ⇨854(2)

An erroneous conclusion of law is not ground for reversal if judgment is right.

2. Food ⇨25

Where candy bars when manufactured were pure, wholesome, fit for human consumption and were of a merchantable quality without presence of any worms, and were in same condition when manufacturer parted with possession, control and right to control of candy bars, manufacturer was not liable to person becoming sick and nauseated after eating candy.

3. Appeal and Error ⇨1071(2)

In action for injuries resulting from eating allegedly unwholesome candy bars,

finding that candy bars were pure, wholesome and fit for human consumption when manufactured and at time manufacturer parted with its possession, control and right to control supported judgment for manufacturer and it was immaterial whether trial court's conclusion of law that there was no implied warranty on part of manufacturer that candy bars would continue to be reasonably fit for human consumption or of a merchantable quality after manufacturer parted with possession, control and right to control, was or was not erroneous.

Ernest A. Kessler, Los Angeles, for appellant.

Catlin & Catlin, Frank D. Catlin, Henry W. Catlin, George L. Catlin and William E. Catlin, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for injuries resulting from eating candy bars manufactured by defendant Curtiss Candy Company, plaintiff appeals.

Facts: Defendant Curtiss Candy Company manufactured Baby Ruth candy bars. Defendant Chapultotec Grocery Corporation purchased some of these candy bars from the Fuji Company which had had them in its possession for about 6 weeks prior to the time plaintiff purchased two of the bars from said defendant. The evidence failed to disclose from whom the Fuji Company purchased them.

Plaintiff, after eating a portion of two of the candy bars, discovered that they had worms which caused her to become sick and nauseated. After receiving the evidence produced by the parties, the trial court made, among others, the following findings:

"That said Baby Ruth candy bars were manufactured with extraordinary care, skill and workmanship and when sold and delivered by said Curtiss Candy Company to independent jobbers and wholesalers, said candy bars were pure, wholesome and fit for human consumption and remained in a pure,

wholesome condition as long as they were in the possession, control, and subject to the right of control of the Curtiss Candy Company.

"That any worms that were in said candy bars at the time plaintiff purchased and ate same were developed after the defendant Curtiss Candy Company parted with its possession, control and right to control said candy."

Thereafter the trial court drew this conclusion of law: "That there was no implied warranty on the part of the Curtiss Candy Company that said candy bars would continue to be reasonably fit for human consumption or of a merchantable quality after the manufacturer, the Curtiss Candy Company, parted with its possession, control, and the right to control the same."

A nonsuit was granted in favor of defendant Chapultopec Grocery. From this order there has been no appeal. The trial court gave judgment in favor of defendant Curtiss Candy Company.

Plaintiff urges that the above mentioned conclusion of law was prejudicially erroneous and requires a reversal of the judgment.

[1] This contention is devoid of merit for the reason that the law is established that an erroneous conclusion of law is not ground for reversal if the judgment is right. (Spencer v. Duncan, 107 Cal. 423, 426 et seq., 40 P. 549; McNutt v. City of Los Angeles, 187 Cal. 245, 259 [5], 201 P. 592.)

[2] In the instant case the trial court found, which finding is not questioned by plaintiff, that the candy bars when manufactured by defendant Curtiss Candy Company were pure, wholesome, fit for human consumption and were of a merchantable quality without the presence of any worms, and that at the time said defendant parted with its possession, control and the right to control said candy bars, they were in the same condition.

[3] In view of these unquestioned findings which support the judgment it is immaterial as to whether the conclusion of law in question was or was not erroneous. (Cf.

Mason v. Del Valle, 213 Cal. 30, 32 [2], 1 P.2d 419; Delmuto v. Superior Court, 119 Cal.App. 590, 594 [3], 6 P.2d 1007.)

In view of the trial court's findings the following cases, relied on by plaintiff, are not here applicable: Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041; Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799, and Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 163 P.2d 470.

Affirmed.

MOORE, P. J., and FOX, J., concur.



137 Cal.App.2d 275

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Homer CRISEL, Defendant and Appellant.
Cr. 3156.

District Court of Appeal, First District,
Division 2, California.

Nov. 28, 1955.

Defendant was convicted of burglary in the second degree. The Superior Court, Monterey County, Stanley Lawson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that since evidence of intent to commit theft was entirely circumstantial, instructing jury that such intent could be inferred from fact that defendant resorted to violence when discovered within house, without also instructing that to justify a conviction on circumstantial evidence, the facts and circumstances must be entirely consistent with guilt and inconsistent with any other rational conclusion, was error.

Judgment reversed.

1. Criminal Law §784(1)

Where evidence of intent to commit theft was entirely circumstantial in prosecution for burglary, instructing jury that such intent could be inferred from fact that defendant resorted to violence when discovered within house, without also instructing that to justify a conviction on circumstantial evidence, the facts and circumstances must be entirely consistent with guilt and inconsistent with any other rational conclusion, was error.

2. Criminal Law §824(9)

Where a specific intent is an element of crime charged and circumstantial evidence is relied on to prove such intent, instruction that to justify a conviction on circumstantial evidence, the facts and circumstances must be entirely consistent with guilt and inconsistent with any other rational conclusion must be given by trial court on its own motion.

Myron E. Etienne, Jr., Salinas, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of burglary in the second degree. With a male companion appellant found himself in the country, in an automobile which was stalled because it had run out of gasoline. He had been drinking heavily. He walked to the nearest farm house to try to get some gasoline. It was broad daylight. When nobody answered his knock he violently kicked in the door and entered. The owner's brother-in-law followed him into the house and appellant, after violently attacking the brother-in-law, then fled. The crime charged was entry with intent to commit theft. The fact that the automobile was without gasoline and that appellant had gone to the house to get some if possible was testified to by appellant and his companion and appellant denied any intention to commit theft. That the car

was stalled and out of gasoline is admitted.

The trial court instructed the jury: "Where it appears that the defendant resorts to violence when discovered within the house, the evidence is sufficient to sustain an implied finding that the defendant's entry into the house was made with intent to commit the crime charged." When this instruction was read to the jury a juror asked to have it reread which was done. After the jury had retired they returned to the courtroom and at their request this instruction was read a third time.

[1,2] The instruction may be technically correct, *People v. Hawkins*, 129 Cal. App. 720, 19 P.2d 249, but it clearly was error to give it without also giving an instruction that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with guilt but must be inconsistent with any other rational conclusion. Where a specific intent is an element of the crime and circumstantial evidence is relied on to prove the intent this instruction must be given by the court on its own motion. *People v. Yrigoyen*, 45 Cal.2d 46, 286 P.2d 1.

Here the evidence of an intent to commit theft was entirely circumstantial. The court instructed the jury that from the circumstance of appellant's attack on the owner's brother-in-law the intent to commit theft could be inferred. Appellant's conduct might well be found to be that of a person in a drunken frenzy rather than that of one intending to commit a theft. "Had the instruction in question been given, the jury might have concluded that the circumstantial evidence, while entirely consistent with defendant's guilt, was also consistent with a rational conclusion that he was innocent." *People v. Yrigoyen*, supra, Cal.2d 286 P.2d at page 3.

Judgment reversed.

KAUFMAN, J., concurs.

137 Cal.App.2d 331

The PEOPLE of the State of California,
Plaintiff & Respondent,
v.

Isaac LOGAN and Billy Eugene Wagner,
Defendants & Appellants.
Cr. 5390.

District Court of Appeal, Second District,
Division 3, California.
Nov. 29, 1955.

Defendants were convicted of narcotic violations. The Superior Court, Los Angeles County, Fred Miller, J., entered judgments and orders denying motions for new trial, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that attempt by counsel for defendants to establish defense of entrapment and failure to call defendants to testify or offer any evidence in their behalf did not show inadequacy of representation by counsel as ground for new trial.

Judgments and orders affirmed.

1. Constitutional Law ☞268

Criminal Law ☞641(3), 1077

Appointment of counsel to represent indigent appellants in a criminal case is discretionary with court and not a matter of right as a part of due process of law, and request for appointment of counsel should be denied, if it clearly appears from the record that appeal or other matter before the court is devoid of merit.

2. Criminal Law ☞641(3)

Appointment of counsel to represent indigent appellants in a criminal case is not required by statute.

3. Criminal Law ☞920

Claim by defendant that his attorney exercised his own judgment and rejected suggestions of defendant during trial is not a ground for granting new trial.

4. Criminal Law ☞641(1), 920

Where it is claimed on motion for new trial or appeal in a criminal case that defendant was inadequately represented by counsel at trial, the question is whether defendant was substantially denied his con-

stitutional right to be represented by counsel.

5. Criminal Law ☞641(1)

Constitutional right to be represented by counsel will be maintained by courts absolutely and to the full extent.

6. Criminal Law ☞641(1)

That defendant who was represented by counsel received poor advice, indicative of poor judgment of his attorney, and acted thereon to his detriment, does not amount to a denial of constitutional right to representation by counsel.

7. Criminal Law ☞920

Where state in prosecution for narcotic violations adduced direct and convincing evidence of acts of defendants constituting essential elements of offense charged and one defendant had previously been convicted of a similar offense, that counsel for defendants sought to establish defense of entrapment and did not call defendants to testify or offer any evidence in their behalf did not show inadequacy of representation by counsel as ground for new trial. West's Ann.Health & Safety Code, § 11714.

8. Conspiracy ☞47

Evidence of unlawful agreement to procure and sell a narcotic to a minor followed by commission of overt acts alleged, including sale of marijuana to a minor, was sufficient to establish unlawful conspiracy to furnish or sell a narcotic to a minor. Pen.Code, § 182; West's Ann.Health & Safety Code, § 11714.

Isaac Logan and Billy Eugene Wagner,
in pro. per.

No appearance for respondent.

SHINN, Presiding Justice.

Upon request for appointment of counsel on the present appeal the court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals for a report to the court as to possible merit in the appeal. The matter was assigned to two members of the committee who have made written report to the court stating that the record had been examined and that in the

opinion of the attorneys it disclosed no meritorious ground of appeal. Defendants were duly so advised and their time to file a brief was substantially extended. No brief has been filed. Such has been the practice of this court for several years. The services of the committee have been willingly rendered and have been of distinct value to the court.

[1,2] Appointment of counsel to represent indigent appellants is not a matter of right as a part of due process. It is discretionary with the court whether counsel should be appointed and a request for appointment should be denied if it clearly appears from the record that the appeal or other matter before the court is devoid of merit. *State v. Sorrentino*, 36 Wyo. 111, 253 P. 14; *McCue v. Commonwealth*, 103 Va. 870, 49 S.E. 623; *Haywood v. United States*, 7 Cir., 268 F. 795; *Applebaum v. United States*, 7 Cir., 274 F. 43; *Reetz v. People of State of Michigan*, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563; *Errington v. Hudspeth*, 10 Cir., 110 F.2d 384, 127 A.L.R. 1467; *Moore v. Aderhold*, 10 Cir., 108 F.2d 729; *De Maurez v. Swope*, 9 Cir., 104 F.2d 758; *Gargano v. United States*, 9 Cir., 137 F.2d 944; *Brown v. Johnston*, 9 Cir., 126 F.2d 727; *Lovvorn v. Johnston*, 9 Cir., 118 F.2d 704, 707. There is no statutory enactment which requires that counsel be appointed. Whenever the record discloses a question of error in the trial or other proceeding which counsel could in good conscience urge in behalf of the client an appointment has been made. Where counsel have not been appointed the court has made an independent study of the record. We have done so in the present case.

The appellants, Isaac Logan and Billy Eugene Wagner, were convicted of two offenses, namely, conspiracy to violate section 11714 of the Health and Safety Code (furnishing or selling a narcotic to a minor), and in a second count a violation of the same section. It was alleged in the information that the defendants committed certain overt acts in furtherance of the conspiracy, and that they feloniously sold marijuana to Lloyd Arthur Epperly. Logan was accused of and admitted a prior felony conviction. This is an appeal from the

judgments and from orders denying motions for a new trial.

Lloyd Epperly testified that he was 17 years old; he received marijuana from Wagner on September 20, 1954 in exchange for \$15 previously paid and that at the time Wagner gave it to him, the defendant Logan was also present. According to the testimony of Epperly and one George Chosner, Epperly had approached defendants two days earlier, and had asked Wagner to obtain some marijuana for him, stating that a friend of his wanted it. Defendant Logan was present while Epperly talked with Wagner. Later that evening both defendants, together with Epperly and Chosner made an unsuccessful trip from Long Beach to Los Angeles where they endeavored to buy some marijuana. They freely discussed its purchase while on this trip. Before going to Los Angeles, the four had stopped at a place known as "The Hutch," where Chosner obtained \$15 from one "Tiny" Atkins, for whom the narcotic was to be purchased. The next day Epperly and Chosner together with defendant Logan again drove around to make a purchase, making one or two stops where they made unsuccessful attempts to purchase. Finally they stopped at a grocery store, Logan took the \$15 from Chosner and gave it to an unidentified person working in back of the store. Logan told Epperly to get the marijuana at Wagner's house the next evening. The next evening defendant Wagner delivered a brown paper bag containing marijuana to Epperly, who drove to a meeting place in an alley in Long Beach where he handed the bag to Chosner, who in turn gave it to "Tiny" Atkins. Detective Good testified that he had observed the transaction through a crack in a fence and seized the package from Atkins. He recognized Epperly, who was later apprehended. At the trial the contents of the bag were identified by an expert, as Indian Hemp, commonly referred to as marijuana. Defendants did not testify nor offer any evidence at the trial.

Defendants were represented by separate counsel at the trial and upon their motions for a new trial. Upon denial of their motions they requested an opportunity to ob-

tain new counsel. Thereafter several continuances were granted pursuant to their request. Defendants obtained new counsel, who made motion for an order vacating the order denying the motions for a new trial. The motions were supported by affidavits of defendants and a brother of Logan. The grounds of the motion and the substance of the affidavits were that defendants had not been properly represented at the trial in that they were advised by their attorneys not to take the stand and that persons who could have given evidence in their behalf were not called as witnesses. It was asserted in the affidavits that the attorneys intended to urge as a defense that the defendants were entrapped by the police into committing the offenses and that the defendants themselves stated to their attorneys that they were opposed to relying upon that defense. The trial judge permitted extensive presentation of the motions and gave the same patient consideration. The motions were denied, probation was denied, and defendants were sentenced to state prison. No notice of an appeal from the order was given. Defendants' attorneys gave notice of appeal from the judgments and orders denying motions for a new trial. Thereafter defendants substituted themselves in the place and stead of the attorneys.

[3] It appears from the record that the court in granting the defendants an opportunity to procure new counsel and continuing the matter for that purpose intended that the continuance was of the hearing of the motions for a new trial and that notwithstanding the entry of an order denying the motions a ruling on the motions was held in abeyance. If so, the notice of appeal from the order denying the motions for a new trial was sufficient. But the motions presented no sufficient grounds for a new trial. The affidavits stated that defendants would have testified and would have called witnesses except for the advice of their attorneys but they did not state that defendants or their witnesses would have given testimony contradictory of that introduced by the People. And a claim by a defendant that his attorney exercised his own judgment and rejected the sug-

gestions of the client during the trial is not a ground for granting a new trial.

[4-6] When it is claimed on motion for a new trial or appeal in a criminal case that the defendant was inadequately represented by counsel at the trial, the question is whether he was substantially denied his constitutional right to be represented by counsel. The right to representation is one which our courts will maintain "absolutely and to the full extent". *People v. Avilez*, 86 Cal.App.2d 289, 194 P.2d 829, 833; *In re Major*, 135 Cal.App.2d 405, 287 P.2d 359. But where an accused is represented by counsel and the basis of his claim is that he received poor advice, indicative of poor judgment on the part of his attorney, and acted thereon to his detriment, those facts, even if substantiated, do not amount to a denial of the right of representation. *People v. Miller*, 114 Cal. 10, 45 P. 986; *People v. Lennox*, 67 Cal. 113, 7 P. 260; *People v. Kirk*, 98 Cal.App.2d 687, 220 P.2d 976; *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657; *People v. Ynostroza*, 105 Cal.App.2d 332, 232 P.2d 913; *People v. Morton*, 100 Cal.App.2d 269, 223 P.2d 259.

[7] The affidavits presented by the defendants show that the alleged ground of disagreement between defendants and their attorneys consisted of the expressed belief of the attorneys that the better defense was a claim of entrapment, whereas the defendants profess to have expressed a desire to testify in denial of the charges. The contention that defendants were entrapped was devoid of merit, but it may nevertheless have appeared to the attorneys as more likely to succeed than mere denials of the testimony of the witnesses for the state, which amounted to convincing evidence of defendants' guilt. Moreover, had Logan testified it would have been developed that he had suffered a prior conviction of the sale of narcotics, a circumstance which would have been disastrous if not fatal to the defense. In brief, the record is devoid of any showing that defendants were not well represented at the trial or that they could have presented a meritorious or even a plausible defense. The claims they made of inadequate repre-

sensation were groundless, *People v. Zucaro*, 47 Cal.App.2d 414, 118 P.2d 40; *People v. Gourdin*, 108 Cal.App. 333, 291 P. 701; *People v. Summers*, 107 Cal.App. 250, 290 P. 464; *People v. Martin*, 128 Cal. App.2d 361, 275 P.2d 635; *People v. Ives*, 17 Cal.2d 459, 110 P.2d 408.

[8] There was direct evidence of acts of the defendants constituting the essential elements of the offenses charged—namely an unlawful agreement to procure for and sell a narcotic to a minor followed by the commission of the overt acts alleged. This was an unlawful conspiracy. § 182, Penal Code; *People v. Benenato*, 77 Cal.App.2d 350, 175 P.2d 296. There was ample evidence of a sale to a minor.

The record is devoid of error; defendants were accorded a fair trial.

The judgments and orders are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



137 Cal.App.2d 33

**Donald K. HUNTOON, Plaintiff and
Respondent,**
v.

Oscar HURLEY, Defendant and Appellant.
Civ. 21157.

District Court of Appeal, Second District,
Division 2, California.

Nov. 17, 1955.

Rehearing Denied Dec. 6, 1955.

Hearing Denied Jan. 5, 1956.

Employee brought consolidated actions against employer on a note and for an accounting to determine amount of salary due employee under agreement that employee was to receive salary equal to 50% of net profits resulting from operations of employer's appliance department. The Superior Court of Los Angeles County, Kurtz Kauffman, J., entered judgment for employee, and employer appealed. The Dis-

trict Court of Appeal, McComb, Acting P. J., held that where referee, after his appointment by court, held a hearing at which it was agreed by the parties that referee would go to employer's place of business and examine employer's books to start the accounting, and books examined by referee were employer's books, kept by employer's accountant, and were in the custody of employer, and were examined more than a year after they had been closed, employer could not thereafter claim that his own books did not accurately reflect the status of his business by hiring other accountants to examine the books.

Affirmed.

1. Trial ⇨398

Where court, in addition to general finding, makes specific finding as to particular fact, latter controls in case of inconsistency.

2. Account ⇨19

Where certain paragraph of complaint in accounting action alleged that defendant was obligated to pay plaintiff a sum in excess of \$14,784.25, and general finding was that allegations contained in that paragraph were true, but specific finding was that defendant was indebted to plaintiff in sum of \$8,965.96, the specific finding was controlling.

3. Appeal and Error ⇨1071(5)

Where alleged inconsistencies in trial court's findings on immaterial issues did not affect the judgment, they were required to be disregarded by District Court of Appeal on appeal.

4. Trial ⇨404(1)

Findings that none of the allegations contained in certain paragraphs was true, were not in the form of a "negative pregnant" but were specific findings of fact.

See publication Words and Phrases, for other judicial constructions and definitions of "Negative Pregnant".

5. Trial ⇨404(1)

A "negative pregnant" in a trial court's finding of fact is such a form of negative expression as may imply or carry with it an affirmative.

6. Account ⌘22

Where judgment in accounting action, tried without a jury, referred to findings of fact and conclusions of law and "interlocutory judgment of accounting" and the "report of the referee in such accounting," it was evident that trial court predicated its judgment on findings of fact, conclusions of law, and referee's report, which was approved as modified, and judgment was not erroneous on ground that it referred only to findings of fact and conclusions of law.

7. Account ⌘20(2)

Where record in action for accounting disclosed that referee made an accounting pursuant to agreement of parties and in accordance with construction placed on agreement by parties themselves when they approved the accounting, the referee's report was prepared in accordance with law and reflected the facts and constituted an accounting.

8. Account ⌘2, 20(1)

In action for an accounting, it was proper for the parties to enter into an agreement for an accounting and to construe the agreement by approving accounting made by referee.

9. Account ⌘20(1)

Where referee was not appointed in action for an accounting to make accounting pursuant to previous stipulation of the parties, but reference was made by trial court pursuant to his general authority to refer accounting matters to a referee, the accounting was not subject to provisions and rules set forth in the Business and Professions Code. West's Ann.Bus. & Prof.Code, § 1 et seq.

10. Account ⌘20(2)

Where referee, after his appointment by court in action for an accounting, held a hearing at which it was agreed by the parties that referee would go to defendant's place of business and examine defendant's books to start the accounting, and books examined by referee were defendant's books, kept by defendant's accountant and were in the custody of defendant, and were examined more than a year after they had been closed, defendant could not thereafter

claim that his own books did not accurately reflect the status of his business by hiring other accountants to examine the books.

11. Appeal and Error ⌘181

Where defendant failed to make objections in trial court, he waived right to urge them on appeal.

12. Appeal and Error ⌘1011(1)

Trial court's finding on conflicting evidence in action for an accounting was binding on appeal.

13. Account ⌘20(1)

Where record in action for an accounting disclosed that parties had held an accounting for sums due plaintiff prior to December 31, 1951, and had mutually accepted such accounting, court properly ordered an accounting for period subsequent to December 31, 1951, only.

14. Master and Servant ⌘71

Generally, where part or all of compensation of employee was based on profits, employee is entitled to receive interest on profits belonging to him and remaining in hands of employer after payment is due.

15. Interest ⌘18(1)

In action by employee against employer for an accounting to determine salary due employee under agreement that employee was to receive salary equal to 50% of net profits, trial court did not err in awarding employee interest on amount found to be due him.

16. Damages ⌘67

Every judgment awarding damages certain or capable of being made certain by calculation on a particular day may include interest from that day.

17. Judgment ⌘202

Where first action on note and second action for accounting to determine amount of salary due were ordered consolidated for trial, and complaint in second action referred to execution of note, and first case referred to "all matters and things hereinabove set forth," judgment included all issues raised in the two complaints and was conclusive as to such issues, the first action was not undecided and left dangling.

18. Judgment ⇨202**Trial** ⇨393(1)

Where two or more suits are ordered consolidated for trial, there should be one set of findings, conclusions of law, and one judgment.

19. Costs ⇨191

Where court, in action on note and for accounting to determine amount of salary, determined that a reference was necessary, and matter of payment of referee's fees was discussed with counsel for both parties, and court expressly reserved right to determine how costs should be allocated, and defendant raised no objection, and reference was not made pursuant to previous stipulation of the parties, and plaintiff was successful in the action, trial court did not err in requiring defendant to pay referee's fees.

20. Appeal and Error ⇨687

Where there was no record before District Court of Appeal of proceedings before referee, District Court of Appeal would not review accounting made by referee to the trial court.

21. Appeal and Error ⇨907(2)

In absence of a record of what transpired before referee, it is conclusively presumed on appeal that evidence supported referee's findings.

Clifford W. Twombly, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondent.

McCOMB, Acting Presiding Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for an accounting to determine the amount of salary due plaintiff from defendant, defendant appeals.

Facts:¹ On September 19, 1951, plaintiff and defendant entered into a written agreement whereby defendant employed plaintiff as manager of his appliance de-

partment for a period of one year commencing on October 1, 1951. Under the terms of the agreement plaintiff was to receive "a salary equal to 50% of the net profits resulting from the operations of the aforementioned appliance department" and "that the net profits shall be determined by a firm of independent Certified Public Accountants, on the basis of generally accepted accounting principles and shall in part be made up of the following: Sales: All sales of appliances, frozen foods and freezer supplies, less any sales discounts and allowances including 'food bonds,' etc." The agreement was terminated on September 13, 1952, by defendant.

Prior to plaintiff's employment and during the period with which we are concerned the books of defendant were kept under the supervision of certified public accountants. The employment agreement was prepared by one of those accountants and contained a list of the accounts to be used in determining plaintiff's earnings. In January, 1952, an accounting for the last quarter of 1951 was made pursuant to the agreement and was discussed by both parties with defendant's accountant and was approved.

In April of 1952, an accounting for the first quarter of the year was made showing that plaintiff was entitled to \$5,616.38, and in payment of this amount he received a check for \$500 and a note for \$5,000.

On August 1, 1952, plaintiff filed a complaint (No. 602376, in the Superior Court of Los Angeles County) against defendant for money due on the promissory note. During the course of the next 10 months plaintiff repeatedly demanded an accounting so that the amount of his wages could be determined, but none was forthcoming. July 14, 1953, he filed an action for accounting (Pasadena No. 4562, in the Superior Court of Los Angeles County). It was stipulated between the parties (a) that the action on the note and the action for accounting should be consolidated for trial, (b) that defendant's contention that the written agreement had been modified should

1. The evidence is viewed in the light most favorable to plaintiff (respondent) pursuant to the rules set forth in *Re Estate*

of Isenberg, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424.

first be determined by the trial court, and (c) that if it was deemed feasible or necessary, that the court might appoint an independent auditor, each side to pay an equal share of the costs.

The trial court determined on November 9, 1953, against defendant's contention that the written agreement had been modified and ordered a referee to take an accounting pursuant to the terms of the original agreement. Thereafter the referee held a hearing with the attorneys for the parties at which it was "decided upon between the parties that the referee would go to the place of business of Mr. Hurley (defendant) where the records were being kept and make an examination of the books to determine and start the accounting." After making his examination the referee held a further hearing with the parties and their respective attorneys. The items of the account were reviewed and various stipulations were made. There is no record of either hearing.

The referee filed his report and defendant filed objections to it. The objections were heard by the court, and after allowing some and denying others, the report of the referee was modified and a judgment entered in accordance with the findings of fact and conclusions of law, by which it was found that defendant was indebted to plaintiff in the sum of \$8,965.96.

Questions: First: Were there substantial findings of fact of the trial court which sustained the judgment?

Yes. There were these issues before the court: (1) whether or not the written contract of the parties had been modified by an executed oral agreement; (2) whether or not an accounting was necessary, and (3) the amount, if any, owing plaintiff for his services predicated upon the accounting.

Defendant does not question the sufficiency of the findings upon the first two issues. However, he contends that the findings are inconsistent in that in paragraph XVI of plaintiff's complaint it is alleged that defendant is obligated to pay or deliver to him a sum in excess of \$14,784.25, and that paragraph II of the findings of fact finds that the allegations contained in

paragraph XVI are true. This is the fact. However, defendant fails to note that the court specifically finds that "Defendant is indebted to the Plaintiff in the sum of \$8,965.96" from the 13th day of December, 1952.

[1,2] The rule is settled that where the court, in addition to a general finding such as the one first mentioned above, makes a specific finding as to a particular fact, as the latter finding, *supra*, the latter controls in the case of an inconsistency. (Howard v. Howard, 128 Cal.App.2d 180, 186 [9], 275 P.2d 88 (hearing denied by the Supreme Court).)

[3,4] Other objections of defendant to the findings are: (a) That there are inconsistent findings. An examination of the record discloses that the alleged inconsistencies are on immaterial issues and therefore must be disregarded by this court as they do not affect the judgment. (See cases cited in 7 West's Calif.Dig. (1951) Appeal and Error, § 1071(5)d, p. 578.) (b) That certain findings are in the form of negatives pregnant. The questioned findings read, "That none of the allegations contained in paragraphs I, II, III, IV, V, * * * is true." The finding was not in the form of a negative pregnant but was a specific finding of fact. The findings contained in Austin v. Harry E. Jones, Inc., 30 Cal.App.2d 362, 367, 86 P.2d 379, 382, read, "'That all the allegations * * * are not true'". Manifestly there is a vast difference between the two statements.

[5] A negative pregnant is such a form of negative expression as may imply or carry with it an affirmative. (Jordan v. Jordan, 58 Cal.App.2d 371, 374 [3], 135 P.2d 416.) The questioned findings in the present case do not fall within this rule.

Second: Was the judgment erroneous in that it referred only to the findings of fact and conclusions of law?

[6] *No.* The record discloses that the judgment explicitly refers to the findings of fact and conclusions of law and "interlocutory judgment of accounting" and "the report of the referee on such accounting." Hence it is evident that the trial court pred-

icated its judgment on the findings of fact, conclusions of law and the report of the referee which was approved as modified.

Third: *Was the report of the referee as modified prepared in accordance with law; does it reflect the facts and constitute an accounting?*

[7] *Yes.* The record discloses that the referee made an accounting pursuant to the agreement of the parties dated September 19, 1951, and in accordance with the construction placed upon the agreement by the parties themselves when they approved the accounting rendered for the period ending December 1, 1951.

[8] Such procedure was proper. The rule is clearly stated in *Sayre v. Western Bowl*, 76 Cal.App.2d 793, 798 [2], 174 P.2d 466, 468 (hearing denied by the Supreme Court), where Justice Kincaid, speaking for the court, accurately states the rule thus:

"The trial judge, in construing the terms of the contract between the parties and in applying the evidence thereto, was justified in invoking the well-settled rule that 'a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.' *Woodbine v. Van Horn*, 29 Cal.2d 95, 103, 173 P.2d 17, 22."

[9] The referee was not appointed to make an accounting pursuant to the previous stipulation of the parties, but the reference was made by the trial court pursuant to his general authority to refer accounting matters to a referee. Thus there is no merit in defendant's contention that the accounting is subject to the provisions and rules set forth in the Business and Professions Code. The record discloses that the referee, Mr. Saulque, after his appointment held a hearing at which it was agreed by the parties that he would go to defendant's place of business and examine defendant's books to "start the accounting;" and that he completed his examination by February 16, 1954; that the books ex-

amined by the referee were defendant's books, kept by defendant's accountant and were in the custody of defendant, and that the books were examined more than a year after they had been closed.

[10] Defendant may not now claim that his own books do not accurately reflect the status of his business by hiring, after the books have been examined by the referee, other accountants to examine the books. (*Olmo v. Olmo*, 56 Cal.App.2d 590, 595, 133 P.2d 866; *Freeman v. Donohoe*, 65 Cal.App. 65, 87 [5], 223 P. 431.) The agreement was prepared by defendant's accountant and specifically set forth the items to be considered in determining the "net profits" for the purpose of computing plaintiff's compensation, and the referee, as heretofore stated, computed such "net profits" upon the basis which the parties themselves had adopted in construing the meaning of the agreement.

[11] Likewise it is settled as to certain other objections which defendant now makes for the first time on appeal that since he failed to make any objection in the trial court thereto he has waived any right to urge error here. (Cf. *Rodehaver v. Mankel*, 16 Cal.App.2d 597, 605 [4], 61 P.2d 61.)

[12] Finally, the record discloses that the trial court, upon conflicting evidence, excepted the evidence of an impartial expert, the referee, in preference to the testimony of witnesses produced by defendant. This finding of the trial court, upon conflicting evidence, is, of course, binding upon appeal. The rule is succinctly stated by Mr. Presiding Justice Moore in *Ideal Packing Co. v. Brice*, 132 Cal.App.2d 582, 585, 282 P.2d 957, 960 (hearing denied by the Supreme Court), where in answering a similar contention, he says:

"That court having studied and appraised all evidence introduced, its findings are the ultimate of the truth of the issues investigated. Where a trial court accepts the proof adduced by one expert and rejects that presented by another with reference to the issues of the same controversy, its consideration of the contention involves

an inquiry into the credibility of the witnesses and the weight to be accorded their testimony which no appellate court will indulge."

Fourth: *Did the trial court err by improperly dividing the accounting period by holding that no accounting was necessary for the period prior to December 31, 1951, and confining the accounting period to the period subsequent thereto?*

[13] *No.* The record discloses that the parties had held an accounting for the sums due plaintiff prior to December 31, 1951, and had mutually accepted such accounting. Therefore the court properly ordered an accounting for the period subsequent to December 31, 1951, only.

Fifth: *Did the trial court err in awarding plaintiff interest on the amount found to be due him?*

[14,15] *No.* The general rule is that where part or all of an employee's compensation is based on profits, the employee is entitled to receive interest on profits belonging to him and remaining in the hands of the employer after payment is due. (56 C.J.S. (1948) Master and Servant, § 112, p. 548; *Kales v. Houghton*, 190 Cal. 294, 308, 212 P. 21.)

The following cases, relied on by defendant, are not here applicable. *California Lettuce Growers v. Union Sugar Co.*, Cal. App., 278 P.2d 106, is not applicable for the reason that a hearing has been granted by the Supreme Court. *Cox v. McLaughlin*, 76 Cal. 60, 18 P. 100, was a case where plaintiff's recovery was based on quantum meruit, and therefore the damages were unliquidated. *Lineman v. Schmid*, 32 Cal. 2d 204, 195 P.2d 408, was an action for breach of contract for the purchase of a commodity where damages were based on fluctuating market values and therefore the amount due was not readily or reasonably ascertainable.

[16] The correct rule is that every judgment awarding damages certain or capable of being made certain by calculation on a particular day may include interest from that day. (*Canavan v. College of Osteopathic Physicians and Surgeons*,

73 Cal.App.2d 511, 521 [14], 166 P.2d 878 (hearing denied by the Supreme Court).)

Sixth: *Was the consolidated case No. 602376 undecided and "left dangling?"*

[17,18] *No.* Where two or more suits, as in the instant case, are ordered consolidated for trial there should be one set of findings, conclusions of law and one judgment. (*Wolfson v. Beatty*, 118 Cal.App.2d 392, 398 [3], 257 P.2d 1017 (hearing denied by the Supreme Court).)

The complaint in case Pasadena No. C 4562, refers to the execution of the promissory note. Case No. 602376 refers to "all matters and things hereinabove set forth." The judgment included all of the issues raised in the two complaints and was conclusive as to such issues.

Seventh: *Did the trial court err in requiring defendant to pay the referee's fees?*

[19] *No.* When the court determined that a reference was necessary, the matter of payment of the referee's fees was discussed with counsel for both parties. The court expressly reserved the right to determine how the costs should be allocated, and defendant raised no objection. As previously stated the reference was not made pursuant to the previous stipulation of the parties that should it become necessary to appoint an "auditor" the costs should be divided between the parties. Such stipulation was in an effort to have the matter disposed of without the necessity of a trial and did not contemplate a reference.

Eighth: *Should this court review the accounting made by the referee to the trial court?*

[20,21] *No.* There is no record before us of the proceedings before the referee. Hence the rule is here applicable that in the absence of a record of what transpired before the referee it is conclusively presumed that the evidence supported the referee's findings. (*Rosati v. Heimann*, 126 Cal.App.2d 51, 54 [3], 271 P.2d 953; *Brodie v. Barnes*, 56 Cal.App.2d 315, 319 [1b], 132 P.2d 595.)

There is likewise no merit in defendant's contention that no evidence was taken on

the question of interest income before the trial court for the reason that in the absence of a record of what occurred before the referee, it is conclusively presumed that the referee's finding on the subject was supported by the evidence. Therefore the finding of the referee that interest is a proper item of income in this case is supported by the evidence.

Affirmed.

FOX, J., ASHBURN, J. pro tem., concur.

Hearing denied; McCOMB, J., not participating.



137 Cal.App.2d 87

MARKET STREET RAILWAY COMPANY,
a corporation, Plaintiff and Appellant,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION, a state agency, Defendant
and Respondent.

Civ. 16359.

District Court of Appeal, First District,
Division 1, California.

Nov. 18, 1955.

Action by street railway company to recover sales tax, interest and penalties. The Superior Court, City & County of San Francisco, Edward Molkenbuhr, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Raymond E. Peters, P. J., held that where Board of Equalization, at time street railway company sold its operating properties to city, had in effect a ruling that such bulk sales were not subject to sales tax, company was deemed, as a matter of law, to have changed its position in reliance upon this ruling, and state was estopped from collecting penalty and interest on sales tax unpaid on this sale, although Board's ruling was changed immediately after sale.

Judgment reversed with directions.

1. Limitation of Actions ☞6(4)

Where sales tax assessment was made before effective date of nonretroactive amendment to statute limiting actions for sales taxes, assessment was not affected by the amendment. Revenue and Taxation Code, § 6487.

2. Licenses ☞34

In action by street railway company to recover sales tax paid on sales made in connection with transfer of operative property to city and other liquidating transaction, evidence supported finding that sale had been result of voluntary and willing negotiations between parties.

3. Statutes ☞245

All reasonable doubts in interpretation of tax statutes must be resolved in favor of taxpayer.

4. Licenses ☞15.1(5)

Transactions whereby street railway company sold scrap metal, made sales for accommodation of employees, and sold rock from quarry operated by company were "retail sales" within statute defining retail sales for sales and use tax purposes. Revenue and Taxation Code, § 6007.

See publication Words and Phrases, for other judicial constructions and definitions of "Retail Sales".

5. Licenses ☞15.1(3)

Street railway company, in selling scrap material, in making sales for accommodation of employees, and in selling rock from quarry it operated was in "business" of making retail sales, within statute defining a "business" for sales and use tax purposes. Revenue and Taxation Code, § 6013.

See publication Words and Phrases, for other judicial constructions and definitions of "Business".

6. Licenses ☞15.1(5)

To be subject to sales tax, it is not necessary that sales be made with intention of making a profit, so long as sales result in gain, benefit or advantage. Revenue and Taxation Code, § 6013.

7. Licenses ☞15.1(3)

To constitute a "business" within statute defining a "business" for sales and use

tax purposes, seller must engage in more existing law. Revenue and Taxation Code, than one isolated sale. Revenue and Tax- § 6367.
ation Code, § 6013.

8. Licenses ⇨15.1(8)

"Retailer", within statute defining a re-
tailer for sales and use tax purposes, in-
cludes a seller whose main occupation is not
the making of retail sales, even if enterprise
is not commercial, and test is whether there
are sufficient sales of tangible personal
property sold to a buyer not for resale in
regular course of buyer's business. Rev-
enue and Taxation Code, § 6015.

See publication Words and Phrases,
for other judicial constructions and defi-
nitions of "Retailer".

9. Licenses ⇨15.1(8)

Street railway company which sold, in
900 several transactions, scrap metal and
rock from its quarry, and made accommoda-
tion sales for employees, was a "retailer"
within sales and use tax provision defining a
retailer. Revenue and Taxation Code, §
6015.

10. Licenses ⇨15.1(8)

Street railway company which made
sales of tangible personal property at retail
could be deemed a "retailer" for sales and
use tax purposes, even though, in respect to
its function as a service corporation, it was
a "consumer". Revenue and Taxation
Code, § 6015.

See publication Words and Phrases,
for other judicial constructions and defi-
nitions of "Consumer".

11. Taxation ⇨204(1)

Exemptions from taxation must be
found in tax statute.

12. Licenses ⇨15.1(5)

Transaction whereby street railway
company voluntarily sold its operating prop-
erties to city was subject to sales tax. Rev-
enue and Taxation Code, §§ 6007, 6013,
6015, 6051, 6052, 6091 to 6094.

13. Licenses ⇨8(2)

1947 amendment to sales and use tax
statute so as to exempt occasional sales of
tangible personal property effected a
change, and was not a mere codification of

14. Courts ⇨91(1)

District Court of Appeal was bound in
interpreting a state statute to follow the
rule laid down by state Supreme Court,
rather than interpretation of federal courts.

15. Estoppel ⇨62(1)

Ordinarily, a governmental agency may
not be estopped by conduct of its officers
and employees, but in a proper case equi-
table estoppel will run against government
where justice and right require.

16. Estoppel ⇨62(1)

As a general proposition, estoppel based
on reliance upon an erroneous construction
of statute by an administrative ruling will
not lie against government, particularly
in tax matters.

17. Licenses ⇨28

So far as the state is concerned, a buy-
er has no direct obligation for payment of
sales tax.

18. Estoppel ⇨62(2)

Where taxpayer is a mere collecting
agency, state may be estopped from impos-
ing tax by act of its employees, but it may
not so be estopped for taxes imposed on the
complaining taxpayer, although there may
be an estoppel as to penalty and interest.

19. Estoppel ⇨62(2)

Where street railway company made
taxable sales of tangible personal property,
and failed to report or pay tax thereon, that
Board of Equalization, after company sold
its business, changed a ruling so as to de-
clare such liquidation sales taxable did not
estop state from collecting tax on transac-
tions taking place prior to liquidation sale.

20. Estoppel ⇨62(2)

Where Board of Equalization, at time
street railway company sold its operating
properties to city, had in effect a ruling that
liquidation sales were not subject to sales
tax, company was deemed, as a matter of
law, to have changed its position in reliance
upon this ruling, and state was estopped
from collecting penalty and interest on tax

due on this sale, although Board's ruling was changed immediately after sale.

21. Estoppel Ⓒ62(2)

Where Board of Equalization, during course of street railway company's liquidation proceeding, reversed its previous ruling that liquidation sales were not subject to sales tax, state, although estopped from collecting penalties and interest on sales tax due on transactions prior to date company was informed of the change, was not estopped from collecting such penalties and interest on transactions subsequent to company's acquisition of knowledge.

Keith, Creede & Sedgwick, Frank J. Creede, John S. Howell, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State of California, James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Deputy Atty. Gen., Sho Sato, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

[1] Market Street Railway Company, hereafter referred to as Market, paid under protest, sales taxes, together with interest and penalty, assessed against it for the period August 1, 1933, to December 31, 1948, in the amount of \$111,359.36, and then brought this action to recover this payment.¹ During the trial it was stipulated that the taxes in part had been erroneously assessed against the sale of real property, and that, in any event, Market should recover \$21,325.39, with interest. Judgment in that sum was entered in favor of Market. From that judgment Market appeals, contending that no portion of the amount paid by it under protest should have been assessed.

1. No question of the statute of limitations is involved. Admittedly, Market failed to file a sales tax return between 1933 and 1948. Prior to 1951 it was the law that where the taxpayer failed to file a return the statute of limitations did not start to run until the assessment made by the tax authorities became final. *People v. West Publishing Co.*, 35 Cal.2d 80, 86, 216 P.2d 441. In 1951 this rule was

The State Board of Equalization found that between 1933 and 1948 Market, in some 900 transactions, had sold tangible personal property subject to the tax valued at \$2,987,434.38. Of this amount, \$2,891,578.83 represented the value of tangible personal property transferred by Market to San Francisco on September 29, 1944, when it sold its operative properties to the City. This is the major item involved on this appeal.

The facts are as follows: Market is a California corporation first organized in 1893. From then, in various corporate forms, until 5 p. m. on September 29, 1944, it was a public service corporation operating in San Francisco and San Mateo counties.

As early as 1912 it was the expressed desire of San Francisco to own and operate all of the street railways in the city. The Charter of 1932, in § 119, expresses this purpose in the following language: "It is the declared purpose and intention of the people of the city and county, when public interest and necessity demand, that public utilities shall be gradually acquired and ultimately owned by the city and county."

The efforts of the City to acquire Market became very direct in 1940. For four years thereafter the City tried to negotiate the purchase. In November of 1942, and again in April of 1943, charter amendments authorizing the purchase for \$7,950,000 were submitted to the voters and defeated. Finally on May 16, 1944, the voters approved the addition of Section 119.1 to the Charter providing for the purchase of Market's operative properties for \$7,500,000. Market and the City, on September 14, 1944, entered into a contract, approved by the Railroad Commission, to convey these properties to the City, and a deed was executed making the transfer effective

changed by an amendment to Section 6487 of the Revenue and Taxation Code. Stats.1951, p. 2638, Chapter 1007. Here the assessment was made in 1949 before the effective date of the non-retroactive amendment. Therefore, the assessment here involved is not affected by any statute of limitations, and Market does not contend to the contrary.

as of 5 p.m. September 29, 1944. At that moment Market ceased its operations and commenced winding up its affairs, liquidating the claims against it and disposing of its non-operative properties, both real and personal.

[2] The trial court found that the sale was "the result of voluntary and willing negotiations" between the parties. This finding is supported. Although the evidence shows that Market was apprehensive after 1932, when Section 119 of the Charter was enacted, about the possibility of eminent domain proceedings being instituted against it, and that such apprehension became more acute when Section 119.1 was enacted in 1944, the evidence also shows that beginning in 1942 the company was willing and desirous to negotiate a sale because of steadily declining revenues, increasing expenses, competition, poor financing and possible bankruptcy.

The trial court also found that for many years prior to October 1, 1944, there was in existence an interpretative ruling of the State Board of Equalization, number 63, which provided:

"The tax does not apply to any portion of the consideration paid in connection with the sale of an entire business; that is, equipment, fixtures, and so forth. * * *" But on October 1, 1944, two days after the effective date of the sale, the State Board revised Ruling 63 to read as follows: "The tax applies to that portion of the gross receipts from the sale of an entire business operated by a retailer that represents the fair retail value of the tangible personal property, such as show cases and office or delivery equipment, acquired for use rather than resale by the purchaser of the business. The tax does not apply, however, with respect to tangible personal property such as stock in trade, sold for the purpose of resale in the regular course of the purchaser's business."

The evidence shows that just prior to the sale the legal department of Market had made an analysis of the taxes involved in the transaction and had come to the conclusion that no sales tax was applicable. The trial court found that Market

relied upon Ruling 63 as it read prior to October 1, 1944 "but said ruling did not cause plaintiff to change its position or course of conduct with regard to said sale," and further that "reliance by plaintiff on interpretative Ruling 63 * * * did not result in any prejudice to plaintiff."

On December 29, 1944, Market became aware for the first time of the amendment to Ruling 63, and the chief counsel and vice president of the company advised it that since the ruling did not become effective until October 1, 1944, it was not applicable to the sale.

In 1948, some four years after the sale to the City, the State Board, in auditing the books of another company, discovered sales to that company by Market of some of its non-operative property. An audit of Market's books was then made. This audit disclosed that Market had never paid any sales taxes nor had it ever filed a return, although between 1933 and December of 1948 it made about 900 sales of tangible personal property not for resale by the buyer, totalling, not including the sale to the City, about \$100,000. Prior to the sale to the City these sales consisted mainly of sales of scrap material such as used or surplus ties and rails, sales made for the accommodation of employees, and several sales of rock from a rock quarry operated by Market. Prior to the sale to the City these sales amounted to 11/100 of 1% of the gross operating revenue of Market. After the sale of the operative properties to the City the sales were of nonoperative personalty. In the sale to the City the State Board determined that the tangible personal property involved was valued at \$2,891,578.83. Market contested some of the items on the ground that some of the articles were fixtures, and during trial the parties stipulated that Market should recover \$21,325.39 of the \$111,359.36 tax assessed against and paid by it. This amount was computed as follows:

Tax	\$ 75,065.54
Interest	28,787.27
Penalty	7,506.55
Total	<u>\$111,359.36</u>

The trial court determined that Market was a retailer, that all of the sales of tangible personal property not for resale were taxable, and entered judgment for Market in the stipulated amount of the overcharge—\$21,325.39. Market appeals.

The first basic question involved is whether the sale of all of the operating properties of Market, insofar as it involved a transfer of tangible personal property not for resale by the buyer, in September of 1944, was taxable under the Sales and Use Tax Law of this state. The parties discuss the problem from several standpoints, and quote from and rely upon authorities from many states, but the problem is basically one of interpreting the applicable California statutes.

The Sales and Use Tax Act is found in the Revenue and Taxation Code, §§ 6001 to 7176. As of September 29, 1944, the applicable sections read as follows:

Section 6051: "For the privilege of selling tangible personal property *at retail* a tax is hereby imposed *upon all retailers* at the rate of $2\frac{1}{2}$ percent of the gross receipts of any retailer from the sale of all tangible personal property *sold at retail* in this State * * *."

Section 6007: "A 'retail sale' or 'sale at retail' means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property."

Section 6013: "'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect."

Section 6015: "'Retailer' includes: (a) Every person engaged in the business of making sales *at retail* * * * of tangible personal property * * *."

Section 6052: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done."

[3] In the interpretation of those tax statutes Market correctly points out that all reasonable doubts must be resolved in favor of the taxpayer. *County of Los Angeles v. Jones*, 13 Cal.2d 554, 90 P.2d 802; *Barker Bros., Inc., v. City of Los Angeles*, 10 Cal.

2d 603, 76 P.2d 97. But there is no real doubt as to what the quoted statutes provide. Even interpreted most strictly against the state, they clearly make the transactions here involved "retail sales," and make Market a "retailer." Section 6007 defines a sale at retail as a "sale for any purpose other than resale in the regular course of business". Clearly, Market engaged in sales at retail to a buyer who purchased not for resale in the regular course of his business. The only way an ambiguity can be created in the quoted phrase is by interpreting the phrase "in the regular course of business" as referring to "sale," i. e., the seller, and not to "resale," i. e., the buyer. But the section neither grammatically nor reasonably so provides. Obviously, the words "in the regular course of business" refer to and limit the word "resale" rather than the word "sale."

If any support were needed for such an obvious construction it is to be found in the fact that the phrase "in the regular course of business" was added to Section 6007 in 1941 at the same time that Sections 6091 to 6094 were amended to explain the meaning of the phrase. In these other sections the context, without possibility of a doubt, demonstrates that the phrase refers to the buyer and not to the seller.

As might be expected, all of the California cases involving the general question have held that the sale to be taxable does not have to occur in the regular course of business of the seller. In *Bigsby v. Johnson*, 18 Cal.2d 860, 118 P.2d 289, the taxpayer owned and operated a printing establishment. His regular course of business was the sale of printed matter. He sold some printing equipment that had become obsolete. The Board held the transaction taxable, and the Supreme Court affirmed, rejecting the taxpayer's contention that the sale was casual, incidental, not in the regular course of business, and therefore not taxable. At page 862 of 18 Cal.2d, at page 290 of 118 P.2d the court stated: "The tax is imposed upon retailers for the privilege of doing a retail sales business * * *, and the measure of the tax is the gross receipts of any such retailer from the sale of 'all tangible personal property sold at

retail * * *. * * * *He can claim no exemption merely by virtue of the fact that the sale of used printing equipment was not the kind of retail sale ordinarily made by him.* * * * however forceful may be plaintiff's contention that this type of sale should be exempted from the operation of the statute, such arguments must be directed to the legislature rather than to the courts." (Italics added.)

Likewise, in *Northwestern Pac. R. Co. v. State Board of Equalization*, 21 Cal.2d 524, 133 P.2d 400, the Supreme Court, as one of the grounds of its opinion, held that casual sales of its rolling stock by the company were taxable.

[4] There can be no doubt, therefore, that the 900 separate transactions, including the sale to the City, were clearly "retail" sales.

Market next claims that it was not a "retailer" within the meaning of Section 6015 (a) which defines a "retailer" as "Every person engaged in the *business* of making sales at retail". In the preceding paragraphs it has been demonstrated that the sales here involved were at retail, so that the only question to be determined is whether Market was in the "business" of making such sales. Section 6013 defines "business" to include "any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect."

[5] The courts in interpreting this section leave no doubt that Market was in the "business" of making sales at retail.

In *Los Angeles City High School Dist. v. State Board of Equalization*, 71 Cal.App.2d 486, 163 P.2d 45, it was held that a school board was engaged in "business" as a "retailer" because it made two or three sales of used equipment quarterly. The court held, 71 Cal.App.2d at page 488, 163 P.2d at page 46: "* * * the term 'business' is not used in the commercial sense attributed to it by appellants but must be interpreted in the light of the statutory definition set

forth in the act." See also *People v. County of Imperial*, 76 Cal.App.2d 572, 173 P.2d 352; *City of Los Angeles v. Lewis*, 175 Cal. 777, 167 P. 390; *Marin Municipal Water Dist. v. Chenu*, 188 Cal. 734, 207 P. 251.

[6] It is not required that the sales be made with the intention of making a profit. Thus, in *Union League Club v. Johnson*, 13 Cal.2d 275, 115 P.2d 425, the sales from the operation of a dining room and bar were held taxable despite the fact that the vendor was a non-profit corporation and the activities were carried on at a loss. The criterion expressed in the statute is "gain, benefit, or advantage," not "profit."

[7] Undoubtedly the term "business" requires that the seller engage in more than one isolated sale. The number, scope, and character of the transfers must be considered. *Northwestern Pac. R. Co. v. State Board of Equalization*, 21 Cal.2d 524, 133 P.2d 400. In that case the Supreme Court held that the railroad was in "business" by virtue of one sale of 13 coaches in 1936, a single sale of 2 coaches and a baggage car in 1936, a sale of a truck and trailer, of 20 flat cars and a locomotive in 1937. The total sales approximated \$100,000. In the *Los Angeles City High School Dist. v. State Board of Equalization* case, 71 Cal.App.2d 486, 163 P.2d 45, the district's transfers were held taxable although they amounted to but two or three quarterly.

[8, 9] Thus, the term "retailer" includes a seller whose main occupation is not the making of retail sales. The enterprise does not even have to be a commercial one. The test is whether there are sufficient sales of tangible personal property sold to a buyer not for resale in the regular course of the buyer's business. In the instant case, from 1933 to 1944 Market made 900 retail sales which, not including the sale to the City, amounted to about \$100,000. Under the statute, as interpreted by the cases, this demonstrates the correctness of the finding that Market is a "retailer" within the meaning of the act.²

2. This construction of "doing business" is consistent with the interpretation of that phrase as it is used in other California

tax statutes. See *Hise v. McColgan*, 24 Cal.2d 147, particularly at page 150, 148 P.2d 616.

[10] Market contends that it, as a matter of law, could not be a retailer, because, as a service corporation, it was a "consumer" and not a "retailer." It is true that Ruling 1901 provides that persons "engaged in business of 'rendering service' are consumers not retailers of personal property which they use in rendering service. Hence they must pay tax on the property sold to them." But that ruling only applies to operations in connection with the company's service to the public. Obviously, a person or company can be either a consumer or a retailer, or can be both. As to tangible personal property that it sells, it is a retailer. This was what was necessarily held in *Northwestern Pac. R. Co. v. State Board of Equalization*, 21 Cal.2d 524, 133 P.2d 400. The rule of that case is here applicable.

Market next argues that regardless of the taxability of the transfers made before the sale to the City of the operating properties of the company, that sale was not taxable under the statute. This problem does not seem to have been passed on directly by the California courts.

The main thesis of Market is that liquidation sales were never intended to be within the scope of the act—that the sales tax is imposed on the privilege of *engaging* in business, not on the privilege of *going out* of business.

[11] The answer to this problem must be sought in the terms of the statute. Exemptions from taxation must be found in the statute. It is not for the courts to say that, although the statute applies to all sales of tangible personal property by a retailer, not sold for resale by the buyer, the statute does not apply to this sale by a retailer because of some undisclosed general "intent."

[12] In the instant case, the statute, as it read in 1944, clearly applied to the sale to the City of that portion of the operating assets consisting of tangible personal property. As already pointed out, Section 6051 then provided: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts

of any retailer from the sale of all tangible personal property sold at retail in this State." (Italics added.) We have already demonstrated that Market was a "retailer" within the meaning of the act, and that the sale here involved was a "retail sale." This being so, it follows that almost syllogistic infallibility that this sale was taxable.

As already mentioned, Market urges that, although a liquidation sale is not expressly exempted in the statute, it simply is not such a sale as was contemplated by the Legislature when it passed the statute, because, so it is claimed, the statute is aimed at taxing the privilege of operating, conducting and maintaining a retail business, and not on the "privilege" of going out of business. To sustain this view Market refers to several cases where the point was not involved and the courts used general language to the effect that the sales tax was imposed on the privilege of "operating," "maintaining," "engaging in an occupation or business," etc. See *Roth Drug, Inc., v. Johnson*, 13 Cal.App.2d 720, 57 P.2d 1022; *Western Lithograph Co. v. State Board of Equalization*, 11 Cal.2d 156, 78 P.2d 731, 117 A.L.R. 838; *National Ice & Cold Storage Co. of California v. Pacific Fruit Express Co.*, 11 Cal.2d 283, 79 P.2d 380. These cases did not consider the point here involved. Of course a holding that the tax is imposed on the "privilege" of "operating" a business is not a holding that a sale of an entire business is exempted from the act or, in fact, is not a holding that selling out a business is not "operating" a business during that transaction. That point was neither considered nor passed on by the cited cases. They are of no help in passing on the point here involved.

Market also refers to two Georgia cases where it was held that the Georgia sales tax statute did not apply to the sale of an entire business. *Novak v. Redwine*, 89 Ga. App. 755, 81 S.E.2d 222; *State v. Dyson*, 89 Ga.App. 791, 81 S.E.2d 217. The *Novak* case is the key case. Under a statute substantially similar to ours, that case undoubtedly held that a sale by a retail baker of his bakery business and store fixtures was not taxable, the court reasoning that

the baker was not "engaged in the business" of selling the bakery and the fixtures. [89 Ga.App. 755, 81 S.E.2d 225.] The rationale of the Georgia cases is that the Georgia statute was not intended to apply to casual and isolated sales by retailers, but only applied to sales made in the regular course of business. In other words, the Georgia court interpreted the term "business" in its common and accepted meaning. *Novak v. Redwine*, 81 S.E.2d 222, 223, 225. But this interpretation is directly contrary to that made by the Supreme Court in *Bigsby v. Johnson*, 18 Cal.2d 860, 863, 118 P.2d 289, and by the Appellate Court in *Los Angeles City High School Dist. v. State Board of Equalization*, 71 Cal.App.2d 486, 488, 163 P.2d 45. These cases have already been discussed. For this reason the Georgia cases are not persuasive.

[13] It should also be pointed out that in 1944 the California act had no exemption of casual and occasional sales. In 1947 Section 6367 was amended so as to exempt occasional sales of tangible personal property from the tax. Market contends that this was a mere codification of existing law. This is not so. Clearly, these changes were intended to and did modify the definition of "business" set forth in *Bigsby v. Johnson*, 18 Cal.2d 860, 118 P.2d 289, and *Los Angeles City High School Dist. v. State Board of Equalization*, 71 Cal.App.2d 486, 163 P.2d 45. Thus, the 1947 amendment to Section 6367 is of no aid to Market.

Market also places considerable reliance on two Federal Court of Appeal cases from the Ninth Circuit interpreting the California sales tax act and certain federal statutes. The cases are *State Board of Equalization of State of California v. Boteler*, 131 F.2d 386, and *California State Board of Equalization v. Goggin*, 191 F.2d 726, 27 A.L.R.2d 1211. In both cases the court ruled against the contention of the State Board of Equalization that a sales tax was applicable to a sale, by a trustee in bankruptcy, of an entire business as part of the process of liquidating that business. There is undoubtedly language in these cases that supports the contention of Market that the sales tax act is not applicable to the sale of a business. For example, in the *Goggin*

case, *supra*, at page 729 of 191 F.2d, the court stated: "The California Supreme Court has stated that the tax measure involved is an excise tax for the privilege of *conducting a retail business*, measured by the gross receipts from sales. [Citations.] * * * when the trustee in bankruptcy disposed of the trucks here involved * * * the sale was not made in the course of conducting a business but in the process of putting an end to a business." In the *Boteler* case, *supra*, the Federal Court applied the same rule to a liquidation by many sales, refusing to draw a distinction between a liquidation sale in bulk and one by the piece. This was held although the federal statute provides that trustees in bankruptcy conducting businesses are subject to all state taxes applicable to such businesses.

[14] It is possible that these cases can be explained on the theory that the federal courts there involved felt that a trustee in bankruptcy was not a retailer because of his status under federal law. It seems most likely that the federal courts construed the term "business" in the federal statute in its ordinary commercial sense and not as the California courts have construed the term in the sales tax act. At any rate, even if these cases are contrary to the views herein expressed, this court, as an intermediate state appellate court, is bound in interpreting a state statute to follow the rule laid down by the Supreme Court of this state.

It follows that both as a matter of interpretation and of binding precedent this sale was taxable.

A much more difficult question is presented by Market's contention that Ruling 63, upon which Market admittedly relied, estops the State Board from collecting the tax, penalties, and interest.

As already pointed out, the State Board in 1933 adopted Ruling 63, which provided that "The tax does not apply to any portion of the consideration paid in connection with the sale of an entire business; that is, equipment, fixtures, and so forth. * * *" This ruling remained in effect until October 1, 1944, two days after the consummation of

the sale. Ruling 63 was adopted pursuant to Section 7051, which permits the Board to "prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement" of the sales tax and to "prescribe the extent to which any ruling or regulation shall be applied without retroactive effect." There is no doubt but that Market, at the time of the sale, knew of this ruling and relied upon it. The trial court so found. It is also undisputed that the sale by Market to the City had great notoriety, that at least one member of the Board had actual knowledge of the sale at the time it was made, and that no tax was assessed by the Board until 1949, over four years after the sale had been consummated.

The trial court found that, although Market relied on Ruling 63 (the evidence showing that counsel for the company advised the company on the basis of the rule that no tax was payable), the "ruling did not cause plaintiff to change its position or course of conduct with regard to said sale." The court also found that "Reliance by plaintiff on interpretive Ruling 63 * * * did not result in any prejudice to plaintiff. It is untrue that plaintiff could have added sales tax reimbursement to the \$7,500,000 purchase price * * * The \$7,500,000 provided for in said charter amendment was the maximum amount the City and County of San Francisco was authorized to pay to plaintiff for its operative properties." The court also found that the delay in assessing the tax was not unreasonable and was caused by the failure of Market to file a sales tax return.

[15] It is the correctness of these findings and conclusions that is attacked by Market. It has frequently been stated that an estoppel will not be enforced against the government. Thus, in *Boren v. State Personnel Board*, 37 Cal.2d 634, at page 643, 234 P.2d 981, at page 986, where the Board agreed to employ the plaintiff in a definite geographical area, the Court concluded that "the authority of a public officer cannot be expanded by estoppel." See also *Whitcomb Hotel, Inc. v. California Employment Comm.*, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405. But the rule is not an

absolute one. As was said in *Baird v. City of Fresno*, 97 Cal.App.2d 336, 342, 217 P.2d 681, 685: "Ordinarily, a governmental agency may not be estopped by the conduct of its officers and employees but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it." See for a good discussion, *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. In *Cruise v. City and County of San Francisco*, 101 Cal.App.2d 558, 565, 225 P.2d 988, 993, this court had the following comment to make: "Whether an estoppel exists against the government should be tested generally by the same rules as those applicable to private persons. The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one."

[16] None of these cases involved reliance on an erroneous administrative tax ruling. The State Board cites many cases from this and other jurisdictions to the effect that an estoppel based on reliance upon an erroneous construction of the statute by an administrative ruling will not lie against the government, particularly in tax matters. As a general proposition this is sound law. Obviously, a tax administrator should not be permitted by an erroneous ruling to exempt a taxpayer from the obligation to pay taxes. But that is as far as the rule goes. The proper limitations on that rule were pointed out by this court in *La Societe Francaise, etc., v. California Employment Comm.*, 56 Cal.App.2d 534, 133 P.2d 47, in which a petition for hearing was unanimously denied. In that case the Societe deducted, under the terms of the California Unemployment Insurance Act, the prescribed contributions due from its employees, and allocated its own contributions to the payment of the tax. By a formal ruling of the tax agency it was ruled that the Societe, as a charitable institution, was not subject to the tax. The Societe then, in reliance on the ruling, refunded to the employees the amount that had been deducted from their salaries, and used the money it had allo-

cated for its share of the tax for other purposes. Two years later the tax agency reversed its ruling, this time ruling that organizations like the Societe were subject to the tax. The tax agency then sought to collect from the Societe the total tax imposed on both employer and employees, penalties and interest. It was held that, although no estoppel could apply to the portion of the tax directly due from the Societe, as to the portion of the tax due from the employees, and as to penalties and interest the state was estopped. There are several statements in that case that are applicable here. At page 552 of 56 Cal. App.2d, at page 56 of 133 P.2d this court stated:

"As to such part of the tax, the burden of which the act contemplates will be borne by the employees, and which the employer 'transmits' to the fund, we are of the view that the state may not belatedly hold the employer to payment where he has failed to pay, or to make the necessary deductions from his employees' wages, in reliance on an express ruling that he is not liable for the tax. As between the state and the employer, the state may not in good conscience thus place on the employer a burden which the act itself did not intend that he should bear. We are further of the view that the employer cannot be held to pay interest on contributions which were not paid when due solely in reliance on the official ruling of non-liability. On the other hand, the state should not lose its right to taxes which the employer should have paid from its own funds to discharge its own tax obligation * * * notwithstanding plaintiff failed to make payment when due in reliance on the erroneous ruling of non-liability."

As to that portion of the tax imposed directly on the Societe the court had the following to say, 56 Cal.App.2d at page 553, 133 P.2d at page 57: "It is the general rule that the government does not lose its revenues because of an erroneous ruling of an administrative official as to the meaning of a tax law. [Numerous citations.] An administrative regulation which is in conflict with the statute is invalid and the government is not bound thereby. [Citations.]

The duty of the tax officials is to collect taxes imposed by law. * * * it is generally no defense that taxes were not paid when due in reliance on an official ruling of non-liability. The taxpayer is deemed to act with knowledge that administrative officials cannot bind the government by their erroneous interpretation of tax statutes."

The court then went on to discuss the modern attitude of the courts in ameliorating the harsh rule that the government is not bound by the rulings of tax officials administering the tax laws, and then stated, 56 Cal.App.2d at page 555, 133 P.2d at page 57: "It is our view that in the present case a proper regard for the protection of the interests of the government in its revenues, with recognition also of a degree of responsibility on the part of the government to a taxpayer who has relied to his prejudice on an official ruling, is achieved by requiring the taxpayer to discharge that part of the tax burden which it was contemplated it should bear by the statute imposing the tax, while relieving it from liability for the employees' contributions and interest on delayed payments. The taxpayer will pay from its own funds as much as it would have paid originally but for the erroneous administrative ruling, but it will not pay more." See also *Libby, McNeill & Libby v. Wisconsin Department of Taxation*, 260 Wis. 551, 51 N.W.2d 796, relying heavily on the *La Societe Francaise* case and discussing that case at some length.

Market argues that the sales tax is very similar to the employee's contribution involved in the *La Societe Francaise* case, supra, in that the seller under the Sales Tax Act is empowered to pass the tax on to the consumer. Reliance is placed upon Section 6052 of the Sales Tax Act which provides that "The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done." See *Clary v. Basalt Rock Co.*, 99 Cal.App.2d 458, 222 P.2d 24.

[17] So far as the tax itself is concerned, it is fundamentally different from the tax involved in the *La Societe Francaise* case, supra. So far as the unemployment tax is concerned, the portion of the tax im-

posed on the employees is a tax payable by those employees, and the employer is a mere collection agency. But the sales tax is not a tax on the buyer, but a tax on the seller, imposed on the privilege of selling goods at retail. While the seller may pass the tax on to the buyer, the tax itself is imposed on the seller, and the payment of it is his primary obligation. The buyer has no direct obligation, so far as the state is concerned, for the payment of the tax. *Clary v. Basalt Rock Co.*, 99 Cal.App.2d 458, 222 P.2d 24. In the case of *Crane Co. v. Arizona State Tax Commission*, 63 Ariz. 426, 163 P.2d 656, 163 A.L.R. 261, the court was presented with this precise question. There, as here, a seller at retail failed to pass on the sales tax to the buyer in reliance upon an erroneous administrative regulation. The seller urged that the state was estopped, and cited the *La Societe Francaise* case. In discussing that case the court said, 163 P.2d at page 662: "In that case, the California court held that where the commission had informed the employer it was not subject to the unemployment insurance tax, and for that reason it collected no tax from its employees, the commission was estopped from collecting that portion of the tax which, under the law, the employer was required to collect from employees. The employer was merely a collecting agent for that part of the tax which the act contemplated should be borne by the employees. * * * Here [in reference to the Sales Tax] the appellant is in no sense the tax collector. It is the taxpayer. True, it has the right to pass on the taxes to the purchaser, but it is not under any statutory duty to do so."

[18] We agree with this reasoning. The general rule is that the state cannot be estopped because of acts of its employees from collecting the tax from the taxpayer. If the taxpayer is a mere collection agency the state may be estopped, but not where the tax is imposed on the complaining taxpayer. The public policy behind this rule is self-evident. That is this case. So far as the tax is concerned on the sale to the City, and the taxes on the transactions both before or after the sale, there can be no estoppel.

But this reasoning does not apply to the penalty and interest. Against those items, in a proper case, there can be an estoppel. The question is whether this is such a case.

The trial court held that it was not because, so the trial court found, the taxpayer did not change its position in reliance on the erroneous ruling. This reasoning is based on the fact that although Market admittedly knew of Ruling 63, relied upon it, and was advised by its counsel that no tax was payable, it suffered no detriment because it could not have passed the tax onto the City for the reason that it charged the City \$7,500,000, the full amount authorized by the voters, so that there was no money from which to pay an additional sum in taxes. It is also urged that Market failed to file a return and that this was the proximate cause for the imposition of penalty and interest.

[19] This problem, as to interest and penalties, must be divided into three parts: First, interest and penalties on sales made before September 29, 1944; interest and penalty on the sale of September 29, 1944; and interest and penalties on the sales in liquidation made between September 29, 1944, and December 31, 1948. So far as the sales made between 1933 and September 29, 1944, are concerned, a return should have been filed, the tax should have been paid, and there is no ground for an estoppel. Ruling 63 has no application, because that ruling only applied to a sale of an entire business. Therefore, the penalties and interest were properly assessed on the transactions.

[20] But a different situation exists as to the sale of September 29, 1944. Here the taxpayer was told by the State Board by Ruling 63 that the transaction was not taxable. It relied on that ruling. To say that it did not change its position on such reliance because the City could only pay \$7,500,000, and could not have paid the tax, is to engage in mere guesswork. Entering into the sale in the induced belief that the transaction was not taxable was a change of position as a matter of law. Would Market have entered into the sale had it known

that the transaction was taxable and that it would have to pay the tax? Could the City, from other funds, have legally paid the tax? If Market had known the tax was payable, would it have insisted on the City sponsoring some form of legislation to exempt the transaction from the tax? Would such legislation have passed? These questions, of course, cannot be answered. What Market would have done, had it known that the transaction was taxable, can never be known. The reason that it cannot be known is because the State Board, by its Ruling 63, made the answering of that question unnecessary and impossible. For the State Board now to say that the sale would have gone through anyway is to engage in conjecture and surmise. The very fact that Market did not pay the tax because it was told it did not have to, and so did not file a return and thus incurred the penalty and liability for interest, necessarily, and, as a matter of law, amounted to such a change of position as to raise the estoppel. The finding to the contrary is unsupported and against the law.

But, says the State Board, Market learned of the change in the ruling made on October 1, 1944, not later than December 29, 1944, and should then have known that the change was retroactive. The contention requires but scant consideration. The State Board would impose on Market the duty of knowing that original Ruling 63 was erroneous, that the October 1, 1944, ruling stated the law as it always existed, and was intended to be retroactive. After having entered into the sale on September 29, 1944, in reliance on Ruling 63 the taxpayer was under no duty in December of that year to review the law applicable to the completed sale.

[21] The knowledge gained on December 29, 1944, however, is of some significance. After the sale and up until December 31, 1948, Market engaged in several transfers of tangible personal property in the liquidation of its non-operative properties. Market is liable for the tax on these transactions. So far as penalties and interest are concerned, since these were liqui-

dation sales, penalties and interest on the sales made between September 29, 1944, and December 29, 1944, cannot be collected. The estoppel as to similar penalties and interest as to the sale itself applies equally to these transactions, and for the same reasons. But as to the sales after December 29, 1944 (the date Market became aware of the new ruling as to liquidation sales), and December 31, 1948, no reason for an estoppel exists. After knowledge of the new ruling there could not, as to future transactions, be any estoppel.

It is obvious that the judgment must be reversed to permit the somewhat complex accounting that will be required. The trial court is directed to take such an accounting in accordance with the views herein expressed. For the guidance of the trial court the following is a summary of such views:

1. Market is liable for the tax on all sales made by it of tangible personal property sold to buyers not for resale between August 1, 1933, and December 31, 1948. This includes the tax on the portion of the sale price to the City that represents the sale of tangible personal property.

2. Market is liable for penalties and interest on all sales of such property made by it between August 1, 1933, and September 29, 1944.

3. The State Board is estopped from collecting penalties and interest for failure to pay the tax on the sale to the City, and is also estopped from imposing penalties and interest for failure to pay the tax on liquidation sales of non-operative personal property made between September 29, 1944, and December 29, 1944.

4. Penalties and interest for failure to pay taxes on liquidation sales of personalty made between December 29, 1944, and December 31, 1948, are collectible by the state.

The judgment is reversed with directions to the trial court to take the accounting and enter its judgment in accordance with the views herein expressed.

BRAY and FRED B. WOOD, JJ., concur.

137 Cal.App.2d 403

Nora E. SCHMITT, Plaintiff and Appellant,
v.

**JOE MORTON LUMBER COMPANY and J.
E. Morton (herein sued as Joseph Mar-
tin), Defendants and Respondents.**
Civ. 8680.

District Court of Appeal, Third District,
California.

Nov. 30, 1955.

Breach of contract action, in which, upon defendants' failure to make an appearance, plaintiff had obtained a default judgment. The defendants moved to set aside the default and the default judgment, and the Superior Court, Humboldt County, Carl L. Christensen, Jr., J., entered an order setting them aside. The plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that where defendants' failure to make appearance was due to inadvertence of counsel, and counsel offered poor health and press of other business as excuse for his failure to file his clients' appearance in action, and defendants moved to set aside default and judgment less than month after service of summons, and about two weeks after default was taken, trial court did not abuse its discretion in granting the requested relief.

Order affirmed.

1. Appeal and Error ⇨957(1)

Motions for relief from default are addressed to the sound discretion of the trial court, and the exercise of that discretion, in the absence of a clear showing of abuse, will not be interfered with by an appellate tribunal. West's Ann.Code Civ.Proc. § 473.

2. Judgment ⇨143(14, 15)

Where defendants' failure to make appearance was due to inadvertence of counsel, and counsel offered poor health and press of other business as excuse for his failure to file his clients' appearance in action, and defendants moved to set aside default and judgment less than month after service of summons, and about two weeks

after default was taken, trial court did not abuse its discretion in granting requested relief. West's Ann.Code Civ.Proc. § 473.

Mathews & Traverse, Eureka, for appellant.

Blaine McGowan, Eureka, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order setting aside a default and a default judgment in an action brought to recover damages for breach of contract. Plaintiff appeals.

Appellant's complaint was filed on October 13, 1953. Summons was served upon defendants on January 8, 1954, but they failed to appear or answer within time. On January 21st a default was taken and judgment was entered in favor of plaintiff. Notice of motion to set aside the default and the judgment was filed February 5th. The supporting affidavits contained the following averments: Prior to January 8th respondents engaged an attorney to represent them in any litigation which might arise from the matters upon which the present suit is based and, therefore, when on January 8th summons was served they left the copies of complaint and summons with the secretary of respondents' attorney who assured them the matter would receive the attorney's attention. However, at that time the attorney was absent from his office upon the advice of his physician. He returned to work on January 12th and was then apprised of the pending action and of the deposit of the papers in his office by respondents. He failed to make a timely appearance. His excuse was that due to poor health and the pressure of other business he inadvertently let the time for pleading elapse. He was then spending a limited amount of time at his office because his doctor had advised a curtailment of his activities due to a coronary disturbance he had recently suffered and an attack of intestinal influenza which left him weak and subject to severe coughing spells and nausea. He urged his condition upon the trial court as his excuse for inadvertently failing to file his clients' appearance in the action.

[1, 2] It is well settled that motions for relief from default under the remedial provisions of Section 473 of the Code of Civil Procedure are addressed to the sound discretion of the trial court and the exercise of that discretion, in the absence of a clear showing of abuse, will not be interfered with by an appellate tribunal. *McNeil v. Blumenthal*, 11 Cal.2d 566, 81 P.2d 566. In the cited case the facts shown in excuse of default had been accepted by the trial court as justifying relief. On motion to either dismiss the appeal as frivolous or affirm the order the Supreme Court elected to affirm the order. We feel a similar factual situation is shown by the record here.

The order appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



137 Cal.App.2d 148

DAVIS LUMBER COMPANY, a California Corporation, Plaintiff and Appellant,

v.

Bruce E. HUBBELL, Sr., Defendant and Respondent.

R. W. SCHMITZ, Tes Glammugnani, and Davis Lumber Company, a California Corporation, Plaintiffs and Appellants,

v.

Walter W. SADLER and Julia D. Sadler, his wife, Defendants and Respondents.

Civ. 8691, 8692.

District Court of Appeal, Third District, California.

Nov. 18, 1955.

'Appeals from orders of the Superior Court, Yolo County, C. C. McDonald, J., granting motions by defendants in two actions to strike costs after judgments for plaintiffs. The District Court of Appeal, McMurray, J. pro tem., held that defend-

ants, by waiting 20 and 29 days, respectively, after receipt of memoranda of plaintiffs' costs, before filing notices of motions, waived right to object to plaintiffs' filing of cost bills after statutory time therefor.

Orders reversed.

1. Costs ⇐199

The statutory provisions specifying times for filing cost bill and taxing costs are mandatory. West's Ann.Code Civ.Proc. § 1033.

2. Costs ⇐206

A party neglecting to apply to court within statutory time for taxation of costs awarded against him is deemed to have assented to correctness and lawfulness of items in verified memorandum of costs filed by adverse party and total amount of such items, on entry thereof in judgment by court clerk, is of same force and effect as any other part of judgment, so that party subject to payment of costs, being entitled to waive all objections to claim therefor, may limit his objections to grounds specified in his motion to tax costs. West's Ann. Code Civ.Proc. § 1033.

3. Costs ⇐199, 206

A party failing to file and serve memorandum of costs within time prescribed by statute is conclusively deemed to have waived any costs accruing in his favor as against timely motion by adverse party to tax costs, but if memorandum is filed and served in due form within time prescribed, adverse party, failing to file or notice such a motion within specified time, is conclusively deemed to have waived all objections to memorandum. West's Ann.Code Civ.Proc. § 1033.

4. Costs ⇐206

A court clerk owes no duty to determine regularity of filing of cost bill, but burden of attacking it rests on party who will have to pay costs, and if he fails to move to tax costs within time allowed by statute, he is conclusively presumed to have waived irregularity in filing of bill. West's Ann.Code Civ.Proc. § 1033.

5. Costs $\Rightarrow$ 199

Since time to file cost bill may be extended by court and relief may be given under statute, if bill is not filed within time required by statute, such requirement is not jurisdictional, so that failure to file bill within time limit can be attacked only by motion to tax or strike costs within statutory time. West's Ann.Code Civ.Proc. §§ 473, 1033, 1054.

6. Costs $\Rightarrow$ 206

Defendants, waiting 20 and 29 days, respectively, after receiving of plaintiffs' memoranda of costs before filing notices of motions to strike costs, waived right to object to filing of cost bills after statutory time therefor. West's Ann.Code Civ.Proc. § 1033.

Robert M. Cole, Davis, for appellants.

Douglas C. Busath, Sacramento, for respondents.

McMURRAY, Justice pro tem.

The above two actions are consolidated by stipulation for the purpose of appeal as both involve the propriety of orders granting motions to strike costs after judgments obtained by plaintiffs in the trial court. These appeals are presented on agreed statements under Rule 6 of the Rules on Appeal.

The agreed statements define the issue here as:

"If a prevailing party files his cost bill late, is the [right to object to such] lateness of filing waived by the losing party if the losing party does not file an appropriate objection within five days after receiving the cost bill?"

[1,2] The case of San Francisco Unified School District v. Board of National Missions, 129 Cal.App.2d 236, 276 P.2d 829, is apposite here and requires that appellants' position be sustained. It is said therein, 129 Cal.App.2d at pages 241-243, 276 P.2d at pages 832-833:

"* * * Then, some 26 days after service of the cost bill plaintiff moved to strike the whole cost bill on the

ground that it was not filed within the time prescribed by law. * * * while it is true that the order from which the appeal here is taken is not, strictly speaking, based on a motion to tax costs, but is founded on a motion to strike the cost bill from the files, yet, in its general purpose and effect, it amounts to the same thing. In fact, the application upon which the order appealed from herein is based has been treated as amounting to the same proceeding as a motion to tax or retax costs.' Markart v. Zeimer, 74 Cal.App. 152, 156, 239 P. 856, 857. The court below denied both motions. Plaintiff appealed apparently only from the order denying the motion to strike. This raises the question of whether a motion to strike a cost bill will lie after the expiration of the time specified in section 1033. It has been held that the section is mandatory as to the time to file the cost bill. Coast Electric Service, Inc., v. Jensen, 111 Cal.App. 124, 295 P. 346. It would seem that if that requirement in section 1033 is mandatory, the requirement in the same section as to the time to tax would likewise be mandatory. In Mojave & B. R. Co. v. Cuddeback, 28 Cal.App. 439, at page 441, 152 P. 943, at page 944, the court said concerning a motion to tax costs under section 1033: 'If, however, the notice of motion be not given within the time specified therefor, the clerk must, upon the expiration thereof, make the entry in accordance with the memorandum of costs filed. * * * Thus, if a party to an action against whom cost is awarded neglects, within the time specified in section 1033, to apply to the court to have the same taxed, he is deemed to have assented to the correctness and lawfulness of the items as claimed in the verified memorandum of costs as filed, the total of which, upon being entered in the judgment by the clerk in accordance with his duty, is of the same force and effect as any other part of the judgment. This being true, and since the party subject to the payment of cost may

waive any and all objections to the claim for cost, it follows, we think, that he may limit his objections to such grounds *only* as he may specify in his motion as the reasons for asking the intervention of the court in taxing the cost.'

[3, 4] "In *Griffith v. Welbanks & Co.*, 26 Cal.App. 477, at page 480, 147 P. 986, at page 988, the court said: 'It follows that if the one party fails, within the time prescribed, to file *and* serve his memorandum of costs, then he is to be conclusively deemed to have waived the costs, if any, accruing in his favor. And if, the memorandum having been in due form filed and served within the time prescribed, the adverse party fails, within the specified time, to file or notice a motion to have the costs taxed, he is conclusively deemed to have waived any and all objections thereto.'

"Having in mind that *Mojave & B. R. Co. v. Cuddeback*, supra, 28 Cal.App. 439, 152 P. 943, 944, held that by failing to move to tax within time the party subject to the payment of costs is deemed to have waived 'any and all objections to the claim for cost,' and that it is the duty of the clerk in such event to make entry of the costs in the judgment, it would follow that the language in *Griffith v. Welbanks & Co.*, supra, 26 Cal.App. 477, 147 P. 986, 988, to the effect that the party failing to file his cost bill within time 'is conclusively deemed to have waived' his costs, means as against a motion to tax filed within time only. When a cost bill is filed it is not the duty of the clerk to determine the regularity of its filing. The burden of attacking it rests upon the party who will have to pay the costs, and if he fails to move within the time allowed he is 'conclusively' presumed to have waived such irregularity.

[5] "It must be remembered that under section 1054 the court may extend the time to file a cost bill, *Coast*

Electric Service, Inc., v. Jensen, supra, 111 Cal.App. 124, 126, 295 P. 346, and that where the bill is not filed in time relief may be given, in a proper case, under section 473, Code of Civil Procedure. Therefore, even though on motion made within due time, the late cost bill, in the absence of relief given under section 473, may be stricken, see *Dow v. Ross*, 90 Cal. 562, 27 P. 409; *Coast Electric Service, Inc., v. Jensen*, supra, 111 Cal.App. 124, 295 P. 346, the requirement that the cost bill be filed within five days is not jurisdictional. It not being jurisdictional, the failure to file within the time limit can only be attacked as prescribed by law, which is by a motion to tax (or strike) within the period prescribed by section 1033. Such motion not having been filed within that time and no relief having been sought under section 473, the trial court properly refused to strike the cost bill."

[6] In the instant cases it appears from the statements that respondents waited 20 days and 29 days respectively after receipt of the memorandum of costs before filing the notices of motion to strike in these two actions. Other than that the above quoted language is completely in point.

Although the parties have agreed that the lateness of filing objections to a late cost bill is the only question involved, it appears from the agreed statements that in one case the notice of entry of judgment was filed on March 10, 1954, and the memorandum of costs was served and filed on the same day and that in the other case notice of entry of judgment was filed on April 2, 1954, and the memorandum of costs was served and filed the same day.

Under such a chronology it is difficult to understand the appellants' concession that the cost bills were not filed in time.

There is reference in one of appellants' briefs to the case of *Dow v. Ross*, 90 Cal. 562, 27 P. 409, as authority for the proposition that *actual* notice of the decision starts the five-day period for filing a cost bill. That case, decided in 1891, dealt with Code of Civil Procedure Section 1033 as it

then read and was in accord with the provisions then contained in that section. Those provisions have been changed and at the time here involved provided that the five-day period should commence to run "after notice of the entry of the judgment, * * *"

In *Fisher v. Eckert*, 94 Cal.App.2d 890, at page 894, 212 P.2d 64, at page 67, the court, in considering an argument that knowledge of the decision was tantamount to notice of entry of judgment, said:

"Since the dismissal became a judgment and was entered in the clerk's register on October 20, the next question is whether defendants had *notice of such entry*, within the meaning of section 1033, supra. It is plaintiffs' argument that the presence of counsel for defendants in the court and under the circumstances related was sufficient notice of such entry. Defendants' counsel argues otherwise and maintains that defendants never did have notice of the entry of the dismissal in the clerk's register. It is true that written notice of such entry is not required where there is actual notice of such entry. *Dow v. Ross*, 90 Cal. 562, 27 P. 409; *Mullally v. Irish-American Benevolent Society*, 69 Cal. 559, 11 P. 215; *O'Neil v. Donahue*, 57 Cal. 226.

"It is clear from the proceedings had that defendants did have actual notice that plaintiffs had filed with the clerk a dismissal of the action and that the trial court acted upon such dismissal by excusing the jury from further attendance. However, there is no showing that the clerk at that time had entered such dismissal on his register. In fact, the entry of such dismissal on the register could have been delayed for several days without defendants' knowledge and the time for filing such cost bill would not have run until defendants had *notices of such entry*. *Hauptman v. Heebner*, 34 Cal.App.2d 600, 94 P.2d 48; *King v. Superior Court*, supra, 12 Cal.App.2d [501] at page 508, 56 P.2d 268. It appears that defendants did not have notice of the entry of the

dismissal on the clerk's register in the instant action and the time for filing such cost bill would not commence to run until that occurred. The cost bill was therefore filed within time. The order striking same was erroneous."

In accord with the foregoing authorities the orders appealed from are reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



137 Cal.App.2d 73

Fred CONRAD, an individual doing business under the fictitious name of **Fred Conrad Company**, Plaintiff and Appellant,

v.

Charles P. THOMPSON and Audrey W. Thompson, Defendants and Respondents.

Civ. 5072.

District Court of Appeal, Fourth District,
California.

Nov. 17, 1955.

Real estate broker's action for breach of contract. The contract was one for installment sale of land by a vendor to the defendant vendees, and provided for the subdivision and improvement of the land and sale of the lots by vendees and for exclusive listing of the lots with the plaintiff broker at a specified commission. The Superior Court, Riverside County, Russel S. Waite, J., rendered judgment for defendant vendees, and the plaintiff realtor appealed. The District Court of Appeal, Barnard, P. J., held that the statute authorizing rescission of a contract for failure of consideration through fault of the person as to whom one rescinds was applicable as against a third party beneficiary to a contract and authorized rescission as against such third

party beneficiary where the consideration promised by him failed.

Affirmed.

1. Contracts ⇨171(1)

Whether a contract is severable or entire, from standpoint of rescission, depends largely on intention of parties and object of contract. West's Ann.Civ.Code, § 1689.

2. Brokers ⇨10

Where contract for installment sale of land to be subdivided and improved provided that third party realtor was to have exclusive handling of sale of the lots, and provided for his commissions thereon, the listing was severable from the sale portion of contract, and vendor's concurrence was not necessary to rescission of such portion of contract by vendees, nor was it necessary that the vendees repudiate sale portion of contract to rescind the listing. West's Ann.Civ.Code, § 1689.

3. Contracts ⇨273

As general rule, one must rescind all of his contract and may not retain rights under it which he deems desirable to have and repudiate the remainder of its provisions, but there are certain exceptions where circumstances justify rescission only as to particular matters or particular parties involved in entire transaction. West's Ann.Civ.Code, § 1689.

4. Contracts ⇨187(1)

Where contract for benefit of third party exists, such party is subject to ordinary rule governing a party to a contract. West's Ann.Civ.Code, § 1689.

5. Contracts ⇨260

Statute authorizing rescission of contract for failure of consideration through fault of person as to whom one rescinds was applicable as against third party beneficiary to contract and authorized rescission as against him where consideration promised by him failed. West's Ann.Civ.Code, § 1689.

6. Brokers ⇨10

Where contract for installment sale of land to be subdivided into lots and improved and sold provided for exclusive listing of

the lots with certain realtor with specified commission to be realtor, and realtor was not ready, willing and able to perform as contemplated by such contract and failed to invest \$5,000 in the project according to his oral promise to vendees, vendees could rescind that portion of contract in favor of realtor. West's Ann.Civ.Code, § 1689.

7. Brokers ⇨11

In real estate broker's action arising out of vendees' service of notice upon him of termination of listing agreement contained in contract between a vendor and vendees providing for sale of land to be subdivided and improved by vendees and for exclusive handling of the improved lot sales by the broker at specified commission, evidence sustained trial court's finding that broker was not ready, willing and able to perform his duty as contemplated by the contract. West's Ann.Civ.Code, § 1689.

Best, Best & Krieger, Enos C. Reid, Riverside, for appellant.

Harmon C. Brown, Riverside, for respondents.

BARNARD, Presiding Justice.

The defendants purchased ten acres of land from one Gilmore under a contract dated February 1, 1952. The plaintiff acted as broker and was paid a commission by Gilmore. This contract recited that Thompson desired to purchase this property for the purpose of subdividing and erecting dwellings thereon. It provided for a price of \$18,000, with a down payment of \$5,000, and an escrow; that the seller should receive \$300 from the sale of each lot to apply on the purchase price; and that if any balance remained after two years it should be payable in monthly payments of \$50, and secured by a trust deed on the remaining lots. This agreement also contained a paragraph providing that Fred Conrad "shall at all times have the exclusive handling of said property in regard to the sale of all lots and to include all improvements placed thereon"; that "the provision in this paragraph shall be in lieu of any other agreement with the said Fred

Conrad"; and that "Charles P. Thompson agrees to pay Fred Conrad a commission of \$200 per house and lot as commission for sale of each house and lot and no more."

On March 3, 1952, the defendant served written notice on the plaintiff that his agency for the handling or sale of this property was thereby terminated. The defendants, through a title company, took the necessary proceedings before the Riverside Planning Commission and the State Real Estate Commissioner to subdivide the property and to permit sales of lots therein to be made. The final report of the Real Estate Commissioner was dated May 19, 1952. Thereafter, the defendants proceeded to build homes and sell the lots in this subdivision.

The plaintiff later brought this action, relying on the paragraph above quoted as constituting a contract for his benefit. An amended complaint, filed on January 9, 1953, alleged that this land had been subdivided and 50 houses and lots had been sold; that the plaintiff was at all times ready, willing and able to perform his duty with respect to an exclusive handling of the sale of houses and lots as contemplated in the contract; that the defendants had wrongfully refused to permit him to sell said houses and lots, and wrongfully prevented him from performing; and that he had been damaged in the sum of \$10,000. The answer denied the material allegations of the complaint, and alleged as a further defense that in consideration of being thus named in this contract as exclusive agent for the sale of these lots, the plaintiff verbally agreed with the defendants that he would invest the sum of \$5,000 and become a limited partner in this venture; that the plaintiff failed and refused to invest \$5,000 or any part thereof in said project; and that on March 3, 1952, his agency for the handling or sale of said property was terminated by the defendants.

After a trial, the court found that the defendants proceeded to subdivide said property into 50 lots, upon which houses were erected; that all 50 of said houses and lots were sold; that it is not true that the plaintiff has at all times been ready, willing and able to perform the duty of exclusive han-

dling of said property, and handling the sale of said houses and lots as contemplated in the contract; that it is not true that the defendants have wrongfully refused to permit the plaintiff to sell said houses and lots, or have wrongfully prevented him from performing; that it is true that in consideration of being named as the real estate broker for the sale of the lots and property described in this contract the plaintiff verbally agreed with the defendants that he would invest the sum of \$5,000, and become a limited partner in this project; that the plaintiff failed and refused to invest \$5,000, or any part thereof, in said project; that on March 3, 1952, his agency for handling or selling said property was terminated by the defendants; and that it is not true that the sum of \$10,000, or any amount, is due to the plaintiff. Judgment was entered in favor of the defendants, and the plaintiff has appealed.

The appellant contends that the court should have found that a contract for his benefit as a third party existed in this case; that there was no evidence showing that he was not at all times ready, willing and able to perform his duty thereunder; and that the court should have found, as a matter of law, that there was no effective rescission "of the third party contract." With respect to the matter of rescission, it is argued that a rescission could only be effected by the action of both the seller and the buyer named in the contract; that the attempted rescission or revocation was made by the buyer alone, and no such attempt was made by the seller, Gilmore; that the contract could not be rescinded or revoked after the third party beneficiary had acted upon the contract which was made for his benefit; and that the appellant, prior to March 3, 1952, had done certain things in the nature of preliminary work looking to the subdivision of the property, and had talked to many persons who might become potential buyers.

[1-3] The paragraph upon which appellant relies rather clearly appears to relate to a matter which is separate and apart from the purpose and object of the purchase and sale contract, of which it was a part. That

paragraph had nothing to do with the contract of sale itself, which was the real object of the contract. While the contract provided for the subdivision of the property and the sale of individual lots, the seller had no interest in the arrangements made by the buyer for the sale of such lots. This is indicated by the terms of the contract itself and confirmed by the seller's testimony at the trial. The paragraph itself states that it shall be "in lieu of" any other agreement with the appellant. The only reasonable interpretation is that this provision was intended as a substitute for, and to avoid the necessity of, any other writing which would otherwise be required for the collection of a broker's commission. It was nothing more than such a written memorandum or listing, which was severable or divisible from the purchase and sale agreement entered into by the other parties. Whether a contract is severable or entire depends largely on the intention of the parties and the object of the contract. *Sweet v. Watson's Nursery*, 23 Cal.App.2d 379, 73 P.2d 284. It sufficiently appears here that this portion of the contract was severable from the remainder.

Having no interest in this severable portion of the contract of purchase and sale the seller had no interest in the rescission or termination of that part of the contract, and his participation or concurrence in the notice of rescission given by the respondents was not essential in order to terminate that part of the contract. Nor was it essential that the respondents rescind or terminate the entire contract of sale or give up their rights as purchasers of the property. As was said in *Simmons v. California Institute of Technology*, 34 Cal.2d 264, 209 P.2d 581, 592:

"Although the general rule undoubtedly is that one must rescind all of his contract and may not retain rights under it which he deems desirable to have and repudiate the remainder of its provisions, there are certain exceptions where the circumstances justify a rescission only as to particular matters

or particular parties involved in an entire transaction."

[4-7] There was some evidence that the appellant lost his best salesmen, and did not have the organization required for this work. The evidence also shows that nothing material was done by him toward performing his agreement before the contract was terminated by the respondents. The appellant's testimony in this regard was vague and unsatisfactory, and related to claimed assistance in subdividing the property. He had nothing to do with this, under the contract, and the respondents paid a title company to handle that matter for them. He could not legally sell any lots until after May 19, 1952, and he testified that he did nothing after the notice of termination was given him on March 3.

The court's findings of a failure of consideration, which were fully supported by the evidence, furnish a further reason why the appellant was not entitled to recover. Where a contract for the benefit of a third party exists, such a party is subject to the ordinary rules governing a party to a contract. Section 1689 of the Civil Code provides that a party to a contract may rescind the same "If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part; * * *." Three witnesses testified that before the contract of sale was entered into the respondents told the appellant that they would not give him an exclusive selling agency unless he invested \$5,000 in the project, and there was ample evidence that he agreed to do this and later failed and refused to do so. No contention was made at the trial, or is made here, that the appellant invested any money in this subdivision or had the willingness or ability to do so. The court's finding that the appellant was not ready, willing and able to perform his duty as contemplated in the contract is sustained by the evidence.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

137 Cal.App.2d 197

The PEOPLE of the State of California,
Respondent,

v.

Joseph Godfrey MOORE, Appellant.

Cr. 3122.

District Court of Appeal, First District,
Division 1, California.

Nov. 22, 1955.

Hearing Denied Dec. 21, 1955.

Defendant was convicted of child molestation. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment and defendant appealed. The District Court of Appeal, Peters, P. J., held that evidence supported implied finding that defendant committed the overt acts with the required abnormal sexual motivation.

Affirmed.

1. Vagrancy ⇨

The purpose of vagrancy child molestation statute is protection of children from interference by sexual offenders and the apprehension, segregation and punishment of the latter. Pen.Code, § 647a(1).

2. Criminal Law ⇨13

The meaning of words "to annoy or molest" in vagrancy child molestation statute are sufficiently definite and certain to advise public generally what acts and conduct are prohibited. Pen.Code, § 647a(1).

3. Vagrancy ⇨1

The words "annoy" and "molest" in vagrancy child molestation statute connote abnormal sexual motivation on part of offender. Pen.Code, § 647a(1).

See publication Words and Phrases, for other judicial constructions and definitions of "Annoy" and "Molest".

4. Vagrancy ⇨1

The vagrancy child molestation statute must be construed reasonably as setting up an objective test for annoyance or molestation. Pen.Code, § 647a(1).

5. Criminal Law ⇨1144(13), 1159(2)

On appeal the appellate court must view the evidence in the light most favorable to the prosecution, and if there is any sub-

stantial evidence or reasonable inferences from that evidence to support judgment the appellate court must affirm.

6. Criminal Law ⇨1128(4)

Where defendant elected not to present his side of the story to jury at trial, he could not on appeal get his story before the appellate court.

7. Criminal Law ⇨1128(2)

Facts dehors the record could not be considered to determine whether prior conviction was invalid in that the arrest there involved was illegal.

8. Vagrancy ⇨3

In vagrancy prosecution for molesting child, fact that the child did not testify that she was "annoyed" or "molested" was not fatal to the prosecution's case which could be based on other testimony disclosing that accused had the required intent. Pen.Code, § 647a(1).

9. Vagrancy ⇨3

In vagrancy prosecution for molesting child, evidence supported implied finding that defendant committed the overt acts with the required abnormal sexual motivation. Pen.Code, § 647a(1).

10. Criminal Law ⇨1159(4)

Minor discrepancies which are normal and do not raise suspicion that testimony of any witness is fabricated or inherently improbable are matters for jury to consider and are not relevant to the appeal.

11. Criminal Law ⇨721(1)

Where defendant failed to take the stand, prosecutor had a right to comment on the failure and to state that since defendant had not contradicted prosecution's witnesses such testimony stood uncontradicted and that jury could infer that such witnesses told the truth.

12. Criminal Law ⇨713

Statements made by prosecuting attorney at time of sexual psychopath hearing after defendant was convicted by jury of vagrancy molestation offense against eight year old girl could not have affected jury in its consideration of the molestation charge and could not have affected the judge since he found defendant was not a sexual psy-

chopath. Pen.Code, § 647a(1); Welfare and Institutions Code, § 5501.

13. Criminal Law ☞655(7), 722½

It is error for prosecution or court to refer to prior conviction, unless relevant for impeachment purposes in cases where defendant testifies.

14. Criminal Law ☞633(2)

Even though first conviction under vagrancy child molestation statute is misdemeanor and subsequent convictions are felonies, fact that the court clerk in reading the charge stated that the offense was a felony did not inform jury there had been a prior conviction. Pen.Code, §§ 647a(1), 1025, 1093, subd. 1.

15. Criminal Law ☞814(3), 1172(6)

The giving of the instruction that defendant was on trial only for offense charged in information and that jury could not convict merely because they believed defendant was guilty of some other crime or offense not charged, was for protection of defendant's rights and should not have been given where there was no evidence of other crimes, but since there was no evidence of any other crime the erroneous giving of it could not possibly have been prejudicial. Pen.Code, § 1025.

Albert T. Shine, Jr., Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., San Francisco, J. F. Coakley, Dist. Atty., of Alameda County, Robert L. Anderson, Deputy Dist. Atty., Oakland, for respondent.

PETERS, Presiding Justice.

Defendant, by information, was charged with having violated Section 647a(1) of the Penal Code. The charge was that on June 23, 1954, he did "annoy and molest" a small girl, and that he had previously been convicted of a similar charge under the same section in Los Angeles County.

Section 647a(1) reads: "Every person who annoys or molests any child is a vagrant and is punishable upon first conviction

by a fine of not exceeding five hundred dollars (\$500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction by imprisonment in the state prison not exceeding five years."

[1] The purpose of the section is clear. In *People v. Pallares*, 112 Cal.App.2d Supp. 895, at page 900, 246 P.2d 173, at page 176, this purpose was expressed as follows: "The object of the enactment of the code section was the protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter. It is common knowledge that the subject of sex offenders, and particularly the protection of the young from improper advances, has in recent years engaged the close attention of the legislature and of the general body of the citizens of this State."

[2-4] 112 Cal.App.2d Supp. at page 901, 246 P.2d at page 176 the proper interpretation of the section was given by the court as follows:

"It seems equally clear that the meaning of the words 'to annoy or molest', as employed in the Code section, are sufficiently definite and certain to advise the public generally what acts and conduct are prohibited. Annoy means to disturb or irritate, especially by continued or repeated acts; [citations] 'to weary or trouble; to irk; to offend; to disturb or irritate, esp. by continued or repeated acts; to vex; to molest; * * * harm; injure'. (Webster's New International Dictionary Second Edition.)

"The same dictionary defines 'molest' as, 'to interfere with or meddle with unwarrantably so as to injure or disturb'. Molest is, in general, a synonym for annoy. The term 'molestation' always conveys the idea of some injustice or injury. Molest is also defined as meaning to trouble, disturb, annoy, or vex. [Citation.]

* * *

"When the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this State indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children. It should be noted further that the section must be construed reasonably as setting up an objective test for annoyance or molestation; * * *. The annoyance or molestation which is forbidden is in no sense a purely subjective state on the part of the child. The objectionable acts of a defendant constitute the annoyance or molestation contemplated by the statute. [Citation.]"

This case was approved in *People v. McNair*, 130 Cal.App.2d 696, 279 P.2d 800. After quoting with approval from the *Pallares* case, *supra*, the court stated, 130 Cal. App.2d at page 697, 279 P.2d at page 801: "It is also settled that the element of annoyance as provided in section 647a(1) of the Penal Code is not concerned with the state of mind of the child. It is the objectionable acts of defendant which constitute the offense. (*People v. Pallares*, *supra*, 112 Cal.App.2d Supp. 901, 902, 246 P.2d 173.) If the conduct of a defendant is so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would 'annoy or molest' within the purview of section 647a(1), Penal Code. [Citations.]"

[5] The main contention of defendant is that the evidence does not support the finding that he performed any acts with the intent to "annoy" or "molest" the child within the meaning of Section 647a(1) of the Penal Code as interpreted in these two cases. This requires an examination of the record. Before summarizing the evidence, however, it seems necessary to call attention to the well settled but often

overlooked rule that on such an appeal the appellate court must view the evidence in the light most favorable to the prosecution. If there is any substantial evidence or reasonable inferences from that evidence to support the judgment the appellate court must affirm. *People v. Pianezzi*, 42 Cal. App.2d 265, 108 P.2d 732. In *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 779, the Supreme Court restated this rule in the following language: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. [Citations.]"

The trial judge charged the jury as to the elements of the offense as set forth in the *Pallares* and *McNair* cases, *supra*, both as to the overt acts and the intent required to constitute the offense charged. The instructions told the jury what is necessary to constitute "annoying" or "molesting," and stated that the challenged conduct must be motivated by an abnormal or unnatural sexual interest or intent before a conviction was justified. The basic question is whether the evidence, tested

by the standards set forth in the Newland case, *supra*, supports the implied findings of the jury that such acts were committed by defendant with the required intent.

The sufficiency of the evidence turns upon the credibility of one witness—a Mrs. Dotson. A review of the evidence follows:

The child affected was M. K., a girl eight years old, who lived with her parents in Berkeley. The defendant was employed by a social service organization to solicit contributions for the agency. The child first met defendant on June 20, 1954, while playing in the driveway next to her home. She testified that defendant then appeared quite friendly, and that they had a discussion about the ball with which she was playing. On the next day, June 21, 1954, defendant again visited the area and had a small ball attached to a string which he told M. K. that he would give to her, but did not do so. On this occasion defendant solicited at the home of M. K. for funds for the agency for which he was collecting. On June 23, 1954, defendant again returned to the area to solicit funds. M. K. was then playing with another little girl and boy in a garden adjoining the home of a Mrs. Lott, who was a neighbor of the parents of M. K., and who cared for the child during the day when the mother of M. K. worked. The child testified that she accompanied defendant to the house next to Mrs. Lott's because she wanted the ball he had promised; that when they got to the top of the stairs defendant picked her up and they had a discussion about her weight; that when the occupant of the house came to the door defendant put her down and solicited a contribution; that she then accompanied defendant to the porch of Mrs. Lott's house where defendant again picked her up and they again discussed her weight; that when Mrs. Lott came to the door defendant put her down. Defendant then solicited a contribution from Mrs. Lott. The child testified that, although she had not asked defendant to pick her up, at no time did he hurt her.

So far, the testimony shows nothing but friendly non-criminal activity on the part of defendant. The prosecution sought to show criminality by the testimony of Mrs.

Dotson. Her house was so located that from her kitchen window she could clearly see the garden where M. K. was playing with other children, the stairway of the large house next to Mrs. Lott's, and Mrs. Lott's front porch. The distance from her kitchen window to the stairway of the large house was about 100 feet, and the distance to the front porch of the Lott house slightly less. Mrs. Dotson testified that from her kitchen window on June 23rd she observed M. K. playing in the garden; that she saw defendant approach the child and bring out a ball on a string; that she saw defendant and M. K., hand in hand, ascend the stairway of the house next to Mrs. Lott's; that she saw defendant pick M. K. up, place his hands under her buttocks and then move the front of her body up and down against the front of his body; that the two then descended the stairway and proceeded to the porch of Mrs. Lott's house; that again defendant picked M. K. up, put his hands on her buttocks, pulled her to him, and, with her legs around his hips, moved her up and down against his body; that defendant then put M. K. down and rang Mrs. Lott's doorbell; that both M. K. and defendant were fully clothed during these maneuvers, and that no attempt was made by defendant to remove any of his own clothing or that of the child. Mrs. Dotson testified that she then went over to Mrs. Lott's house to tell her what she had seen, passing defendant on the way, and reported to Mrs. Lott. Mrs. Lott testified that when she heard the first part of Mrs. Dotson's story she called to defendant who was in front of the house and asked him if he knew M. K. The defendant volunteered the statement: "I don't know what this lady told you but I was only playing with the child," and stated that he knew the child and named the street upon which M.K. lived. Mrs. Lott then ordered defendant not to play with the child and turned to hear the balance of Mrs. Dotson's story. After hearing it, she again went out to find defendant, but by this time he had disappeared.

This is substantially the evidence relied upon by the prosecution to support the conviction. Defendant did not take the stand. After the jury brought in its verdict,

the trial court, acting under the provisions of Section 5501 of the Welfare and Institutions Code, suspended the imposition of sentence and ordered defendant to a state hospital for a 90-day observation and determination as to whether he was a sexual psychopath. The hospital certified that he was not, and the trial court so found, denied probation and imposed sentence. Defendant, *in propria persona*, appealed from the judgment and from the order denying his motion for a new trial. He then filed an opening brief *in propria persona*, but after the filing of respondent's brief requested the appointment of counsel. The request was granted and since that time appellant has been ably and diligently represented by a court-appointed lawyer who was granted permission to, and did, file a supplemental opening brief on behalf of his client.

[6,7] Insofar as the sufficiency of the evidence is concerned, it is obvious that the jury believed the testimony of Mrs. Dotson, and inferred from that testimony that the acts were motivated by an abnormal sexual desire. The jury was told that, in this type of accusation, since it is easily made and difficult to disprove, the testimony of Mrs. Dotson should be viewed with caution. Under these circumstances, it cannot be said that the jury was without power to believe the testimony of Mrs. Dotson. Certainly her testimony was not inherently improbable. It is equally clear that the inference involved is a reasonable one. This being so, under the rule announced in *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778, this court is without power to disturb the verdict. See also *People v. Pettis*, 95 Cal.App.2d 790, 213 P.2d 731. This is particularly true in a case where the defendant at the trial failed to dispute the evidence in any way. Appellant does attach to his brief filed *in propria persona* a statement setting forth his side of the story. Obviously, if appellant wanted this evidence considered he should have presented it to the jury. He elected, as he had a right to do, not to do so. But he cannot on appeal now get his story before an appellate court. *People v. Collins*, 117 Cal.App.2d 175, 255 P.2d 59; *People v. Ruiz*, 103 Cal.App.2d 146, 229 P.2d 73. Equally without merit is

appellant's attempt to attack the validity of the prior conviction on the ground that the arrest there involved was illegal. The facts relied upon are *dehors* the record and cannot be considered.

[8,9] The fact that the child did not testify that she was "annoyed" or "molested" is not fatal to the prosecution's case. As was pointed out in *People v. McNair*, 130 Cal.App.2d 696, 279 P.2d 800, the test is an objective and not a subjective one. The testimony of Mrs. Dotson was sufficient to show the overt act, and the sex intent is reasonably inferred from her testimony.

[10] It is true that the record discloses a few minor discrepancies in the testimony of the various witnesses. The charged discrepancies were all as to minor matters. Certainly these discrepancies were normal and do not raise the slightest suspicion that the testimony of any witness was fabricated or was inherently improbable. These discrepancies were matters for the jury to consider and are not relevant to this appeal. *People v. Skaggs*, 80 Cal.App.2d 83, 181 P.2d 390; *People v. Alexander*, 92 Cal.App.2d 230, 206 P.2d 657.

[11] Appellant charges the prosecuting attorney with prejudicial misconduct in several respects. It is charged that the prosecutor stated in his argument that defendant's failure to take the stand created a presumption of guilt. There is no such statement in the record. The prosecutor, of course, had a right to comment on the failure of defendant to take the stand. *People v. Adamson*, 27 Cal.2d 478, 165 P.2d 3. The record shows that the prosecutor commented on such failure, and properly stated that, since defendant had not contradicted the prosecution's witnesses, such testimony stood uncontradicted in the record, and that from this fact the jury could infer that such witnesses told the truth. This was proper. A careful reading of the balance of the prosecution's argument shows nothing even approaching improper argument, far less anything prejudicial.

[12] The appellant also complains of certain statements made by the prosecuting attorney at the time of the sexual psycho-

path hearing. These statements were made after the conviction by the jury, and so, of course, could not have affected that verdict. Moreover, the trial judge found that defendant was not a sexual psychopath, so the challenged statements could not have affected the trial judge.

[13] Counsel for appellant makes the argument that prejudicial error was committed by the trial court in improperly referring to the prior conviction. Of course, it is error of a most serious type for the prosecution or the court to refer to a prior conviction, unless relevant for impeachment purposes in cases where defendant testifies. *People v. Sansome*, 84 Cal. 449, 24 P. 143; *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924; *People v. Stoddard*, 85 Cal.App.2d 130, 192 P.2d 472. It is this rule upon which appellant relies.

[14] It will be remembered that the offense here involved is a felony only if the accused has suffered a prior conviction under the same section. Section 1025 of the Penal Code provides that where the defendant admits the charged prior "the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." Section 1093(1) of the Penal Code requires, in felony cases, that the clerk must read the indictment or information to the jury "and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction." It is appellant's contention that these sections were violated by the court clerk in reading the charge. The clerk properly omitted the portion of the charge referring to the previous conviction, but did read that appellant was accused "of a *felony*, to wit, a violation

of Subdivision 1 of Section 647a of the Penal Code." The ingenious argument is made that because a violation of Section 647a(1) can only be a felony if there has been a prior conviction under the section, the mere reference to the offense being a "felony," necessarily told the jury that there had been a prior conviction. This, it is claimed, violated Sections 1025 and 1093(1) of the Penal Code, *supra*. The contention is without merit. The word "felony" did not refer to the prior, but to the charge for which defendant was then on trial. Calling the offense a "felony" no more informed the jury that there was a prior than did the fact that the case was being tried in the Superior Court, which only tries felony cases.

[15] A somewhat similar argument is based on the giving of the instruction that "The Defendant is on trial *only* for the offense charged in the information, and you may not convict Defendant solely or only because you may believe, if you do believe, that Defendant is guilty of some other crime or public offense not charged in the information here under consideration."

Since there was no evidence of any other crime, appellant claims that coupled with the word "felony" this must have focused the jury's attention on the prior. But the jury did not know of the prior. The instruction is one for the protection of defendant's rights. While it should not be given where there is no evidence of other crimes, the erroneous giving of it could not possibly have been prejudicial.

The order and judgment appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

BENEFICIAL FIRE AND CASUALTY INSURANCE COMPANY, a California corporation, Plaintiff and Respondent,

v.

KURT HITKE & COMPANY, Inc., a California corporation, et al., Defendant and Appellant.*

Civ. 20998.

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 21, 1955.

Hearing Granted Jan. 18, 1956.

Insurance company brought action against general agent for declaratory judgment to determine method of computing agent's compensation under written contract. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment adverse to agent and an order denying agent's motion for a new trial, and the agent appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where contract between insurance company and general agent provided that from gross earned premiums on all policies there should be deducted losses and allocated loss adjustment expense and a fixed charge by company of a sum equal to 20% of gross earned premiums, and that remainder, if any, constituted the agent's commission, with maximum limit of 30% of gross earned premiums, and that cancellation of contract should apply to all provisions except those pertaining to compensation, and that they should remain in full force and effect until all premiums have been earned and losses have been paid, or until an earlier mutually agreeable date has been set, agent's compensation was to be adjusted after termination of contract and on basis of actual experience.

Appeal from order dismissed, and judgment affirmed.

1. Appeal and Error ⇨842(1)

If contract between insurance company and its general agent was unambiguous, and extrinsic evidence was properly excluded, proper interpretation of the contract was a

* Opinion vacated 297 P.2d 428.

question of law for the reviewing court to decide ultimately.

2. Declaratory Judgment ⇨258

Where no jurisdiction was reserved for taking or approval of accounting in action by insurance company against general agent for a declaratory judgment to determine method of computing general agent's compensation under written contract, the judgment was not interlocutory.

3. Insurance ⇨84(1)

Where contract between insurance company and general agent provided that from gross earned premiums on all policies there should be deducted losses and allocated loss adjustment expense and a fixed charge by company of a sum equal to 20 per cent of gross earned premiums, and that remainder, if any, constituted the agent's commission, with maximum limit of 30 per cent of gross earned premiums, and that cancellation of contract should apply to all provisions except those pertaining to compensation, and that they should remain in full force and effect until all premiums had been earned and losses had been paid, or until an earlier mutually agreeable date has been set, agent's compensation was to be adjusted after termination of contract and on basis of actual experience.

4. Evidence ⇨450(6)

In action by insurance company against general agent for declaratory judgment to determine method of computing agent's compensation under unambiguous written contract, parol evidence was properly excluded.

5. Evidence ⇨448, 593

Where contract is not ambiguous, parol evidence is inadmissible, and, if received, must be disregarded.

6. Contracts ⇨170(1)

Evidence concerning practical construction of a contract by the parties thereto is admissible only in case of ambiguity of contract.

7. Evidence ⇨450(6)

In action by insurance company against general agent for declaratory judgment to determine method of computing

agent's compensation under written contract, evidence which went to meaning and legal effect of contract and not to some specific word or phrase therein was not admissible under statute providing that terms of writing are presumed to have been used in their primary and general acceptance, but evidence is admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly. West's Ann.Code Civ. Proc. § 1861.

8. Customs and Usages ⇨17

Evidence of custom is not receivable in teeth of a writing which shows that it is at variance with alleged custom.

9. Evidence ⇨458

Statute providing that a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates, does not authorize consideration of extrinsic evidence of a contract which is clear and certain on its face. West's Ann.Civ.Code, § 1647.

10. Evidence ⇨458

Statute providing that for proper construction of an instrument, circumstances under which it was made, including situation of subject of instrument, and of parties to it, may also be shown, so that judge be placed in position of those whose language he is to interpret, does not authorize consideration of extrinsic evidence of a contract which is clear and certain on its face. West's Ann.Code Civ.Proc. § 1860.

11. Appeal and Error ⇨110

Order denying motion for new trial was not appealable, and attempted appeal therefrom would be dismissed.

John S. Bolton and F. V. Lopardo, Los Angeles, for appellant.

Hill & Attias, Henry Attias and Philip Glusker, Beverly Hills, for respondent.

ASHBURN, Justice pro tem.

Action for declaratory judgment brought by Beneficial Fire and Casualty Insurance

Company against its general agent, Kurt Hitke & Company, Inc., to determine the method of computing the agent's compensation under a written contract, and to have it declared that some \$59,087.48 previously paid the agent was an advance only, subject to adjustment and perhaps repayment after all earned premiums and all losses have been ascertained on the basis of actual experience. The court adopted plaintiff's contentions.

Defendant on appeal complains principally about exclusion of parol evidence as to trade customs concerning general agent commissions, offered in an effort to establish that monthly payments made to the agent were final and not provisional. Its counsel also contend that the court's construction of the contract is erroneous, even upon the assumption that parol evidence was properly excluded.

The object of the contract is described in the findings: "Under the terms of the contract, the defendant was appointed plaintiff's 'general agent'. Defendant was authorized to underwrite and issue policies of automobile public liability insurance in the name of plaintiff covering certain substandard risks such as taxi cabs, trucks and busses, and also was to settle and adjust claims under policies written by it."

The contract was made on February 16, 1950, and the action filed on October 14, 1952, some two and one-half years later. The instrument provides for cancellation upon 30 days written notice by either party. No such notice was given but the court found that after the filing of the complaint, "there have been no new policies written under the contract, the term of all policies written under the contract has expired," and "All premiums covering the policies written by defendant under the contract have now been earned. That is, the period of coverage applicable to any premium paid in advance under any of said policies has passed. However, a number of open claims remain undisposed of, and thus not all losses to be paid under all of said policies have been paid." These findings are not challenged.

[1] Holding the contract to be unambiguous, the court excluded parol evidence and construed the contract by consideration of the language found within its four corners. In such circumstances, assuming that extrinsic evidence was properly excluded, the proper interpretation of the contract is a question of law for the appellate court to decide ultimately. In *re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825; *Fox v. Fox*, 42 Cal.2d 49, 52, 265 P.2d 881; *Meyer v. State Board of Equalization*, 42 Cal.2d 376, 381, 267 P.2d 257. The interpretation thus placed upon the writing by the trial judge appears to this court to be correct, as a review of the provisions of the instrument will presently reveal.

Defendant, as such general agent, had the duty to investigate all losses and cooperate with the claim department of the company in the settlement thereof, or as stated in the findings: "[T]o settle and adjust claims under policies written by it." Paragraph (15) of the contract prescribes a formula for computing the agent's compensation upon a contingent basis. From gross earned premiums upon all policies there shall be deducted, (a) losses and "allocated loss adjustment expense," and (b) a fixed charge by the company of a sum equal to 20% of such gross earned premiums, and the remainder, if any, constitutes the agent's commission, with a maximum limit of 30% of the gross earned premiums. The text

of paragraph (15), except the last subparagraph thereof, is set forth in the margin.¹ Manifestly, this provides a contingent fee which is to be accepted "as compensation in full for all services to be performed under this contract" by the general agent—contingent because the actual losses and "the allocated loss adjustment expense" may be so heavy as to absorb the entire premiums when added to the arbitrary deduction of 20% of gross earned premiums. Paragraph (15) is the basic compensation provision. Paragraph (14) provides for monthly payments to the agent which are necessarily interim and provisional in their nature.² This paragraph calls for monthly computation made by the company of all premiums earned during the preceding month, followed by a statement to the agent of the computed amount thereof, together with "a record of all losses and loss expense paid and of all reserves for losses incurred on a case basis." The phrase "reserves for losses" is plainly the equivalent of "allocated loss adjustment expense" which is defined in paragraph (15) to be: "Loss Adjustment expense is hereby defined to be the allocated direct and overhead cost of the General Agent of the adjustment of each claim arising under this Agreement," and which is described in paragraph (16) as "reserves for the outstanding losses and loss adjustment expense." Necessarily, this item must originate in defendant's records

1. "The General Agent agrees to accept as compensation in full for all services to be performed under this contract, and the Company agrees to pay the General Agent for the performance of such services, such compensation to be determined in the following manner: From the gross earned premium under all policies of insurance, renewals, endorsements or binders, there shall be deducted the following items: (a) Losses and allocated loss adjustment expense; (b) a fixed charge by the Company of a sum equal to 20% of such gross earned premium; (c) from the residue remaining shall be paid a sum as commission to the General Agent not to exceed 30% of the gross earned premium.

"Loss adjustment expense is hereby defined to be the allocated direct and overhead cost of the General Agent of the adjustment of each claim arising under this Agreement. The amount charged as

loss adjustment expense shall be subject to review by the Company, and in the event of dispute shall be settled by arbitration as hereinafter set forth."

2. (14) "On or before the 30th day of each month, the Company will compute all premiums earned during the previous month and will furnish the General Agent with a statement thereof, together with a record of all losses and loss expense paid and of all reserves for losses incurred on a case basis. At such time the Company shall remit to the General Agent all commission earned during said previous month. In the event the computation of commission earned at the end of any regular monthly adjustment period results in a deficit against the General Agent, this deficit shall be fully covered by a subsequent commission earning before any earned commission shall be due the General Agent."

and be furnished by the agent to the company. Counsel so conceded at the trial. In the nature of things it can be but an estimate, hence the provision in paragraph (16) for review by the company and arbitration of the item in event of dispute. That paragraph prescribes the method of arbitration and the result is stated as follows: "And the decision of any two shall be used for the reserve in the computation of the compensation and underwriting profits provided for in Paragraph 14 until subsequent developments occur which may change the extent of liability." Manifestly, the reserve for loss expense is an estimated provisional item originating with the agent, and so the payment based thereon normally would be subject to later adjustment. Hence the concluding sentence in paragraph (14) which, in effect, says that so long as the contract continues a deficit occurring in one month shall be offset by earnings in a later month or months before payments are to be resumed. It is to be noted that all these monthly payments are based upon reserve for losses which may prove through experience to be too large or too small to fit individual cases. Standing alone, paragraph (14) provides and suggests no method of ultimate correction if the reserves prove to be too low. Even an arbitration under (16) is binding only "until subsequent developments occur which may change the extent of liability."

The last subparagraph of (15) provides for an annual computation of "underwriting profits" in this language: "As soon after December 31 of each calendar year as practicable, the underwriting profits arising out of the net retained business under this contract shall be computed and 50% thereof shall be payable to the General Agent. That retained business shall be defined as the net amount of risk assumed by the Company after deducting quota share reinsurance." It was stipulated that no such profits were ever made. But this portion of (15) does enter into the problem of construction now before the court. Counsel for defendant at the trial defined the phrase "underwriting profits" in this language: "You see, underwriting profits have a definite definition and it, of course,

includes paid losses, reserve for losses, paid loss expense, and producers' commissions which are credited to the general agent because you always have to pay your agent * * *." Respondent's brief gives substantially the same meaning to the term.

In the case of Massachusetts Bonding & Ins. Co. v. Lundy, 8 Cir., 160 F.2d 680, 682, it is said: "The contract related solely to division of 'underwriting profits' of the company, which in common understanding and by dictionary definition could only mean the excess of the company's income over its expense and loss from the underwriting business." To same effect see 44 C.J.S., Insurance, § 49, p. 500; Bullion v. Aetna Ins. Co., 151 Ark. 519, 237 S.W. 716, 718. The "reserve for losses" mentioned in defendant's attorneys' definition of underwriting profits would necessarily be a part of the computation, for no method of periodic elimination of errors in reserves is prescribed and the underwriting profit arises only after monthly payment of agent's commissions, and so this additional item of compensation to the agent remains either faulty or subject to readjustment on the basis of experience.

Paragraph 19 takes care of the whole problem. It provides for cancellation by either party upon giving of 30 days prior written notice, and then says: "Cancellation in this instance shall apply to all provisions in the contract except those items which pertain to the compensation of the General Agent, which items shall remain in full force and effect until all premiums have been earned and losses have been paid, or until an earlier mutually agreeable date has been set. With respect to those items the Company agrees to pay the General Agent any and all amounts due the General Agent and the General Agent agrees to pay the Company any and all amounts due the Company." Plainer language could scarcely be found to express the thought that the agent's compensation should be ultimately adjusted after termination of the contract and on the basis of actual experience. The word "items" refers to all elements of the compensation computation and the agreement of the agent to pay the company, or the company to pay the agent, is made

"with respect to those items." This language rules out appellant's contention that the agent's obligation to pay on final accounting refers to such things as premiums received by it and not previously turned over, a matter which is covered elsewhere in paragraphs 3, 4 and 6.

[2, 3] The judgment says: "The plaintiff is entitled to a judgment decreeing and declaring that upon cancellation of the contract, and after all premiums have been earned and all losses have been paid, an accounting shall be made in accordance with the provisions of paragraph 19 of the contract. Such accounting shall follow the compensation formula set out in paragraph 15. * * * If the defendant has been paid, under the provisions of paragraph 14 of the contract, an amount in excess of such amount as the above accounting shall show it is entitled to receive as compensation, the defendant shall promptly pay to the plaintiff the amount of such excess. If the defendant has not been paid, under the provisions of paragraph 14 of the contract, the amount to which it is entitled as compensation, to be shown by such final accounting, the plaintiff shall promptly pay to the defendant the amount of compensation to which the defendant is entitled less the amount the plaintiff shall have theretofore paid to the defendant under the provisions of paragraph 14 of the contract." No jurisdiction was reserved for the taking or approval of the accounting.³ This judgment reflects a correct interpretation of the contract, made without the aid of any oral evidence.

Appellant urges that these cases are to the contrary: *Massachusetts Bonding & Ins. Co. v. Lundy*, supra, 8 Cir., 160 F.2d 680; *Aldrich v. New York Life Ins. Co.*, 235 N.Y. 214, 139 N.E. 245. Examination discloses that they are not opposed to the judgment rendered at bar. The *Massachusetts Bonding Company* case does say that the contract does not require the general agent "to pay a loss to the company if such should result from his employment," but the respondent does not claim, and the

trial court did not hold, that defendant must bear or repay any of the losses incurred under the instant contract, only that his compensation becomes nil if the final accounting discloses that the overall operation resulted in no balance when losses and the 20% of gross earned premiums are deducted from the total of such premiums.

Respondent cites *Milwaukee Mechanics' Ins. Co. v. Warren*, 150 Cal. 346, 89 P. 93, and *National Union Fire Ins. Co. v. Nason*, 21 Cal.App. 297, 131 P. 755, as sustaining the trial court's ruling. In a measure they do so. The *Milwaukee Mechanics' Insurance* case dealt with a general agent's contract which prescribed as his compensation 35% of the gross premiums "after deducting all return premiums, rebates, and reinsurances." [150 Cal. 346, 89 P. 96.] The term of the agency was one year and it remained in effect some 14 months before the controversy as to the computation of the agent's compensation developed. The agent objected to being charged in an accounting between the parties with his share of premiums which had to be returned. This contention was rejected, the court saying, 150 Cal. at page 354, 89 P. at page 96: "Certainly it was never understood by the parties that, if Warren and Lanktree wrote a policy on the day before the expiration of their agency, they would be entitled to retain 35 per cent. of the entire amount of the premium, even though on the day after they ceased to be agents the policy was canceled by the insured and the company compelled to return the greater part of the premium. It was necessarily in the contemplation of the parties that return premiums might be payable after the termination of the agency, and the right of Warren and Lanktree to retain 35 per cent. of the premiums on any business written by them was always subject to the contingency that the policy might be canceled, and that they might, therefore, be liable to the company for 35 per cent. of the amount refunded by the company upon such cancellation. See *American Steam*

3. Hence the judgment is not to be deemed interlocutory. *Lyon v. Goss*, 19 Cal.2d 659, 670, 123 P.2d 11.

Boiler Ins. Co. v. Anderson, 57 N.Y.Super. Ct. 179, 6 N.Y.S. 507. If it be said that under this construction there could be no final settlement of account on the termination of the agency, it may be answered that the contract plainly shows that such immediate settlement was not within the purview of the parties at the time the contract was made."

[4-6] Appellant's contention that parol evidence was improperly excluded cannot prevail, for the contract is not ambiguous, and of course that is the primary criterion upon the question of the admissibility of such evidence, *Hicks v. Whelan Drug Co.*, 131 Cal.App.2d 110, 114, 280 P.2d 104; if received with respect to an unambiguous writing the evidence must be disregarded. *Hale v. Bohannon*, 38 Cal.2d 458, 465, 241 P.2d 4; 18 Cal.Jur.2d, sec. 256, p. 740. Appellant's offer to show practical construction by the parties runs headlong into the parol evidence rule. Such an aid to the interpretation of a contract is admissible only in case of ambiguity. *Bettis Rubber Co. v. Kleaver*, 104 Cal.App.2d 821, 826, 233 P.2d 82; 12 Cal.Jur.2d, sec. 129, p. 342.

[7] In an effort to avoid the effect of the rules just mentioned appellant's counsel rely upon section 1861, Code of Civil Procedure,⁴ and cases holding it applicable even in the absence of ambiguity on the face of the writing. The cited cases are: *Ermolieff v. R.K.O. Radio Pictures*, 19 Cal.2d 543, 122 P.2d 3; *Wachs v. Wachs*, 11 Cal.2d 322, 79 P.2d 1085; *Body-Steffner Co. v. Flotill Products*, 63 Cal.App.2d 555, 147 P.2d 84; *Higgins v. California Petroleum & Asphalt Co.*, 120 Cal. 629, 52 P. 1080; *Ross v. Frank W. Dunne Co.*, 119 Cal.App.2d 690, 260 P.2d 104; *Ferris v. Emmons*, 214 Cal. 501, 6 P.2d 950; *Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.*, Cal.App., 286 P.2d 825. They deal with the meaning of specific words or phrases and rest upon the concept

thus expressed by Mr. Justice Holmes in his customary felicitous phrasing: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372, L.R.A.1918D, 254. But the offer made at the trial was not so restricted. It went to the meaning and legal effect of the contract, not some specific word or phrase therein. We quote extracts from the offer: " * * * that never in the general agency contracts used in the insurance business for more than a hundred years has any general agent been required to return any of his earned commission under even the contingency theory * * *. It is a specialist field and it has been in existence for many hundreds of years and there are just certain things that don't occur, and one of them is that a general agent is never required to pay back out of earned commissions, as I mentioned before." On motion for new trial appellant's counsel said, with respect to a proffer of testimony of Mr. Ray Meyer, former vice president of plaintiff: "His testimony will be that his interpretation, his understanding of the way the contract was operated by Mr. Dillingham, Vice President for Hitke, and the Beneficial Vice President, was that it was an earned commission, not refundable at any time; that that monthly payment of earned commission was final." Even if there were an ambiguity in the instrument, such conclusions would not be competent evidence. In *Achen v. Pepsi-Cola Bottling Co.*, 105 Cal.App.2d 113, 233 P.2d 74, an action for declaratory relief to have franchise contracts construed so as to prohibit cancellation, the court adopted defendant's construction of the contract which gave it the right to cancel. Plaintiff had sought to introduce evidence of what some officers of defendant had stated to the effect that the contract prohibited unilateral cancellation.

4. "The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar significance,

and were so used and understood in the particular instance, in which case the agreement must be construed accordingly."

105 Cal.App.2d at page 123, 233 P.2d at page 80, the court said: "Appellants particularly point to the testimony of some of the distributors who testified that the officers of the company interpreted the language of the contracts to mean, as for instance, that the term of the contract was for an indefinite period and could not be cancelled. The short answer to the contention is that the exception to the hearsay rule which permits declarations or admissions by a party to be shown applies only to declarations or admissions of *fact* and not to the interpretation, legal or otherwise of the facts. Here the factual language set forth in the contracts was not only equally available, but known to the respective parties. What the language used in the contracts meant was a matter of interpretation for the courts and not controlled in any sense by what either of the parties intended or thought its meaning to be if it ran contrary to the court's interpretation of it. The views expressed by any party to the contracts were, at best, his opinion or conclusion and as such not admissible, under any exception to the hearsay rule or otherwise."

[8] It is likewise true that evidence of custom is not receivable in the teeth of a writing which shows that it is at variance with the alleged custom. See *India Paint & Lacquer Co. v. United Steel Prod. Corp.*, 123 Cal.App.2d 597, 613, 267 P.2d 408; *Miller v. Germain Seed, etc., Co.*, 193 Cal. 62, 66, 222 P. 817, 32 A.L.R. 1215.

[9,10] Appellant's reliance upon section 1647, Civil Code⁵ and section 1860, Code of Civil Procedure,⁶ is misplaced. Neither of these sections authorizes the consideration of extrinsic evidence of a contract which is clear and certain on its face. *Courtright v. Dimmick*, 22 Cal.App. 2d 68, 70-71, 70 P.2d 269; *United Iron Works v. Outer Harbor, etc., Co.*, 168 Cal. 81, 84, 141 P. 917; *Leonard v. Huston*, 122

Cal.App.2d 541, 548, 265 P.2d 566; *Parker v. Meneley*, 106 Cal.App.2d 391, 401, 235 P.2d 101. There was no error in the exclusion of the proffered parol evidence.

[11] Defendant appeals from the judgment and attempts to appeal from the order denying its motion for new trial. That order is not appealable and the attempted appeal is dismissed.

The judgment is affirmed.

McCOMB, Acting P. J., and FOX, J., concur.

Hearing granted; McCOMB, J., not participating.



137 Cal.App.2d 251

William H. MILLER, Plaintiff and Respondent,

v.

Fred JENSEN, Individually and doing business under the fictitious name and style of Jensen & Pitts, and Gerald Detels, Defendants and Appellants.

Civ. 16494.

District Court of Appeal, First District,
Division 1, California.

Nov. 28, 1955.

Hearing Denied Jan. 25, 1956.

Motorist brought action against owner and driver of dump truck for injuries sustained in collision at intersection. The Superior Court, Marin County, Jordan L. Martinelli, J., entered judgment for motorist, and owner and driver of truck appealed. The District Court of Appeal, Bray, J., held that where there was no evidence that any portion of roadway on which motorist and truck driver intended to travel or did travel was closed to traffic, Superior Court was not required to instruct that compliance with requirement

circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

5. Civil Code, sec. 1647. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

6. Code Civ.Proc., sec. 1860. "For the proper construction of an instrument, the

of Vehicle Code that a vehicle be driven on the right half of the roadway, is excused when right half of roadway is closed to traffic while under construction or repair.

Judgment affirmed.

1. Appeal and Error ⇨928(4)

The District Court of Appeal, in determining whether trial court erred in failing to give instructions favorable to defendants, was required to take defendants' evidence and reasonable inferences therefrom in their most favorable light to defendants.

2. Automobiles ⇨147

An act or failure to act below statutory standard of the Vehicle Code is negligence per se and is negligence as a matter of law.

3. Automobiles ⇨159

Circumstances of emergency or unusual conditions may be shown to excuse violation of the Vehicle Code.

4. Automobiles ⇨147

Unless and until justification or excuse for violation of the Vehicle Code appears, such violation must be treated as negligence per se.

5. Automobiles ⇨147

The fact which will excuse violation of the Vehicle Code is one resulting from causes or things beyond control of person charged with the violation.

6. Automobiles ⇨159

In applying rule that violation of Vehicle Code is negligence per se, but that circumstances of emergency or other conditions may be shown to excuse the violation, each violation must be considered in connection with surrounding circumstances.

7. Automobiles ⇨245(68)

Ordinarily, question whether there is an excuse for violation of the Vehicle Code, presents a question of fact for jury, but if court is impelled to say that, from the facts, reasonable men can draw but one inference and that pointing unerringly

to negligence of plaintiff contributing to his injury, it is then a matter solely for court.

8. Trial ⇨252(8)

In action by driver of automobile against owner and driver of dump truck for injuries sustained in intersectional collision, trial court, which read to jury portion of statute requiring a vehicle to be driven on the right half of a roadway, was not required to read exceptions providing that statute was not applicable when right half of a roadway is closed to traffic while under construction or repair, where there was no evidence that any portion of the highway on which motorist or truck driver intended to travel or did travel was closed to traffic. Vehicle Code, § 525(a) (3).

9. Trial ⇨252(8)

In action by driver of automobile against owner and driver of dump truck for injuries sustained in intersectional collision, wherein there was no evidence of any excuse that would have justified truck driver in failing to drive on right half of roadway, court, which instructed jury with reference to statute requiring a vehicle to be driven on right half of roadway, did not err in failing to instruct that violation of statute was not necessarily negligence if excused by the circumstances. Vehicle Code, §§ 525, 525.1, 540, 544.

Keith, Creede & Sedgwick, Scott Conley, San Francisco, for appellants.

Lewis, Field & DeGoff, San Francisco, for respondent.

BRAY, Justice.

In a personal injury action, the jury returned a verdict for plaintiff of \$18,000. From the judgment entered thereon defendants appeal.

Question Presented.

The sole question presented is whether the trial court should have instructed that violation of Vehicle Code sections 540 and 544 (which it read to the jury) was not necessarily negligence if (a) excused by

the circumstances, or (b) if excused by the situation set forth in section 525(3).

Evidence.

Defendant Detels was driving a heavy dump truck loaded with 6 tons of asphalt belonging to defendant Jensen easterly along Belvedere Drive in Marin County towards its intersection with Reed Boulevard. That intersection is unusual in shape. By reason of the curving corners the intersection is larger than the ordinary one where two streets cross. Defendant Jensen was doing some road surfacing on the west half of Reed south of the intersection. In order to make the asphalt topping to be applied later, stick, it was necessary to sweep the street clean of gravel so that the "black coat" could be applied. From 1 to 3 days prior to the accident the west half of Reed through to the northwest corner of the intersection had been swept. Thus the westerly half of the intersection had been swept. The evidence fails to disclose whether it was to be oiled. Presumably it was at least as far as the middle of the intersection. It is not clear whether the westerly half of Reed had been oiled (received its adhesive "black coat.") Presumably it had because the paving (with asphalt) had started 400 to 500 feet south of the intersection and was progressing towards it. At no time had the paving on Reed approached within 60 feet of the intersection. There was roadmaking equipment around the intersection. Jensen's foreman first testified that there was a roller on the southwest corner. Later he testified to a roller being with other equipment in the northwest corner of the intersection off the highway, the roller being on Belvedere. There was a sign on Belvedere, "Danger, men and equipment working," 300 or 400 feet from Reed, and apparently one at the southwest corner of the intersection. There were present an 800 gallon oil tank and one or two barricades (just where they were located does not appear). About 60 feet down on Reed was an asphalt spreader. This was a sort of box into which the asphalt was poured and which did the actual spreading of it. Detels testified that he intended to drive

along Belvedere to the gravelled area at the southeastern corner of the Reed intersection, wait there until the spreader was ready, after which he would have driven the truck south into and down the east side of Reed and then swung westerly in an arc so as to bring him north of the spreader box which was on the west side of Reed, and then he would back his truck into the box and dump the load. (Thus, he had no intention of making a right hand turn into Reed, but intended to cross over to the opposite side of Reed before turning right out of Belvedere into the easterly side of Reed.) Traveling along Belvedere at 15 to 20 miles per hour, his right wheels when he was about 20 feet from the intersection were about 4 feet from the right edge of Belvedere. Although looking as he did in the right hand mirror he could see back about 100 feet, and in the left hand mirror he could see a considerable distance back. He could not see a vehicle directly back of the truck and within 75 feet of it, because of the great width of the truck. Just as he entered the intersection he gave a signal for a right turn. Detels looked in the mirrors on three different occasions as he crossed the intersection and did not see anything. He veered about 2 feet to the left and going about 5 to 7 miles per hour he started to make a right turn. Then through his window he saw plaintiff, applied his brakes, stopped immediately and was standing still. Plaintiff's car then traveled about 6 feet. The truck's front right bumper and the front of the left rear fender of plaintiff's car collided. At that time the truck's right front wheels were in the gravel area.

Plaintiff's version of the accident was that proceeding about 20 to 25 miles per hour he was following the truck at first about 200 to 250 feet behind it. The truck was moving at a slower speed. When the truck was approximately 200 feet from the intersection it moved out toward the center of the road. Plaintiff was then about 150 feet behind the truck. Belvedere there turns slightly to the right. The truck continued in a straight line, thereby bringing it nearer the center of the road. The truck

seemed to be about to make a left turn. The right side of Belvedere was clear to plaintiff's right (down Reed) and he saw no traffic there. He then looked forward and saw that the truck had apparently changed direction and was coming to the right. Plaintiff slammed on his brakes and turned the steering wheel to the right. His car skidded forward on the loose gravel about 10 feet. Plaintiff then took his foot off the brake, stepped on the gas, turned the wheel to the left in an endeavor to avoid the accident by getting across the intersection ahead of the truck. He was probably going about 20 to 25 miles per hour when the vehicles collided. When he struck the gravel the car moved sideways out of control. Plaintiff saw no signal given by the truck.

Both plaintiff and Detels drew on the map the line each claimed the truck traveled through the intersection up to the point of impact. Detels' line indicates a very narrow arc to the left, while plaintiff's line indicates a much wider one. The investigating police officer placed the point of impact as indicated by the debris at a point which corroborates plaintiff's line and indicates that the truck when struck was not yet entering the easterly side of Reed, as claimed by Detels.

One Redmon, an employee of defendant Jensen, who was at the spreader box, saw the truck coming on Belvedere. He traced the truck's course generally about the same as did Detels, except that near the center of the intersection he drew a slightly wider arc to the left than did Detels. It appeared to him the truck was stopped when hit. When the witness first saw plaintiff's car it was coming about 40 to 45 miles per hour on Belvedere. It reduced its speed about the center of the intersection and was going about 10 to 15 miles per hour at the time of collision. It did not skid. It stopped quickly. (The police officer testified to skid marks of 20 feet.)

[1] Summing up the testimony, and

taking defendants' evidence at its most favorable, including the reasonable inferences therefrom,¹ it is clear that Detels did not keep to the right side of Belvedere, but swung to the left and was making a right turn into the far side of Reed when the accident occurred. While there is some confusion as to whether there was a roller at the southwest corner of the intersection, such roller, if it were there, in no wise caused Detels to fail to turn into the west or near side of Reed. The only reason given by Detels for his disregard of the requirements of the Vehicle Code was, in effect, that it was more convenient for him later to reach the spreader. He at no time testified that he followed the route he did because the repairs, the equipment or any physical condition of the streets made it necessary for him to do so.

Instructions.

The court read to the jury section 540, a right turn at an intersection must be made as close as practicable from the right side or edge of the highway and a left turn from the right portion of the highway nearest the center; section 525, vehicles must be driven upon the right half of the highway; section 525.1, any vehicle proceeding at less than normal traffic speed shall be driven as close as practicable to the right hand edge; section 544, no turn shall be made from a direct course until the move can be made with reasonable safety and after appropriate signal given continuously for the last 50 feet.

The court then instructed that a violation of each or any of these sections would constitute negligence as a matter of law. Defendants contend the court erred (a) in not reading the second portion of section 525, Vehicle Code, and (b) in not stating that such violation would not constitute negligence per se if the violation was excusable or justifiable. They contend the instructions should have been so qualified.

[2-7] The law relating to the effect of violations of the Vehicle Code is well de-

1. This we are required to do in determining whether the court erred in failing to give instructions favorable to defendants. The rule, of course, is just the

contrary in determining whether the evidence supports the verdict. Here there is no contention that it does not.

fined in *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279—an act or failure to act below the statutory standard is negligence per se and is negligence as a matter of law. Circumstances of emergency or unusual conditions may be shown to excuse the violation. Unless and until justification or excuse for violation appears, the general rule applies and it must be treated as negligence per se. 29 Cal.2d at page 588, 177 P.2d 279. “* * * the fact which will excuse the violation of a statute has been defined by the court as one resulting ‘from causes or things beyond the control of the person charged with the violation.’” 29 Cal.2d at page 589, 177 P.2d at page 283. In the application of the rule each violation must be considered in connection with the surrounding circumstances. Ordinarily the excuse presents a question of fact for the jury, but if the court is impelled to say that from the facts reasonable men can draw but one inference and that pointing unerringly to the negligence of the plaintiff contributing to his injury, it is then a matter solely for the court. 29 Cal.2d at page 590, 177 P.2d 279.

(a) *Section 525, Vehicle Code.*

[8] This section requires a vehicle to be driven on the right half of a roadway. The portion omitted is “except as follows: * * * (3) When the right half of a roadway is closed to traffic while under construction or repair.” There was not the slightest evidence that any portion of either Belvedere or Reed which Detels intended to travel, or did travel, was closed to traffic. So there was no basis whatever for mentioning this exception.

De Yo v. Umina, 121 Cal.App.2d 505, 263 P.2d 623, is not in point. At that time section 525, Vehicle Code, read that vehicles must be driven upon the right half of the highway except when overtaking and passing another proceeding in the same direction. The trial court failed to read the exception. There was evidence through a presumption in the plaintiff's favor that at the time of the accident the plaintiff was overtaking and passing another vehicle, hence under the circumstances of the case the court in merely reading a portion of the

section erroneously instructed the jury. Here there is no evidence to require the reading of the omitted portion.

(b) *Were the violations excusable?*

[9] We fail to find any evidence or reasonable inferences therefrom which would justify Detels driving down Belvedere away from the normal position on the right side, in arcing to the left, and in attempting a turn into the far side of Reed. He, himself, makes no excuse for it other than convenience in later approaching the spreader. Certainly, convenience does not meet the requirement above stated that the violation of a statute must arise from causes or things beyond Detels' control. See *Kuehn v. Lowthian*, 124 Cal.App. 2d 867, 269 P.2d 666, discussing and supporting the cases holding that the excuse must be based upon causes beyond the appellant's control. Defendants contend that the street work being done on Reed approaching the corner (still more than 60 feet therefrom) and equipment scattered around, justified Detels in his action. In the first place, Detels at no time according to his own testimony was actuated by any feeling of necessity to do what he did; he did it for convenience alone. Secondly, there is no evidence upon which such a necessity could have been based, no showing that anything at all prevented Detels from continuing on the right hand side of Belvedere and then making a right turn into the west side of Reed and proceeding southerly to the feeder box, all as the law required him to do. While it is true that Reed was under repair, such fact in itself would not justify violations of the statute. If reasonably necessary in order not to delay or impair the work going on, the jury could determine that such violations were justified. Here, practically the only claim of justification is based upon the fact that had the truck obeyed the law and gone down Reed on the right hand side it later would have had to maneuver across Reed in order to back up to the feeder box. Obviously this would be a matter of convenience only. As said in *Cavagnaro v. City of Napa*, 86 Cal.App.2d 517, 528, 195 P.2d 25, 32: “* * * in the *Satterlee*

case it is stated with cited authority (29 Cal.2d at page 588, 177 P.2d at page 283) that unless and until justification or excuse for violation of a statute appears, the general rule applies and it must be treated as negligence *per se*."

Defendants offered no qualifying instructions, contending that it was the duty of the court to give them of its own motion, citing *Ornales v. Wigger*, 35 Cal.2d 474, 478, 218 P.2d 531; *Satterlee v. Orange Glenn School Dist.*, supra, 29 Cal.2d 581, 177 P.2d 279, and *Gallup v. Sparks-Mundo Engineering Co.*, 43 Cal.2d 1, 271 P.2d 34. These cases, however, do not so hold. The *Ornales* case stated that the general rule is that before an appellant may complain of the lack of an instruction he must request that the charge be made more specific or ask for qualifying instructions, but that this rule is qualified by the rule that the appellant may complain, in the absence of such request, where the instruction erroneously states the applicable law and prejudice is suffered thereby. It then specifically held that the appellant could not complain of the failure of the trial court to give an instruction qualifying its instructions on the effect of the violation of a statute, for the reason that the appellant had offered no such qualifying instruction. In the *Satterlee* case it was held that the trial court was justified in refusing to give an instruction offered by the appellants to the effect that violation of section 550, Vehicle Code, would be negligence *per se* because it did not cover the issue as to whether the circumstances were such as to excuse violation, as the facts in the case would have warranted a finding that the violation was excused. In the *Gallup* case, it was held, likewise, that the trial court was justified in refusing an instruction offered by the appellants that violation of a certain statute was negligence *per se* and in giving instead an instruction to that effect but qualifying it if the violation could reasonably be excused. None of these cases considered whether it was the duty of the court to give a qualifying instruction of its own motion. In *Cavagnaro v. City of Napa*, supra, 86 Cal.App.2d 517, 528, 195 P.2d 25, one of the grounds given by the

reviewing court, after considering the *Satterlee* case, supra, upon which defendants rely, in upholding the failure of the trial court to qualify an instruction upon the effect of the violation of a statute was that the appellant had made no request for such instruction. In *Mehling v. Zigman*, 116 Cal. App.2d 729, 735, 254 P.2d 141, after considering the *Ornales* case, supra, upon which defendants also rely, the reviewing court refused to hold erroneous an instruction given by the trial court that violation of section 502, Vehicle Code, was negligence *per se*, without qualification, pointing out that no qualifying instruction was offered by the appellants.

Fuentes v. Panella, 120 Cal.App.2d 175, at page 183, 260 P.2d 853 at page 858, holds: "But these cases do not stand for the proposition that excuse instructions can be given only where there is an admitted violation and the violator offers evidence of justification for such violation. The jury may believe that a violation of the law has taken place, and thus disbelieve the testimony to the contrary, but at the same time believe that such violation, under all the circumstances, was justifiable because of the circumstances." However, that rule is of no comfort to defendants here because the circumstances of our case bring it within the other rule set forth, 120 Cal.App.2d at page 183, 260 P.2d at page 858: "Of course, where there is no evidence at all of justification, or the surrounding circumstances do not show it, it is error to instruct on excuse."

The instructions given by the court here were not erroneous. They were correct as far as they went. If defendants desired to have them qualified they should have so informed the trial court. See *Kuehn v. Lowthian*, supra, 124 Cal.App.2d 867, 873, 269 P.2d 666, holding that since the appellants had not offered a proper instruction on the subject they could not complain that the excuse instruction there given did not contain the qualifications the appellants claimed it should have.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

137 Cal.App.2d 41

Marty MARTYN and Ted Kneeland,
Plaintiffs and Appellants,

v.

Jacques LESLIE, Phillip Wain, Joseph Shane,
Richard Hungate, Defendants and
Respondents.

Marty MARTYN and Ted Kneeland,
Plaintiffs and Appellants,

v.

Jacques LESLIE and Richard Hungate,
Defendants and Respondents.

Civ. 20786, 20787.

District Court of Appeal, Second District,
 Division 3, California.

Nov. 17, 1955.

Hearing Denied Jan. 5, 1956.

Consolidated actions were brought for damages for alleged usury in transactions, through which loans of money were made, and for money had and received, and one of the defendants filed a cross-complaint. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgments adverse to the plaintiffs, and they appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence sustained finding that there was no usury.

Judgments in each action against the plaintiffs and in favor of the defendants affirmed, and judgment in favor of one of the defendants on his cross-complaint reversed.

1. Usury ☞117

In consolidated actions for damages for alleged usury in transactions through which loans were obtained, and for money had and received, evidence sustained finding that there was no usury. West's Ann. Civ.Code, § 1916-1 et seq.; West's Ann. Const. art. 20, § 22.

2. Appeal and Error ☞996

Inference to be drawn from the evidence is the province of the trial court and not the District Court of Appeal on appeal.

3. Usury ☞52

Fact that defendants, through contracts with third persons, insured themselves

against loss and insured themselves a profit over and above rate of interest, which they would have been entitled to receive had transaction in fact been that of a loan, does not establish usury. West's Ann.Civ. Code, § 1916-1 et seq.; West's Ann.Const. art. 20, § 22.

4. Usury ☞52

If, as a part of a transaction through which a loan of money is made, lender in addition requires borrower to sell lender property of a value much in excess of price paid, excess value of property will be considered as an exaction for the use of the money and will render the entire transaction usurious. West's Ann.Civ.Code, §§ 1916-1 et seq., 1916-2; West's Ann.Const. art. 20, § 22.

5. Usury ☞117

In consolidated actions for damages for alleged usury in transactions, through which loans were made, and for money had and received, evidence sustained finding that price paid by defendants for interests in the transactions was adequate and that the sale of such interests was not a subterfuge under the Usury Act. West's Ann. Civ.Code, §§ 1916-1 et seq., 1916-2; West's Ann.Const. art. 20, § 22.

6. Usury ☞103

A borrower is not estopped from asserting usury merely because he has knowingly met the usurious exactions of the lender. West's Ann.Civ.Code, §§ 1916-1 et seq., 1916-2; West's Ann.Const. art. 20, § 22.

7. Discovery ☞79

Where defendants took depositions of plaintiffs, and plaintiffs offered and read into evidence the depositions taken by defendants, court properly sustained defendants' objections to plaintiffs' answers which were not responsive. West's Ann.Code Civ.Proc. § 2056.

8. Discovery ☞79

Where defendants took depositions of plaintiffs, and plaintiffs offered and read into evidence the depositions taken by the defendants, court properly sustained defendants' objections to plaintiffs' answers which constituted hearsay or conclusions

of the witnesses, since defendants by taking deposition of plaintiffs did not waive incompetency of the plaintiffs' testimony West's Ann.Code Civ.Proc. § 2032.

9. Usury ⚖115

The parol evidence rule is not applicable in cases involving the claim of usury, and parol evidence is, in such cases, admissible to show the actual nature of the transaction, and in no way depends on the existence of an ambiguity in a written contract. West's Ann.Civ.Code, § 1916-1 et seq.; West's Ann.Const. art. 20, § 22.

10. Appeal and Error ⚖1047(3)

Where substance of matter stricken was later received in evidence through answers to other questions, those who had introduced the stricken matter were not prejudiced by the striking of such matter.

11. Usury ⚖114

In consolidated actions for damages for alleged usury in transactions, through which loans were made, and for money had and received, wherein plaintiffs contended that the sale of them of the 15% interest in the transactions for \$500 was but a subterfuge under the Usury Act, court properly sustained objections to questions asked of plaintiffs whether they would have sold the 15% interest for \$500 if the sale had been unconnected with loan, since state of mind of plaintiffs was not in issue or relevant. West's Ann.Civ.Code, § 1916-1 et seq.; West's Ann.Const. art. 20, § 22.

12. Partnership ⚖5

Though, in written partnership agreements, there was no mention of the sharing of losses by the parties, sharing of losses was implied.

13. Partnership ⚖22

Where contract created a partnership, declaration in contract that it would not be deemed to create a partnership would not change the legal status.

14. Joint Adventures ⚖5(1)

Partnership ⚖108

A partner or joint adventurer is not entitled to sue the other members of the

partnership or venture at law until an accounting has been had, and it has in fact been determined that they are indebted to him.

15. Partnership ⚖108

Where there had been no accounting and it had not been determined whether partnership venture resulted in a loss, judgment in favor of one of the partners on his cross-complaint for an accounting and for money due and owing was erroneous.

Minter & Feder, Hollywood, Stanley M. Arndt, Los Angeles, for appellants.

Belcher, Kearney & Fargo, Los Angeles, for respondents.

NOURSE, Justice pro tem.

The above entitled actions were consolidated for trial. The action in which Leslie and Hungate are the only defendants will be hereinafter designated the second action. The lower court did not follow the rule laid down in Wolfson v. Beatty, 118 Cal.App.2d 392, at page 398, 257 P.2d 1017, but made findings of fact and conclusions of law and judgments in each action. The record here, therefore, consists of one reporter's transcript and two clerk's transcripts.

The plaintiffs appeal from the judgment in favor of the defendants in each action. What we will hereafter say will apply to both appeals unless the context indicates to the contrary.

The issues will be clarified by an analysis of the pleadings. In the following analysis the amounts set forth in brackets are taken from the allegations in the second action. In substance, the plaintiffs allege that plaintiffs were partners doing business under the fictitious name and style of "Marted"; that defendants Leslie and Hungate were at all times mentioned in the complaint joint adventurers and partners in the transactions therein set forth and that the defendant Leslie acted for himself and as the duly authorized agent of the defendant Hungate; that the defendants loaned to the plaintiffs the sum of \$36,000 [\$28,000] and that contemporaneously with the making of the loan, the plaintiffs executed the written instru-

ments labeled "Assignment", a copy of which is annexed as Exhibit A to the complaint. That pursuant to the terms of Exhibit A, the plaintiffs executed to defendants their promissory note in the sum of \$35,500 [\$27,500] payable on or before six months after its date and bearing interest at 5 per cent per annum [6 per cent] and secured by chattel mortgage. A copy of the note is set forth and incorporated as Exhibit B. That by the terms of Exhibit A plaintiffs agreed to sell and assign to defendants 15 per cent of their right, title and interest in a series of television programs which were described in Exhibit A and known as "Double Play", in consideration of the payment by defendants to plaintiffs of the sum of \$500. That said Exhibit A further provided that plaintiffs were granted an option to reacquire said 15 per cent interest for the sum of \$8,000 [\$6,750], said option to be exercised in writing within thirty days after the expiration of six months from the time of sale. That as partial security, the defendants required that defendant United Television Programs, Inc., and its president, one King, execute a written guaranty for the payment of said promissory note, a copy of that guaranty being annexed to the complaint and incorporated as Exhibit C. That as part of the transaction and prior to making the loan, the defendants further required United and King to execute "a guaranty agreement" guaranteeing that if the plaintiffs failed to exercise their option to repurchase said 15 per cent interest from the defendants, then United and King would, upon demand, purchase said interest for the sum of \$8,000 [\$6,750]. The copy of said alleged guaranty is made a part of the complaint as Exhibit D. That in truth and in fact the sale of said 15 per cent interest by the plaintiffs to the defendants, the option granted to plaintiffs to repurchase said 15 per cent, and the guaranty of United and King to purchase said interest in the event plaintiffs failed to do so, was a sham, subterfuge, trick and device on the part of defendants to exact a bonus of \$7,500 [\$6,250] in addition to the interest reserved by the promissory note and for the loan of the \$36,000 [\$28,000] and to evade the Usury Act of the

State of California and Article XX, § 22 of the Constitution of this State. That plaintiffs paid to the defendants the principal of said promissory note together with the interest reserved therein and within the option period paid to the defendants the sum of \$8,000 [\$6,750] and that of said sum of \$8,000 [\$6,750] the sum of \$7,500 [\$6,250] was in truth and in fact a bonus paid to the defendants for the loan of \$36,000 [\$28,000] and over and above the interest reserved by the promissory note. That the return of interest charged by the defendants for said loan is not clearly or otherwise expressed in writing, nor was any return of interest clearly expressed in writing, other than the 5 per cent set forth in the promissory note. That the defendants and each of them have exacted, demanded and received in the aggregate \$8,036.21 [\$6,931.61] for the use of the amount of \$36,000 [\$28,000] actually loaned to the plaintiffs. That treble the amount so received, to wit, \$24,108.63 [\$20,794.83] is payable to plaintiffs from the defendants.

By a second cause of action which is in the form of a common count for money had and received, plaintiffs allege that the defendants are indebted to them in the amount of the interest and alleged bonus paid and that no part of said sum has been paid.

The defendants by their answer admit the execution of all the instruments referred to in the complaint. They deny that Leslie and Hungate were partners or joint venturers in the transactions described in the complaint or that Leslie acted as agent for Hungate in those transactions. They allege that Leslie at all times mentioned in the complaint was a joint venturer with the plaintiffs and that acting as such and as the agent for the plaintiffs, participated in the transactions involved. They deny that they had loaned to the plaintiffs the sum of \$36,000 [\$28,000] or any amount in excess of the sum of \$35,500 [\$27,500], and allege that concurrently with the making of said loan they had purchased from the plaintiffs for the sum of \$500, a 15 per cent interest in the proposed television series described in the complaint and had granted the plaintiffs an option to repurchase said interest for the sum of \$8,000 [\$6,750]. They deny

that they had required the execution of the guaranty agreements annexed to the complaint, but allege that said guaranty agreements were executed by United and King as an inducement to the defendants to make said loan and to purchase said 15 per cent interest. They deny that the option and guaranty agreements were a sham, subterfuge, trick or device to exact a bonus in any sum whatsoever. They admit the payment to them of the principal and interest provided for in the promissory note and admit the receipt from the plaintiffs of the further sum of \$8,000 [\$6,750], but allege that prior to the payment to them of said sum plaintiffs had voluntarily exercised their option to repurchase said 15 per cent interest and that upon the payment to them of said sum they retransferred and reassigned to plaintiffs said interest. They deny that said sum of \$8,000 [\$6,750] or any part thereof was paid or received as a bonus for any loan. They acknowledge receipt of the interest reserved under the terms of the promissory note, but deny that they exacted, demanded or received any bonus or additional interest and deny that there is any sum due to the plaintiffs. They deny the material allegations of the second alleged cause of action. In an affirmative defense defendants plead facts which they assert estopped plaintiffs from asserting that the monies paid to them were paid as a bonus or interest or were usurious. It is not necessary here to go into the details of these affirmative allegations. In the second action, defendant Leslie cross-complained against the plaintiffs.

From this analysis of the pleadings it appears that the issues of ultimate fact tendered by the pleadings were:

First, was the assignment to the defendants with the option to the plaintiffs to repurchase and the agreement of United and King to purchase the 15 per cent interest, a subterfuge and sham to cover the real transaction between the parties?

Second, was there in fact a loan to the plaintiffs of the sum of \$36,000 [\$28,000]?

Third, were the amounts paid by the plaintiffs in the exercise of the alleged option in fact the payment of a bonus for the

loan rather than the payment of a purchase price?

Fourth, were the plaintiffs estopped?

Upon all of these issues of fact, the trial court made findings against the plaintiffs and in favor of the defendants. The appellants make four assignments of error on this appeal: (1) that the court erred in not holding that usury was involved; (2) that the court erred in its ruling as to the admission of evidence; (3) in giving judgment to the defendant Leslie on his cross-complaint; and (4) that certain findings are contrary to the evidence.

Appellants' first and fourth assignments of error in reality constitute a claim on their part that the findings are contrary to and not supported by the evidence. We have come to the conclusion that the findings, with certain exceptions hereafter noted, are supported by substantial evidence.

The following facts were established either without contradiction or by substantial evidence:

The defendant Leslie was at all times material to the controversy here the attorney for the plaintiffs and acted as such in the drafting of all of the pertinent instruments and in the negotiations between the plaintiffs and the other defendants involved in the first action and between the plaintiffs and himself and the defendant Hungate involved in the second action. He was also, at all times, the owner of an interest in the business conducted by the plaintiffs and to which business the transactions involved here relate. He also, at times acted for his co-defendants and received compensation from them. He held, as trustee for the benefit of himself and his co-defendants, practically all of the assets of the plaintiff partnership. To say the least he carried water on both shoulders.

The plaintiffs were partners doing business under the name of Marted. Upon the formation of the partnership they undertook the production of a television program entitled "Double Play" in which were to be starred a nationally known baseball personality and his wife, a well known actress. This program was to consist of a serial running through twenty-six (later changed to

thirty-nine) episodes, one to be released each week.

The partners entered into a contract with one Mohr whereby he agreed to finance the productions and to distribute them. Three episodes were produced with money advanced by Mohr, but he failed to advance enough to pay the salaries (\$1,250 per week) of the stars and certain other expenses incurred, and refused further advances.

The plaintiffs then produced three more episodes with monies procured from various sources, but the stars still remained unpaid and the partnership was now indebted to the stars in the sum of \$7,500 for salaries and to a bank from which it had borrowed the sum of \$2,500, upon the guaranty of the defendant Leslie. It was unable to proceed with the production of the remaining episodes and unless it could proceed, the six that it had produced were worthless.

At this time, and in February, 1952, the partnership entered into two further contracts, both drafted by Leslie. By the first of these, the partnership agreed that Leslie should receive 15 per cent of the net profits of the entire series as compensation for the legal services performed and to be performed by him for the partnership (Mar-ted). It further assigned to him an undivided 15 per cent of all assets and profits now owned or which might be hereafter acquired by it. The second contract was with United Television Programs, Inc., hereinafter called "United", of which corporation one Gerald King was president. This contract will be hereafter referred to as the "distribution agreement". By it United was given the exclusive right to distribute the entire series and agreed to advance \$2,500 in cash to pay off the partnership indebtedness to the bank, and to deliver to the stars the promissory note of another corporation in satisfaction of the \$7,500 due them as salary. By the contract United was entitled to certain percentages of all amounts received from sponsors of the series but agreed to forego its commission from the first \$81,000 of gross returns and in lieu thereof to take double commission on the second \$81,000 of gross returns. This was to enable the partnership to use the first

gross returns to further finance the venture. Shortly thereafter, the partnership's agreement with Mohr was cancelled and he agreed to take a stated amount out of 50 per cent of the net profits in lieu of any rights he might have in the venture under the cancelled contract.

The partnership now sought further financing but was unable to procure it. While the partnership was endeavoring to further finance its venture, King discussed the matter with the defendant Wain (United's accountant) telling him that if he, Wain, would finance the remaining portion of the series United would defer its commission until Wain's investment was repaid and that King and United would guaranty him against loss. Wain told King he had a friend, the defendant Shane, who might be interested in coming in with him, but that both he and Shane were primarily interested in capital gains, not ordinary profits. Wain contacted Shane, and Shane King. King advised Shane that he could guaranty the results of the deal because of commitments and contracts he already had with sponsors. King advised plaintiffs of Shane's and Wain's interest, and at their request, defendant Leslie contacted them. They told Leslie that they were not interested in the deal unless something could be worked out that would result in their realizing a capital gain. They later told him they would not be interested unless Leslie himself went into the deal. Leslie advised plaintiffs of his conversation with Wain and Shane and later advised them that he had devised a scheme which he thought would satisfy Wain and Shane and which might result in their realizing capital gains. Plaintiffs directed Leslie to submit the scheme to Wain and Shane. This he did. The scheme was, in substance that defendants would loan the partnership \$37,500 and would purchase from plaintiffs a 15 per cent interest in "Double Play", plaintiffs to reserve an option to repurchase this interest at a date six months after the consummation of the purchase from the partnership. Upon the scheme being presented to Shane, he advised Leslie that before he would go ahead he wanted to find out if King would stand by his statement that he and United

would guaranty him (Shane) against loss. Shane contacted King and told him he would make the deal as outlined by Leslie if King and United would: (1) guaranty the loan; (2) allocate the first money received from distribution to repayment of the loan, and (3) agree to purchase for \$8,000, the 15 per cent interest which defendants were to purchase from plaintiffs if they (plaintiffs) failed to exercise their option to repurchase. To this King agreed.

Leslie then drafted four instruments. The first of these instruments was designated "Assignment", and will be hereafter so designated.

By the terms of this agreement, the plaintiffs assigned to defendant Leslie all their interest in the television program series, including all negatives, etc., made or developed in connection therewith, their agreement with Mohr, their agreements with the stars, their agreement with United, to be held by him in trust for defendants Shane, Wain, Leslie and for Gerald King, until such time as the plaintiffs should have executed chattel mortgages, assignments of accounts receivable, notes, pledges and "any other documents that may be required in connection with the loan to us of \$35,000". They further agreed to execute an agreement guaranteeing that twelve additional films in the series would be produced for the sum of \$35,500; that if sums in excess of \$35,500 were required to be advanced by the lenders, that they would convey absolutely to the lenders a 5 per cent interest in the enterprise for each \$1,000 so advanced. They further agreed that all sums so advanced should be recouped and paid "from the proceeds accruing from the distribution and exploitation of the television series together with interest at 5 per cent per annum". They agreed to execute a document providing for the repayment of \$35,500 together with interest at 5 per cent per annum "which sum shall be payable from the first proceeds derived from the distribution and exploitation of said television series". They agreed to sell to defendants Shane, Wain and Leslie a 15 per cent interest of their right, title and interest in the television program in consideration of payment to them of the sum of \$500, and in further

consideration, that they be granted an option to repurchase said 15 per cent interest for the sum of \$8,000, said option to be exercised in writing at any time after September 1, 1952, and prior to October 31, 1952. By the terms of the instrument, Leslie was directed and authorized to hold any monies payable to the plaintiffs by United under the distribution agreement until such time "as we shall advise him whether or not it is our intention to exercise said option".

The second instrument has been referred to in the record as a promissory note, and will be hereafter referred to as such. By the terms of this instrument the plaintiffs promised to pay on or before six months to defendants Shane, Wain and Leslie the sum of \$35,500 with interest at 5 per cent per annum, "pursuant to the terms of those certain agreements dated March 14, 1952, entered into in connection with a series of television photoplays produced under the title 'Hot Stove League' or 'Double Play' or both."

The third agreement is entitled "Guaranty Agreement", but hereinafter will be referred to as the "Note Guaranty". By the terms of this instrument United and King, as an inducement to the three defendants above named to lend to plaintiffs the sum of \$35,500, guaranteed repayment to the lenders of said sum with interest. United agreed by the terms of the instrument to transfer and assign to the defendants all monies received by it under its Distribution Agreement until such time as the sum of \$35,500, with interest, had been paid to the defendants. King and United agreed that if they were required to make good upon their guaranty, they should do so by paying the lenders not less than the sum of \$2,000 per week. By the terms of the instrument, defendants Shane, Wain and Leslie agreed to loan plaintiffs the sum of \$35,500. The instrument was signed by United, King and the three defendants named.

The fourth agreement was also entitled "Guaranty Agreement", but will be here referred to, in order to distinguish it from the Note Guarantee, as "United Purchase Agreement". By the terms of this agreement it was provided that as an inducement to defendants Shane, Wain and Leslie to

purchase an undivided 15 per cent interest in the television program, United and King would, in the event plaintiffs failed to exercise their option to repurchase said 15 per cent interest on or before October 31, 1952, on demand of the defendants, purchase said interest and pay therefor the sum of \$8,000.

The first of these four instruments is dated March 17, 1952. The others are all dated March 14, 1952, but it is apparent from the record that they were all executed on the 17th, and the court so found.

There also was drafted an instrument entitled "Mortgage of Chattel, Pledge and Assignment", by the terms of which plaintiffs mortgaged the six television photoplays theretofore produced, all other television photoplays thereafter produced in connection with the series and all literary, musical or dramatic or other material upon which the programs were based, all copyrights in the physical properties used in connection therewith to secure the payment of \$35,500 with interest and any additional sums loaned by the mortgagee to the plaintiffs. Defendant Shane was the only person named as mortgagee.

Upon the execution of these instruments, the defendants paid to the plaintiffs the sum of \$36,000. Of this sum one-third was advanced by Shane, one-third by Wain, one-sixth by Leslie and one-sixth by Hungate, Hungate having been declared in on the deal through a collateral agreement between himself and Leslie.

The \$36,000 was all deposited in one bank account established in the name of Martyn, Leslie and King. Between March 17, and the first part of May, 1952, twelve pictures or episodes were produced and sales to exhibitors totaling more than \$80,000 had been made by United which reported to defendant Leslie that the weekly income from these contracts was sufficient to cover the loans made by the defendants "plus the repayment fee".

This money was not immediately available and \$27,000 additional capital was required to produce the additional pictures necessary to make the total number of twenty-six which United had guaranteed

to the exhibitors with which it had signed contracts.

Wain and Shane were unwilling to do any further financing and plaintiffs were unable to interest others, but finally induced Leslie and Hungate to do the financing. Leslie then prepared documents which were duplicates of the documents prepared as to the first transaction, except that Hungate and Leslie only were involved as lenders and purchasers, and the principal sum in the promissory note was \$27,500, and the rate of interest 6 per cent. There was, of course, a difference in the dates of payment and in the option dates.

This series of documents and the transactions under them are the basis of the second action. Upon the new contracts of guarantee and purchase by United and King being prepared, plaintiff Martyn took them to King and requested that he execute them. King at first refused, but after a conference with defendant Leslie, executed them. After the execution of these documents, Leslie and Hungate, over a period extending from May 16, to June 26, advanced the sum of \$28,000, which was placed in an account in the name of "Leslie or Hungate and Kneeland or Martyn".

The principal and interest on the note of \$35,500 were paid in installments covering the period from June 3, through August 6, 1952.

Shortly after the date upon which the plaintiffs could first exercise their option to repurchase the 15 per cent interest sold to the defendants in the first transaction, they did in writing exercise their option. They did this without any request or demand being made upon them by the defendants so to do. By their direction, defendant Leslie, on September 19, paid to himself and his three codefendants from the funds held by him as trustee, the total sum of \$8,000 that being the option price.

Thereafter, the remaining films were produced. But prior to the date upon which the plaintiffs could exercise their option to repurchase the 15 per cent interest assigned to Leslie and Hungate in the second transaction, plaintiff Martyn had an opportunity

to sell his interest in the venture to one Sax, but Sax would only buy if he could secure a 50 per cent interest in the venture. At this time Leslie held a 20 per cent interest (this being the amount assigned to him, separate and apart from the 15 per cent interest involved in the transactions we have mentioned). Martyn told Leslie and Hungate that he and Kneeland would not exercise their option to repurchase the 15 per cent assigned to said defendants unless Leslie would reduce his 20 per cent interest to 8 per cent. This Leslie finally agreed to and he and Hungate also agreed to permit the option to be exercised prior to the expiration of the six month period. They were paid not only the principal and interest on the note of \$27,500, but the option price of \$6,750. Shortly thereafter, these actions were commenced and at the time of the payments last mentioned the plaintiffs had in contemplation the commencement of these actions.

[1] While undoubtedly from the facts we have stated, and other evidence received, the trial court might well have drawn inferences that would have upheld findings that these transactions were usurious and that the sale and option to repurchase, together with the "United Purchase Agreement", were but a cloak devised to hide the real transactions, and that there were in fact loans of \$36,000 and \$28,000, it was not bound to draw these inferences. On the other hand, the facts established by the evidence and hereinbefore set forth, undoubtedly support the findings made.

[2] What inferences should be drawn from the evidence is the province of the trial court, not this court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

Here the instruments did not on their face show a loan or forbearance of money, except to the extent of amounts set forth in the promissory notes. These instruments on their face do show the sale of an interest in motion pictures to be produced, with an option in the plaintiffs to repurchase. It was for the trial court to determine from all of the circumstances whether the intent of the parties was that disclosed by the face of the instruments or whether in fact those

instruments were a sham and a subterfuge to cover up the real intent of the parties.

Appellants contend, if we understand them correctly, that the facts we have stated compel the drawing of the inference that the transaction was in reality a loan of \$36,000 [\$28,000], and that the sale with options to repurchase and the guaranties were but a subterfuge to cover up the true nature of the transaction. While they point to a number of facts shown by the evidence from which inferences could be drawn which would support findings in their favor, their main reliance is upon the fact that because King and United had agreed that they would, upon demand of the defendants, purchase the 15 per cent interest sold to the defendants in the event the plaintiffs failed to exercise their option to repurchase, and as there was an absolute promise on the part of the defendants to repay \$35,500 [\$27,500], none of the defendants' money was at hazard and that therefore, the entire transaction must be treated as a loan.

They rely principally upon *Martin v. Ajax Construction Co.*, 124 Cal.App.2d 425, 269 P.2d 132. That case, however, is not in point here. In the cited case plaintiffs had loaned to defendants the sum of \$5,000, and received back from the defendants an unconditional note in the sum of \$10,000, payment of which was guaranteed by the principal stockholders of the defendant. In the cited case, the instruments on their face showed a loan of \$5,000, and an unconditional promise to repay \$10,000, within one year, although a collateral agreement did provide for payments to be made upon the note out of funds derived by the defendant from a construction project for which the monies were borrowed. In the case at bar, the instruments on their face show a loan of \$35,500 [\$27,500], with a guaranty of that loan by United and King. But they further show on their face a purchase of a 15 per cent interest in the series of motion pictures (not in *Marted*, the plaintiff partnership) with an option on the part of the plaintiffs to repurchase their interest at a price greatly in excess of that for which they had sold it.

It is true that by means of the "United Purchase Agreement" defendants insured themselves not only against loss, but of a profit. However, they did not thereby exact any payment from the plaintiffs. The plaintiffs were under no obligation to exercise their option, and there was no evidence that they were in any wise obligated to reimburse King or United if they purchased the 15 per cent interest. The evidence is all to the contrary.

The "United Purchase Agreement" was not a contract of guaranty, though so denominated. A guarantor is one who promises to answer for the debt, default or miscarriage of another. Civ.Code, § 2787. King and United did not by this contract undertake to answer for any debt or default of plaintiffs, for, as we have pointed out, plaintiffs had the right, but not the obligation, to exercise their option. By failing to exercise it, they did not default in the performance of any obligation owed to defendants, and King's and United's obligation to purchase could only arise after the plaintiffs' rights to purchase had expired. This being true, there is nothing in the agreements that exacted from plaintiffs any interest or charge for the use or forbearance of money, other than the lawful interest reserved in the promissory notes. It is only the unlawful exaction of interest or other charges for the use or forbearance of money that is prohibited by the Usury Act and the Constitution.

[3] While it is apparent from the evidence, despite the findings of the trial court to the contrary, that defendants would not have loaned the \$35,500 [\$27,500] to the plaintiffs, or have purchased the 15 per cent interest, unless they could protect themselves not only against loss of the money loaned and their investment, but also against the loss of the expected capital gain, this does not establish, as a matter of law, the exaction of anything from the plaintiffs other than the interest that they expressly promised to pay. The fact that the defendants, through contracts with third persons, insured themselves against loss and insured themselves a profit over and above the rate of interest which they would have been en-

titled to receive had the transaction in fact been that of a loan, does not establish usury. 55 Am.Jur. 386; 91 C.J.S., Usury, § 47, p. 630; *Salvin v. Myles Realty Co.*, 227 N.Y. 51, 124 N.E. 94, 6 A.L.R. 581; *McArthur v. Schenck*, 31 Wis. 673, 677; *Wilhoit v. Flack*, 123 Ark. 619, 185 S.W. 460; *Gleason v. Childs*, 52 Vt. 421.

[4] Appellants further assert that the inadequacy of the price of \$500, paid for the 15 per cent interest in each transaction, shows that the sale of that interest was but a subterfuge under the Usury Act. Undoubtedly, it is true that if as a part of a transaction through which a loan of money is made, the lender in addition required the borrower to sell to him property of a value much in excess of the price paid, the excess value of this property will be considered as an exaction for the use of the money and will render the entire transaction usurious. The Usury Act, by its express terms, prohibits the taking of property, as well as money, for the loan or forbearance of money, if the value of the property taken exceeds the lawful charge. *Deering's Gen.Laws*, 1953, Act 3757, § 2, *West's Ann.Civ.Code*, § 1916-2.

[5] In the case at bar, however, no direct evidence was offered to establish the value of the interest purchased by the defendants. There was evidence from which it might have been possible for the court to draw the inference that this 15 per cent interest had a value in excess of the \$500 paid for it, and it may be that it could have drawn the inference that the value of this interest was so great as to make the transaction usurious. The trial court was not bound to draw these inferences. On the other hand, there was direct evidence that at the time of the transactions, the interest purchase had little if any present value, although it undoubtedly had a comparatively large prospective value which depended upon the success of the venture. The evidence, therefore, supported the findings of the trial court that the price paid by the defendants was adequate and we cannot substitute our judgment for its.

Appellants also specifically attack a number of the findings made by the trial court

as being contrary to the evidence. What we have said covers all of these assignments of error, except three. In finding No. 3 the court found that the defendant Leslie had at no time acted on behalf of the defendant Hungate. This finding is contrary to all of the evidence, as it is clear that Leslie was Hungate's agent and that he acted for him in both transactions. This issue, however, was not a material one in view of the court's finding upon the other issues. It might have been material in order to hold Hungate in the first transaction had the court's findings upon the other issues been in favor of plaintiffs.

By finding No. 17 the court found upon many probative facts, none of which, however, is inconsistent with its findings upon the ultimate facts we have heretofore mentioned. Some of the probative facts found seem to us to be unsupported by the evidence, but had the findings been to the contrary, it could not have affected the court's findings upon the ultimate facts. In this finding the court found, among other things, that the \$35,500 [\$27,500] loan was payable out of the proceeds of the distribution of the television series and that said loan was, therefore, uncertain and speculative and a hazard upon the success of the venture. Considering the terms of the assignment and the note alone, this finding would be fully sustained by the evidence. By the assignment it was provided that the plaintiffs would execute a document providing for the repayment of the sum of \$35,500, together with interest thereon "which sum shall be payable from the first proceeds derived from the distribution and exploitation" of the television series, and the promissory note executed pursuant to the assignment provides for its payment pursuant to the terms of the agreement just quoted from. Plaintiffs' promise to pay, therefore, was not an unconditional one, but a promise "to pay out of a particular fund". When, however, these instruments are read in connection with the "Note Guaranty" executed by King and United as a part of the same transaction, the finding ceases to be supported by the evidence, for by the terms of the "Note Guaranty" the guarantors were unconditionally bound to pay the defend-

ants \$35,500 [\$27,500], if plaintiffs did not, and plaintiffs as principles would, consequently, be likewise bound. Inasmuch, however, as the court found that the sale and option portion of the transaction was not a part of the loan transaction, the fact that the finding we have just discussed is contrary to the evidence cannot affect the judgment.

[6] The court, by its conclusions of law, found that the plaintiffs were estopped from asserting that the loan made by defendants to plaintiffs was usurious or in violation of the usury laws or of the pertinent provisions of the Constitution. This conclusion is based upon the facts found in paragraphs 22 and 23 of the findings. By these the court, in substance, found that the plaintiffs freely and voluntarily and without obligation so to do, exercised their option to repurchase the 15 per cent interest which they sold to the defendants, and that in paying to the defendants the sum of \$8,000 [\$6,750] they deliberately and intentionally lead defendants to believe that they were in good faith exercising the option and repurchasing said 15 per cent interest, and to believe in the validity of the loan purchase and the option to repurchase, and in reliance thereon to in good faith make said loan and purchase and to permit plaintiffs to exercise their option to repurchase. These findings and conclusions (except the finding that the plaintiffs freely and voluntarily and without obligation exercised their option) are, as appellants say, "amazing." The whole scheme was the device of the defendant Leslie. If it was a subterfuge and the transaction was in reality but a loan of money, no one knew it better than he and his co-defendants, and no borrower is estopped from asserting usury merely because he has knowingly met the usurious exactions of the lender. *Stock v. Meek*, 35 Cal.2d 809, 817, 221 P.2d 15; 39 Cal.L.Rev. 604, 607-08. But here again these findings and conclusions are not material, for inasmuch as the court's findings of fact and conclusions of law upon the other issues tendered by the complaint and answer (exclusive of the affirmative defense) upheld and compelled the judgment rendered,

the question of estoppel was no longer of importance.

Appellants make two assertions of error as to the trial court's rulings on the admission of evidence. The major part of the testimony taken at the trial consisted in the reading of the depositions of the parties. The plaintiffs had taken the depositions of the defendants, and the defendants those of the plaintiffs. The plaintiffs offered and read into evidence the depositions taken by the defendants. In a number of instances, in answers to questions propounded at the taking of their depositions by counsel for the defendants, the plaintiffs had given answers which were subject to a motion to strike, upon the ground that the answers constituted hearsay or a conclusion of the witness or as not responsive. When the evidence elicited by these questions was offered by the plaintiffs, defendants' counsel objected upon the appropriate ground. The trial court sustained the objections to the reading of the answers, or where they had been read, struck the answers. It was appellants' contention in the trial court, and is his contention now, that the answers having been elicited by questions asked by counsel for the respondents on the taking of the deposition, he waived all right to object to the answers given.

[7] Insofar as the rulings of the trial court were based upon the grounds that the answers were not responsive are concerned, there can, of course, be no possible merit in appellant's point, for that ground for a motion to strike would have been open to respondents had they offered the testimony of these witnesses by themselves reading the depositions. Code Civ.Proc. § 2056.

[8] As to the rulings that were based upon the grounds that the answers constituted hearsay or a conclusion of the witness, the rulings of the trial court were correct. Appellants rely, in support of this point, upon the case of McClenahan v. Keyes, 188 Cal. 574, 206 P. 454, and a number of cases from other jurisdictions. These cases are not in point. Each of them involved waivers as to the compe-

tency of the witness to testify. None of them involved the competency of the testimony which he gave. In each of the cited cases (most of them involved the Dead Man's statute) the court held that although the witness was incompetent to testify, that when the party who had the right to claim his incompetency *made him a witness* by taking his testimony by means of a deposition, he waived his right to claim the incompetency. That is not the situation here. Here the witness was competent, but the testimony he gave incompetent. This incompetency the examining party did not waive, for he was not bound to offer this testimony at the trial, and if the opposing party did use it he could only do so "subject to all legal exceptions" unless the objection went to the form of the question. Code Civ.Proc. § 2032. This same question was raised and decided adversely to appellants in Madera R. Co. v. Raymond Granite Co., 3 Cal.App. 668, 686, 87 P. 27.

[9] Appellant contends that the parol evidence rule is not applicable in cases involving the claim of usury and that parol evidence is, in such cases, admissible to show the actual nature of the transaction, and in no way depends upon the existence of an ambiguity in a written contract. In this claim he is fully supported by the decisions of our Supreme and appellate courts. Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474; Milana v. Credit Discount Co., 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621; Van Noy v. Goldberg, 98 Cal.App. 604, 277 P. 538.

[10] The trial court did not, however, as appellants claim, violate the rule established by these cases. The trial court struck out certain answers given by the plaintiff Kneeland concerning his understanding of the contracts. None of these answers concerned any conversation with the defendants or any of them, or any fact or circumstance surrounding the making of the contracts, nor did they concern the negotiations between the parties or the conduct of any of the parties. We have carefully examined each of the instances in which it is claimed the court so erred, and

are of the opinion that not only was the trial court correct in its rulings, but that the substance of the matter stricken was later received in evidence through answers to other questions. Appellants were therefore not prejudiced by the rulings of the court even though they might be found to have been erroneous.

[11] Upon the plaintiffs being called as witnesses on their own behalf, they were asked in substance whether or not they would have sold a 15 per cent for \$500, if the sale had been unconnected with the loan of \$35,500 [\$27,500]. Appellants assert that the trial court erred in sustaining objections to these questions. There is no merit in this claim. The state of mind of the plaintiffs was not in issue or relevant to any issue. The questions were as to a purely hypothetical set of facts. There was no evidence that the parties ever considered or discussed such a sale as that hypothesized. The evidence is uncontradicted that each of the deals in question was a package deal covering the loan and the alleged sale. The package was wrapped up in the "Assignments". Affirmative answers to the questions propounded would not have tended to prove that the defendants intended to exact usury or that the sale evidenced by the face of the instruments executed pursuant to the assignment was not in fact a sale but a cloak behind which the true transaction was hidden. Plaintiffs might have been unwilling to sell under the facts recited in the question, and still have been willing to sell under the circumstances shown by the evidence.

The judgment on the cross-complaint. In the second action the defendant Leslie filed a cross-complaint for an accounting and for money due and owing. The trial court rendered judgment in his favor for the sum of \$185.65, the amount prayed for. By this cross-complaint Leslie alleged in substance that the cross-defendants, the plaintiffs, were joint adventurers doing business under the fictitious name of Marted Productions and were the owners of the proposed television series and that the cross-complainant was the owner of 8 per

cent of all of the net profits theretofore or thereafter derived from the proposed television series; that the said television series had been successfully produced and that substantial net profits had been realized in an amount unknown to the cross-complainant, but that cross-complainant had been paid no part of that profit; that he had demanded an accounting but that the cross-defendants refused to account or to pay him his share of the profits. By a second cause of action he alleged that defendants were indebted to him in the sum of \$185.65, for monies loaned and advanced. He prayed for an accounting and for judgment in the sum above mentioned, plus his share of the profits as found by the accounting. The trial court found that the series of motion pictures had not been successfully produced; that the cross-defendants had not realized a net profit from the venture; that cross-defendants were indebted to cross-complainant for the sum of \$185.65, on account of monies loaned, and rendered judgment in favor of cross-complainant. This judgment cannot be sustained.

The cross-complainant was, under uncontradicted evidence, a joint adventurer, if not a general partner with the cross-defendants. The evidence shows without conflict the following facts: February 1, 1952, cross-complainant drafted an agreement in letter form between himself and the partnership. By this letter it was recited that Leslie had rendered legal and other services to the partnership; that he agreed to act as attorney for the partnership and to render any and all legal services which might be required by it, other than those involving accounting or tax problems. That in consideration for all the services theretofore rendered or to be rendered, the partnership agreed to pay him a sum equal to 15 per cent of all the net profits derived by or accruing to the partnership from the distribution of the television series; that all profits payable to the partnership should be divided and apportioned 42½ per cent each to Marted and Kneeland, 15 per cent to Leslie. Further, by the terms of the agreement the cross-defendants assigned to Leslie 15 per

cent of all assets and profits "now owned or which may be hereafter acquired by Marted Productions", and further agreed that all ventures and transactions in the motion picture, television or radio field by Marted or Kneeland should be conducted through the partnership. It further provided that nothing contained in the agreement should be "termed to constitute or create a partnership". Leslie's percentage was later increased to 20 per cent, and later still, as we have shown, was reduced to 8 per cent.

In his answer to plaintiffs' complaint, Leslie construed this agreement, for in paragraph I of his answer he alleges that by virtue thereof he became and remained a joint venturer with plaintiffs.

The evidence further shows that during the production of the last picture of the series and after the consummation of the transactions out of which the second action arises, the partnership became short of funds and that Leslie, at the request of his co-adventurers, deposited in the account maintained by him and them the sum of \$712.50, to cover an overdraft. Of this amount he was repaid all of his advance except the amount for which the court gave him judgment.

[12, 13] While in the written agreements between the parties there is no mention of a sharing of losses, this is implied, *Constans v. Ross*, 106 Cal.App.2d 381, 389, 235 P.2d 113, and the declaration in the contract that it should not be deemed to create a partnership does not change the legal status which it in fact creates. *San Joaquin Light & Power Corp. v. Costaloupes*, 96 Cal.App. 322, 330-336, 274 P. 84.

[14, 15] A partner or joint adventurer is not entitled to sue the other members of the partnership or venture at law until an accounting has been had, and it has in fact been determined that they are indebted to him. Here, admittedly, there has been no accounting and it has not been determined whether the venture resulted in a loss. Until that has been determined there is no basis for the finding that the cross-defendants are indebted to the cross-com-

plainant. *Cunningham v. deMordaigle*, 82 Cal.App.2d 620, 186 P.2d 423; *Danelian v. McLoney*, 124 Cal.App.2d 435, 441, 268 P.2d 775; *Stowe v. Matson*, 94 Cal.App.2d 678, 211 P.2d 591.

The judgments in each action against the plaintiffs upon their complaints and in favor of the defendants are affirmed. The judgment in the second action in favor of the defendant and cross-complainant Leslie upon his cross-complaint is reversed. The defendants will recover their costs against the plaintiffs; the cross-defendants will recover costs against cross-complainant Leslie in an amount equal to one-fourth of the amount expended by them in the preparation of their brief, the reporter's transcript and the clerk's transcript in Appeal No. Civil 20787.

SHINN, P. J., and PARKER WOOD, J., concur.



H. J. WILSON, Plaintiff and Appellant.

v.

Charles H. BEVILLE, City of Los Angeles, et al., Defendants.

City of Los Angeles, Defendant and Respondent.*

Civ. 20995.

District Court of Appeal, Second District, Division 2, California.

Nov. 21, 1955.

Rehearing Denied Dec. 12, 1955.

Hearing Granted Jan. 18, 1956.

Action against city and others to quiet title and to obtain ejectment. The Superior Court, Los Angeles County, Leroy Dawson, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Ashburn, J. pro tem., held that, where failure to join lienholder, under street improvement bond, in condemnation proceeding brought by city for street purposes left lien unimpaired by

* Opinion vacated 306 P.2d 789.

judgment in condemnation proceeding, but no claim was even filed against city under claims statute by plaintiff, who claimed under city treasurer's deed issued after foreclosure sale, or by plaintiff's predecessors, plaintiff did not have right to recover from city amount previously awarded and paid to record owner as result of the condemnation proceeding.

Judgment affirmed.

1. Eminent Domain ⇨152(1)

Where condemnation award is on deposit in the court, a lien, whether it be a mortgage, trust deed, or tax lien, attaches to the award and is removed from the condemned land.

2. Eminent Domain ⇨166

A condemnation action is not strictly one in rem but is quasi in rem.

3. Eminent Domain ⇨177

In condemnation proceeding, all persons in interest, including lienholders, must be joined as defendants if their rights are known or appear of record. West's Ann. Code Civ.Proc. §§ 1244, subd. 2, 1245.3, 1246, 1248.

4. Eminent Domain ⇨152(1)

Under statute providing that, where property sought to be taken is encumbered by lien and indebtedness secured by lien is not due at time of entry of judgment, amount of such indebtedness may, at option of plaintiff, be deducted from judgment and that lien shall be continued until such indebtedness is paid applies not only to voluntary liens but also street assessment and similar involuntary liens. West's Ann.Code Civ.Proc. § 1248, subd. 8.

5. Eminent Domain ⇨152(1), 154

In matter of rights of lienholder who has not been joined in an eminent domain proceeding, there is no distinction between a mortgage and a tax lien, and both liens are entitled to protection in the proceeding. West's Ann.Code Civ.Proc. §§ 1244, subd. 2, 1245.3, 1246, 1246.1, 1248, 1252, 1252.1.

6. Eminent Domain ⇨152(1)

Where holder of lien arising from street improvement bond was not joined as

defendant in condemnation proceeding by which city took, for street purposes, part of land covered by lien, failure to join lienholder left his lien unimpaired by the judgment. Streets and Highways Code, §§ 5000-6794; West's Ann.Code Civ.Proc. §§ 1244, subd. 2, 1245.3, 1246, 1246.1, 1248, subd. 8, 1252, 1252.1.

7. Eminent Domain ⇨268

Where lien arising under street improvement bond was not impaired by judgment in condemnation proceeding because of failure to join lienholder in the proceeding, by which city took an easement for street purposes, plaintiff, who claimed through city treasurer's deed issued after foreclosure sale under the bond, was precluded by city's devotion of the condemned land to public use from gaining possession, but intervention of such public use did not destroy plaintiff's right to recover his debt. Streets and Highways Code, §§ 5000-6794; West's Ann.Code Civ.Proc. §§ 1244, subd. 2, 1245.3, 1246, 1246.1, 1248, subd. 8, 1252, 1252.1.

8. Evidence ⇨31

The District Court of Appeal would take judicial notice of the municipal claims statute contained in charter of the city of Los Angeles.

9. Eminent Domain ⇨277

Claims statutes, such as that contained in charter of city of Los Angeles, are fully applicable to claims for compensation under the doctrine of inverse condemnation, and compliance therewith is an indispensable prerequisite to maintenance of an action thereon.

10. Eminent Domain ⇨277

Where failure to join lienholder, under street improvement bond, in condemnation proceeding brought by city for street purposes left lien unimpaired by judgment in condemnation proceeding, but no claim was ever filed against city under claims statute by plaintiff, who claimed under city treasurer's deed issued after foreclosure sale, or by plaintiff's predecessors, plaintiff did not have right to recover from city amount previously awarded and paid to record owner as result of the condemnation pro-

ceeding. Streets and Highways Code, §§ 5000-6794; West's Ann.Code Civ.Proc. §§ 1244, subd. 2, 1245.3, 1246, 1246.1, 1248, subd. 8, 1252, 1252.1.

—♦—
Guerin & Guerin, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Peyton H. Moore, Jr., Chief Deputy City Atty., Spencer L. Halverson, Deputy City Atty., Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Action to quiet title and for ejectment. Plaintiff claims title by virtue of a city treasurer's deed issued to his predecessor in interest after foreclosure sale under a street improvement bond issued pursuant to Improvement Act of 1911 (now secs. 5000-6794, Streets and Highways Code). The assessment resulting in this bond was levied under said Act of 1911 and recorded on November 23, 1927. On November 25, 1927, two days later, the city of Los Angeles commenced a condemnation action entitled *City of Los Angeles v. Howse*, in which it took an easement for street purposes (south La Brea Avenue) across part of the land upon which the street bond constituted a lien. The owner of that lien (who at that time would be the contractor) was not joined as a defendant, nor was he or any holder of the bond ever brought into the action. That fact gives rise to the primary question in this case.

The assessment was recorded on November 23, 1927, the action was filed on November 25, 1927, the bond was issued under said Act of 1911 on December 28, 1927, to Municipal Bond Company. A certificate of a treasurer's sale was issued to one Al Schuh on October 19, 1938, same was transferred on March 8, 1950 to Betty Wilson. The amount set forth in the notice to redeem was \$295.06, but should have been \$309.41. The treasurer's deed was issued to Betty Wilson on August 23, 1950. She quitclaimed to plaintiff on April 12,

1951, and he filed this action on the following day.

Final judgment of condemnation was entered on July 23, 1931, and the record owner of the portion condemned was awarded and paid the sum of \$5,376.20. The city took possession of the condemned property on January 22, 1932, and forthwith devoted it to public use as a part of a city street. No portion of the assessment or bond has been paid.

The court rendered judgment that plaintiff is the owner of the condemned parcel subject to the city's street easement. Plaintiff appeals from the judgment claiming that the city acquired title subject to the lien of his bond, that that lien ripened into a fee title in plaintiff and, alternatively, that the city should have been required by way of inverse condemnation to pay to the plaintiff the amount previously awarded and paid to the record owner, not merely the amount of plaintiff's bond. The city, as respondent, contends first, that the lien of the bond was transferred by the condemnation to the award made in that action regardless of nonjoinder of the lien holder, and that his remedy was to appear and assert his rights in the eminent domain case or to collect the amount of the bond from the owner who received the award.

[1] The question of whether a tax or assessment lien is lifted from the land and transferred to the condemnation award regardless of nonjoinder of the holder of the lien has not been definitely answered in this state.¹ The general proposition that a lien, whether it be a mortgage, trust deed or tax lien, attaches to the award and is removed from the condemned land, has been stated from time to time in this jurisdiction. *Pomona College v. Dunn*, 7 Cal.App.2d 227, 232, 46 P.2d 270; *Rose v. Conlin*, 52 Cal. App. 225, 230, 198 P. 653; *Los Angeles Trust & Savings Bank v. Bortenstein*, 47 Cal.App. 421, 423, 190 P. 850. Certainly that is the result when the award is on deposit in the court. *Board of Capitol Managers v. Brasie*, 72 Colo. 153, 210 P. 63;

1. 79 A.L.R. 116 carries an annotation on the subject entitled "Taxes—property taken by eminent domain."

United States v. Cohen, D.C., 81 F.Supp. 340; United States v. 909.30 Acres of Land, etc., D.C., 114 F.Supp. 756; United States v. Certain Parcels of Land, D.C., 44 F. Supp. 936; Weber v. Wells, 9 Cir., 154 F.2d 1004. But none of the cases just cited (those in California or other jurisdictions) involves the point here presented—the right of a lien holder who has not been joined as a defendant and who has received no part of the award, same having been paid to the owner of the fee.

[2, 3] In California a condemnation action is not strictly one *in rem*, it is *quasi in rem*. Harrington v. Superior Court, 194 Cal. 185, 189, 228 P. 15; 18 Cal.Jur.2d, sec. 257, p. 10. An examination of the statute discloses that it is contemplated that all persons in interest, which of course includes lien holders, must be joined as defendants where their rights are known or appear of record.

[4] Code of Civil Procedure, sec. 1244, states the requirements of the complaint and subdivision 2 says it must include: "The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants". Of course this means they must be joined. The first sentence of sec. 1245.3 contains this: "In any action brought under this title the plaintiff may name as defendants, *in addition to those persons who appear of record or are known to plaintiff to have or claim an interest in the property*, 'all persons unknown claiming any title or interest in or to the property,' naming them in that manner * * *." Section 1246 requires each defendant to set forth his estate or interest in the property described and the amount of damages claimed by him. It also says: "All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to

his own property or interest, or that claimed by him, in like manner as if named in the complaint." Section 1248 requires the court or jury to fix the value of the property sought to be condemned, "and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed". (This is not affected by sec. 1246.1 which was not enacted until after the proceedings now under discussion.) Section 1252 provides that: "Payment may be made to the defendants entitled thereto, or the money may be deposited in Court for the defendants, and be distributed to those entitled thereto." And sec. 1248, subd. 8: "When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid."³ The last quoted subsection has been held to apply not only to voluntary liens but also street assessment and similar involuntary liens. City of Los Angeles v. Superior Court, 2 Cal.2d 138, 140, 39 P.2d 401. There is nothing in these statutory provisions to indicate any legislative recognition of a right to dispose of any lien upon property involved in an eminent domain proceeding without making the owner thereof a party and giving him an opportunity to be heard, not unless his claim is unknown and does not appear of record.

The case last cited, City of Los Angeles v. Superior Court, *supra*, was an action in eminent domain. Between the time of filing the complaint and the making of interlocutory judgment, assessments for street improvements became liens upon the property. The same not being due at the time of judgment, the city withheld the amount thereof and tendered the balance of the money to the owner of the fee, who

2. (Emphasis added.) This section was not enacted until after the proceedings in City v. Howse, but its phraseology is at least a legislative interpretation of the meaning of subdivision 2 of sec. 1244.

3. Section 1252.1, Code of Civil Procedure, providing for payment of taxes and assessments through the eminent domain proceeding, was not enacted until 1953.

refused to accept it. Thereupon the city brought an action in mandamus to compel him to fully satisfy the judgment upon receipt of the said money. The court first disposed of the contention that the terms of sec. 1248, subd. 8 do not include involuntary liens, such as a street assessment, and then explained the purpose of that subdivision as follows: "The purpose of the statute is obviously to prevent a situation wherein the condemnor will pay the full value of the land, and thereafter will be forced to pay again to holders of liens on the land, when the liens become due. Bearing this purpose in mind, it certainly makes no difference whether the lien was created by the owner, as in the case of a mortgage, or arose in other ways." 2 Cal.2d at page 140, 39 P.2d 401. The court relied somewhat upon *Marin Municipal Water Dist. v. North Coast Water Co.*, 40 Cal.App. 260, 180 P. 620.

In that instance plaintiff water company had condemned land of defendant in a previous action; shortly before the interlocutory judgment was entered city and county taxes became a lien thereon; later, an order for possession was made and possession taken upon payment of the award to the defendant; the taxes were then due and were a lien upon the land but were not in default. 40 Cal.App. at page 262, 180 P. 620. Plaintiff later redeemed the premises from a tax sale and then sued defendant to recover the amount it had paid for that purpose. Judgment for defendant was affirmed, the court saying, 40 Cal.App. on page 262, 180 P. on page 621, relative to sec. 1248, subd. 8: "It gives to the person taking property by proceedings in eminent domain the right to retain from the sum of money to be paid for it the amount necessary to discharge any lien existing thereon, but his neglect to adopt this course would not give rise, in the absence of some other provision of law creating it, to a right of action to recover it when once paid. The right given by this section seems to be one the extent of which is measured by the mode prescribed for its exercise. In eminent domain proceedings the only obligation resting upon the defendant is to prove his damages. * * * [40 Cal.App.

at page 263, 180 P. at page 621:] We are of the opinion that the facts set out in the complaint fail to show any obligation on the part of the defendant to have removed the lien of the taxes at the time of the transfer of the land to the plaintiff; and that, there being no such covenant or duty, there could be no liability created either by the fact that the defendant did not pay such taxes, or that the plaintiff did pay the same."

Section 1248, subd. 8 speaks as of the time of entry of judgment, and these two cases recognize that the condemnor must take care of liens accruing before that time or accept the risk of having to pay that portion of the award a second time.

In *Thibodo v. United States*, 9 Cir., 187 F.2d 249, plaintiff, the holder of street improvement bonds issued in 1931, which were a lien upon land condemned by the United States, sued the government to have the amount of his bonds declared a lien upon the condemned property; he had not been joined as a defendant and had received no part of the award. The condemnation action was filed and a declaration of taking and an order for possession made on February 9, 1943. The improvement resulting in the bonds under consideration in the *Thibodo* case was made pursuant to the Improvement Act of 1911 (which is digested in footnote 3 at page 252 of the opinion) and the court held, first, that the recordation of the assessment in accordance with the Act gave constructive notice to all persons of the existence of the lien, citing *Castle v. Schulman*, 32 Cal.2d 222, 195 P.2d 781. The court then said at page 255 of 187 F.2d: "We hold that the lien here involved is a subject of public record, charging a subsequent condemnor with constructive notice thereof. Armed with this knowledge, the amount of the lien could have been withheld for its rightful claimant." At page 256 of 187 F.2d: "Under the California law, a lienholder has a present proprietary interest in the subject matter of land sought to be taken by eminent domain proceedings which confers a right to have such interest considered and determined in said action. *City of Vallejo v. Superior Court*, 1926, 199 Cal. 408, 249 P. 1084,

48 A.L.R. 610; Calif.Code Civ.Proc. (1949) §§ 1244, subd. 2, 1246, 1246.1, 1248. See *Harrington v. Superior Court*, 1924, 194 Cal. 185, 228 P. 15. Section 1248, subd. 8, of the California Code of Civil Procedure provides that if the amount of a lien is not due at the time of entry of the judgment, the amount may be deducted from the judgment, with the lien continuing until the indebtedness is paid. This section is held applicable to street improvement liens. * * * If the lien is due and overdue, the security holder is entitled to have the money awarded in the condemnation proceedings applied to the payment of his claim. * * * The very purpose of the statute is to prevent a situation wherein the condemnor will pay the full value of the land, and thereafter will be forced to pay again to holders of liens on the land. * * *

"While it is true that the above cases seem to imply that the lienholder is not a necessary party to the proceedings, they leave no doubt of the fact that his interest must be protected in some practical manner." The court, at page 256 of 187 F.2d, adverted to the rule that one who seeks relief for deprivation of constitutional rights must first exhaust his remedies in the state court. Then said at page 257 of 187 F.2d: "Plaintiff should be given the opportunity to amend his complaint to show that he has exhausted the state remedy or that this relief is not available to him, or that pursuit for relief through the state courts would be fruitless. When appellant has taken proper steps as just suggested he may then state his claim for relief based upon a deprivation of constitutional rights, by virtue of the 'taking' of his right to have his bonds discharged through foreclosure of the lien upon the land." The essence of this decision is that the holder of a street improvement bond, who is not joined as a party defendant in the eminent domain proceeding, does not lose any of his rights by the awarding and payment of the entire amount of damages to the owner of the fee.

In *State v. Missouri Pac. Ry. Co.*, 75 Neb. 4, 105 N.W. 983, the holder of a tax lien was omitted from the condemnation action

brought by the railway company. The lien was in existence at the time the suit was brought and it was held that the title acquired by the railway company was subject to the tax lien. At page 985 of 105 N.W. the court said: "The property of an individual cannot be taken for the use of a railway company by condemnation proceedings without payment therefor. Under our statute the payment must be made to the owner of the land, and the doctrine is well settled that all persons who have an interest in the land are owners within the meaning of this statute. * * * The lien of these taxes was a matter of record. It could have been easily ascertained, and could have easily been provided for. Several cases have been brought to our attention in which the courts of other states have held that upon the suggestion of the railway company the court would require taxes then existing upon the land to be paid out of the condemnation money while the same was in the hands of the court. *Philadelphia & R. R. Co. v. Pennsylvania S. V. R. Co.*, [151 Pa. 569] 25 A. 177. However this may be, there can be no doubt that under our statute the railway company might protect itself by making lienholders parties to the proceedings, and, if it neglects to do this, and allows the holder of the fee to obtain the entire award, it cannot afterwards insist that the lienholders shall, by such proceeding, be deprived of their interest in the property." This ruling was followed in *Ehlers v. Chicago, B. & Q. R. Co.*, 118 Neb. 477, 225 N.W. 468.

Municipal Securities Corp. v. Kansas City, 195 Mo.App. 464, 193 S.W. 880. In this instance the plaintiff owned tax bills which were liens upon land later condemned by the city. The plaintiff was not made a party to the condemnation action and the entire award was paid to others. He sued the city to recover the amount of the liens held by him and recovered. In affirming the judgment the court said, 193 S.W. at page 881: "On this state of facts, the question is: Has the defendant city become liable to plaintiff for the amount of the tax bills? In our opinion no valid reason can be given why a liability does not exist. Three prominent facts stand out in the

record: One, that plaintiff had the lien; and, second, that defendant appropriated the property on which the lien existed; and, third, that defendant paid out condemnation money to the owners, whose condemned lands it knew were subject to the lien of plaintiff's tax bills, without ever having given plaintiff any notice of its proceedings and of which plaintiff had no knowledge until about six months after the money had been paid. * * *

"That one with an interest in land cannot have it taken from him by a condemnation proceeding without being made a party thereto is a fundamental proposition of law which finds apt illustration in *Holmes v. Kansas City*, 209 Mo. 513, 528, 108 S.W. 9, 1134, 123 Am.St.Rep. 495." At page 882 of 193 S.W.: "Defendant next insists that the lien for plaintiff's tax bills was taken off the land and transferred to the money arising out of its condemnation, and that therefore that fund should be followed by some appropriate action against the owners who received it from the city. It is not necessary to inquire what other remedy or remedies plaintiff may or may not have, as long as the one it has elected to pursue rightfully belongs to it and upon every just and legal principle affords relief."

[5] In this matter of the rights of a lien holder who has not been joined in an eminent domain proceeding we see no distinction between a mortgage and a tax lien. Both are entitled to protection in the condemnation action. It was specifically so held as to mortgagees in *Rose v. Conlin*, supra, 52 Cal.App. 225, 198 P. 653; *City of Vallejo v. Superior Court*, 199 Cal. 408, 416, 249 P. 1084, 48 A.L.R. 610; and impliedly so held in *City of Los Angeles v. Superior Court*, supra, 2 Cal.2d 138, 39 P. 2d 401, and *Marin Municipal Water Dist. v. North Coast Water Co.*, supra, 40 Cal. App. 260, 180 P. 620.

[6] We conclude that the failure to join the lien holder in the case of *City of Los Angeles v. Howse* left his lien unimpaired by the judgment.

[7] The city counters this conclusion with an argument that its title was per-

fectured through devotion to public use and the doctrine of inverse condemnation (See 17 Cal.Jur.2d, sec. 7, p. 585; 18 Cal.Jur. 2d, sec. 374, p. 95; *Hossom v. City of Long Beach*, 83 Cal.App.2d 745, 754, 189 P.2d 787; *Chilberg v. City of Los Angeles*, 54 Cal.App.2d 99, 103, 128 P.2d 693; *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 688, 76 P.2d 681), which is undoubtedly applicable to the extent of precluding plaintiff from gaining possession, thus disrupting the public use; but the intervention of the public use does not destroy a lien holder's right to recover his debt; for instance, after foreclosure and inability to obtain possession he may have an action for mesne profits, (*Dobbins v. Economic Gas Co.*, 182 Cal. 616, 634, 641, 189 P. 1073; *Lowe v. Los Angeles Suburban Gas Co.*, 182 Cal. 649, 189 P. 1084); or he may sue to recover the value of his lien on the date of taking by the public agency.

[8,9] Through application of this doctrine the lien holder becomes a money claimant and is required to comply with any applicable claims statute, such as sections 363 and 376 of the charter of the City of Los Angeles, of which we take judicial notice. They require filing with the city clerk of a written demand for any money or damages alleged to be due from the city provide that no suit may be brought on any such claim unless it has been made and rejected, in whole or in part, and that the demand must be presented within six months after the occurrence from which the damages arose. These claim statutes are fully applicable to claims for compensation under the doctrine of inverse condemnation, *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 126, 119 P.2d 717; *Veterans' Welfare Board v. City of Oakland*, 74 Cal.App.2d 818, 826, 169 P.2d 1000, and compliance therewith is an indispensable prerequisite to the maintenance of an action thereon. *Chilberg v. City of Los Angeles*, supra, 54 Cal.App.2d 99, 104, 128 P.2d 693; *Huffaker v. Decker*, 77 Cal.App. 2d 383, 386, 175 P.2d 254; *Cathey v. City and County of San Francisco*, 37 Cal.App. 2d 575, 576, 99 P.2d 1109.

[10] The court found that no claim was ever filed by plaintiff or his predecessors in interest and this finding is not challenged. It follows that plaintiff has no right to recover herein.

The judgment is affirmed.

McCOMB, Acting P. J., and FOX, J., concur.

Hearing granted; McCOMB, J., not participating.



137 Cal.App.2d 286

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Luis OLGIN, Defendant and Appellant.
Cr. 5500.

District Court of Appeal, Second District,
Division 1, California.

Nov. 28, 1955.

Rehearing Denied Dec. 12, 1955.

Hearing Denied Dec. 28, 1955.

Defendant was convicted of unlawful possession of heroin and he filed a petition for writ of error coram nobis. The Superior Court, Los Angeles County, denied the petition and directed that notice of appeal attached thereto be not filed, and petitioner appealed and the People of the State of California moved to dismiss the appeal. The District Court of Appeal, White, P. J., held that conduct of petitioner, who was confined in prison, constituted constructive filing of notice of appeal within the time allowed and satisfied jurisdictional requirement, in view of fact that petitioner had no notice of ruling on petition and request that attached notice of appeal be filed until after expiration of time allowed for taking an appeal.

Motion to dismiss appeal denied.

Criminal Law §1081

Where petitioner, who was confined in prison, attached notice of appeal to petition for writ of error coram nobis to review conviction for possession of heroin with re-

quest that it be filed if petition was denied and petitioner had no notice of order denying petition and directing that notice of appeal not be filed until after expiration of time allowed for taking appeal, conduct of petitioner constituted constructive filing of notice of appeal within the time allowed and satisfied jurisdictional requirement. West's Ann.Rules on Appeal, rule 31; West's Ann. Health & Safety Code, § 11500.

Luis Olgin, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

Respondent moves to dismiss the appeal herein upon the ground that the notice of appeal was filed too late. Appellant counters with the claim that the particular circumstances shown by the record in this case are such as to preclude dismissal of his appeal.

The following chronology is admittedly correct:

July 13, 1954—An information was filed in the Superior Court of Los Angeles County wherein appellant was charged with a violation of Sec. 11500 of the Health and Safety Code (Possession of Heroin). Said information also charged five prior felony convictions for which appellant served terms of imprisonment in a state prison. All prior convictions were admitted.

October 25, 1954—Appellant was adjudged guilty.

November 12, 1954—Judgment was pronounced committing appellant to State Prison. No appeal was taken from such judgment.

May 17, 1955—Appellant filed in the superior court a petition for writ of error coram nobis and for an order to show cause why the writ should not be granted.

May 18, 1955—The petition was denied.

June 14, 1955—Notice of appeal was filed with the Clerk of the Superior Court from "the judgments and the whole thereof".

Rule 31 of the Rules on Appeal provides that "an appeal [in a criminal case] may be

taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment". In the instant case the clerk received appellant's notice of appeal on June 14, 1955—"twenty-seven days" rather than "ten days" after rendition of the judgment denying his petition for writ of error *coram nobis*.

In opposition to respondent's motion to dismiss the appeal, appellant, appearing in propria persona, filed an answer reciting that when his original petition was filed in the court below, he attached thereto a notice of appeal requesting the Clerk of the Superior Court to file the same in the event his petition for writ of error *coram nobis* was denied. In this regard the record reflects that when, on May 18th, the appellant's aforesaid petition was called for hearing (he not being present) the court made the following order:

"The petition is denied, and it is directed that the notice of appeal attached to the petition be not filed, it having been sent to the Court prematurely. In other words, notice of appeal was sent before the Court had an opportunity to rule on the situation."

The record further reflects that on May 26, 1955 the Clerk of the Superior Court wrote appellant at Folsom State Prison, Represa, California, advising him of the denial of his petition and that the "purported notice of appeal attached to the petition is not to be filed or considered as a notice of appeal because it is premature". This letter was postmarked as mailed on May 25th, and appellant sets forth in his answer (which is not denied), "That due to censor regulations at said prison the said letter was not received by appellant until the 6th day of June of 1955".

In answer to respondent's contention that appellant "does not claim that he did anything within the ten-day period to perfect his appeal," the latter asserts, "The court will take judicial notice of the calendar that May 25th (the date notice of denial of his petition was mailed), was Wednesday; and that in ordinary mail delivery would not have reached Folsom Prison until Friday, May 28th, 1955, or ten days after the ruling. The Court will also take judicial notice that

mail is not delivered direct to the inmate but is censored and in matters or documents containing legal notices is directed to the regularly appointed person in the prison to be inspected before delivery.

"It is to be further noted that Monday, May 30th, 1955 was a legal holiday so that the first possible day the said letter could come to the attention of the proper official was the 31st of May, 1955, or three days after the ten day period had expired, and that in fact appellant did not read the said letter until June 6th at which time he promptly and without delay forwarded an additional notice of appeal. It is to be remembered that until the 6th of June, 1955, appellant had no notice of any kind and further that he relied on the Clerk of the Superior Court to file said notice in accordance with directions.

"How then can the respondent successfully contend that appellant did nothing during the ten day period to perfect his appeal—What else could he have done?"

Under the foregoing circumstances it must certainly be said that in all justice and equity appellant should have some avenue for relief in the courts.

We are not unmindful of the holding in *In re Estate of Hanley*, 23 Cal.2d 120, 123, 142 P.2d 423, 424, 149 A.L.R. 1250, that, "In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal [citations], even to relieve against mistake, inadvertence, accident, or misfortune [citations]", as well as other cases relied upon by respondent. However, these cases present no parallel considerations with the one now engaging our attention. Here, appellant, aware of the "disability", occasioned by his imprisonment, which might prevent him from complying with appeal requirements, attached a notice of appeal to his petition for writ of error *coram nobis* with the request that it be filed in the event of an adverse ruling, and it might well have been filed. Appellant had no notice of such ruling until more than 10 days had expired due to the fact that the county clerk did not mail him notice thereof until 6 days after its rendition and prison regulations which delayed delivery thereof to him. Obvious-

ly, appellant was powerless to do other than he did until he received notice of the adverse decision, and this, through no fault of his own. We are satisfied that this case comes within the sphere of the philosophy—both legal and moral—enunciated in the case of *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868, and that for the reasons therein stated, the conduct of appellant herein, under the facts above narrated, constituted a constructive filing within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law. See *Cochran v. State of Kansas*, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453.

The motion to dismiss the appeal is denied.

DORAN, J., and ASIIBURN, J. pro tem,
concur.



Frederick Sheets LORENZ, Petitioner
and Appellant,

v.

BOARD OF MEDICAL EXAMINERS OF
THE STATE OF CALIFORNIA,
Respondent.*
Civ. 16735.

District Court of Appeal, First District,
Division 2, California.

Nov. 21, 1955.

Rehearing Denied Dec. 21, 1955.

Hearing Granted Jan. 18, 1956.

Proceeding for writ of mandate to set aside order of Board of Medical Examiners revoking doctor's certificate to practice medicine and surgery. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., denied writ of mandate, and doctor appealed. The District Court of Appeal, Kaufman, J., held that trial court was free to make its own findings on whether offense of which doctor had been convicted involved moral turpitude, in view of

* Opinion vacated 298 P.2d 537.

fact that action before trial court was a trial de novo.

Judgment affirmed.

1. Physicians and Surgeons ⇨11(3)

Where, from face of record of conviction alone it can be determined that crime committed by doctor is one of moral turpitude, the Board of Medical Examiners could refuse to receive any contradictory evidence in proceeding to obtain revocation of doctor's certificate to practice medicine and surgery, since record would be conclusive of the question. West's Ann.Gov.Code, § 11500 et seq.; West's Ann.Bus. & Prof.Code, §§ 2361, 2383, 25658(a).

2. Attorney and Client ⇨49

Physicians and Surgeons ⇨11(3)

Where it is not possible to tell from face of record whether moral turpitude was involved in crime of which doctor or attorney was convicted, discipline of doctor or of attorney on basis of such conviction should be imposed by nonsummary procedures. West's Ann.Bus. & Prof.Code, § 6106 et seq.

3. Physicians and Surgeons ⇨11(3)

Where, in proceeding to obtain revocation of doctor's certificate to practice medicine and surgery, doctor was sufficiently advised of nature of testimony he would be confronted with as shown by fact that he had witnesses ready to testify in defense of accusations made, and doctor had waived his right to object to form of accusation, doctor was not deprived of full and fair hearing. West's Ann.Gov.Code, §§ 11500 et seq., 11506(a, b), 11517(c); West's Ann.Bus. & Prof.Code, §§ 2361, 2383, 25658(a), 6101, 6102.

4. Administrative Law and Procedure ⇨676

Review of administrative proceedings must be confined to issues which appear in record as made out by parties to the proceeding.

5. Mandamus ⇨173

In writ of mandate proceeding to set aside order of Board of Medical Examiners revoking doctor's certificate to prac-

tice medicine and surgery, trial court was free to make its own findings on whether offense of which doctor had been convicted involved moral turpitude, in view of fact that action before trial court was a trial de novo. West's Ann.Gov.Code, §§ 11500 et seq., 11506(a, b), 11517(c); West's Ann. Bus. & Prof.Code, §§ 2361, 2383, 25658(a), 6101, 6102.

6. Mandamus ⇨ 174

Upon trial de novo in writ of mandate proceeding to set aside order of Board of Medical Examiners revoking doctor's certificate to practice medicine and surgery, court has power to make its findings of fact and conclusions of law. West's Ann. Gov.Code, §§ 11500 et seq., 11506(a, b), 11517(c); West's Ann.Bus. & Prof.Code, §§ 2361, 2383, 25658(a), 6101, 6102.

Lowell L. Dryden, Denison, Dietrich & Anderson, Los Angeles, Hutchinson & Quattrin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of California, Dan Kaufmann, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court in and for the City and County of San Francisco, denying a writ of mandate to appellant, Dr. Frederick Sheets Lorenz, who sought to set aside an order of the Board of Medical Examiners revoking his certificate to practice medicine and surgery in this state.

An Accusation was filed against appellant before the Board on or about April 9, 1953, pursuant to the provisions of the Administrative Procedure Act. Government Code, § 11500 et seq. Paragraph III of said Accusation charged appellant with unprofessional conduct, contrary to the provisions of §§ 2361 and 2383 of the Business and Professions Code in that "on or about the 3rd day of October, 1952, the respondent herein was duly convicted of an offense involving moral turpitude in the Justice's Court of the Brawley Judicial District, * * * in an action entitled 'The People of the State of California, Plaintiff v. Frederick S. Lorenz, Defendant', No. 646, in

that respondent was convicted therein, upon his plea of guilty, of a violation of Section 61(a) of the Alcoholic Beverage Control Act of the State of California".

Paragraph IV alleged that for the limited purpose of assisting the Board in ascertaining the extent of discipline to be imposed, should the charges be found to be true, that appellant had had his certificate to practice medicine and surgery in California previously revoked on or about March 13, 1947, for unprofessional conduct consisting of conviction of a crime involving moral turpitude, that such revocation had been suspended and respondent had been placed on probation for five years.

A trial of the charges was held before a hearing officer at Los Angeles on February 23, 1954. His proposed decision found that appellant had been convicted of violation of § 61(a) of the Alcoholic Beverage Control Act (now Business and Professions Code, § 25658(a)), upon his plea of guilty; that said conviction arose out of the isolated act of giving to a minor of the age of 17 years a drink containing more than one-half of one per cent of alcohol by volume; that said crime did not involve moral turpitude. He found the prior disciplinary record of appellant, alleged in Paragraph IV of the Accusation, to be true. His recommendation was that the Accusation be dismissed.

On July 9, 1954, the Board of Medical Examiners rejected the Hearing Officer's decision, as they have power to do under § 11517(c) of the Government Code. Both parties filed written arguments with the Board.

On September 27, 1954, the Board rendered its decision finding that appellant's conviction of a violation of § 61(a) of the Alcoholic Beverage Control Act was a conviction of a crime involving moral turpitude and that appellant's prior disciplinary record was true. The Board revoked appellant's license to practice medicine and surgery in California.

Appellant having filed a petition for a writ of mandate in the Superior Court of San Francisco, a trial was had on the record before the Board, consisting of the pleadings, exhibits, and testimony taken before the Hearing Officer.

On January 19, 1955, the Superior Court rendered its judgment denying the writ. The court found as had the Hearing Officer and the Board, that petitioner had been convicted of violation of § 61(a) of the Alcoholic Beverage Control Act. It also found that this conviction was of a crime involving moral turpitude "in that it arose from the furnishing of intoxicating liquor by the petitioner on or about August 17, 1952, at the Travelodge Motel in Brawley, California, to a minor, David Hardenbrook, without just cause or explanation, and that at said time and place and in connection with the furnishing of said intoxicating liquor the petitioner did engage in immoral acts with the said minor."

Section 2383 of the Business and Professions Code, reads in part as follows: "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

Section 25658(a), Business and Professions Code (formerly Sec. 61(a) of the Alcoholic Beverage Control Act) provides that "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor."

The Accusation filed against appellant by the Board, as heretofore noted, charged that appellant had been convicted of a crime involving moral turpitude.

At the trial before the Hearing Officer, the minor, David Hardenbrook, testified that he was 17 years of age at the time of the alleged offense, and resided in Brawley, California. He had first met appellant when he had been hospitalized at Children's Hospital in Los Angeles when he was nine or ten years of age. Appellant had planned to take David with him on a trip to New Mexico. David was waiting at the Travelodge Motel in the evening when appellant drove in from Hermosa Beach. The witness said that appellant registered, went with David to David's home, and then both returned to the motel. Appellant got bottles of coke, took a bottle of gin from his

suitcase, mixed drinks of gin and coke which both of them drank. After this they disrobed and engaged in sex play. They also took photographs of each other. About ten o'clock that evening appellant took David home.

Several character witnesses testified to appellant's good reputation for morality, truth, honesty and veracity in the community. Two doctors testified that they had examined appellant and did not find that he had any homosexual tendencies. A private investigator testified to statements made by David Hardenbrook prior to trial which were contradictory to those made by him at the trial.

Appellant testified that he had practiced for six and one half years in Hermosa Beach, specializing in pediatrics. He denied seeing David at the motel in Brawley, and testified that he saw him at his home. While he admitted having had gin in his suitcase, he denied having given David a drink at the motel. He denied having had a conversation with Deputy Sheriff Thomas to the effect that David was waiting for him at the motel when he arrived; that he did not remember telling him that they went to David's house and then returned to the motel where they talked; that he did not recall telling him that he took a picture of David at the motel. He denied the acts of sexual misconduct. Deputy Sheriff Thomas testified that appellant told him that he would have a mixed drink, and David would drink the mix; that appellant said that David was at the Travelodge Motel when he arrived, that they went to David's home for dinner, returned to the motel for half to three quarters of an hour, and that he had taken a picture of David in his room at the motel.

It is the Board's position that in determining whether or not the appellant had been convicted of a crime involving moral turpitude, the Board of Medical Examiners could consider all of the circumstances surrounding the commission of the violation of the state liquor law, and it relies principally upon the case of *Brainard v. State Board of Medical Examiners*, 68 Cal.App.2d 591, 157 P.2d 7, and *Wyatt v. Cerf*, 64 Cal.App. 2d 732, 149 P.2d 309.

[1,2] Appellant argues that whether or not a crime involves moral turpitude is a question of law which must be determined from the record of the conviction alone. In the case of *In re McAllister*, 14 Cal.2d 602, 604, 95 P.2d 932, 933, a disbarment case, the Supreme Court said that "whether petitioner was convicted of a crime involving moral turpitude or of one not involving moral turpitude was a question of law and not one of fact," and that the court was limited to "the consideration of the record of conviction as certified to us by the clerk of the trial court, as section 287 of the Code of Civil Procedure makes said record conclusive evidence of petitioner's conviction." The cited case was a summary disbarment proceeding now provided for in sections 6101 and 6102, Business and Professions Code, which allow summary disbarment of attorneys convicted of a felony or misdemeanor involving moral turpitude upon certification to the Supreme Court of the record of conviction. Section 2383 of that same code does not provide for mandatory revocation of a physician's license summarily upon certification of the record of conviction to the board, as is true in cases involving attorneys. It provides that conviction constitutes unprofessional conduct, and that the record of conviction is conclusive evidence of such unprofessional conduct, and the Board *may* revoke or suspend the license. Section 2361, Business and Professions Code empowers the Board to act when instances of unprofessional conduct are brought to its attention. Undoubtedly in cases where from the face of the record of conviction alone it could be determined that the crime was one of moral turpitude, the Board could refuse to receive any contradictory evidence, for in such cases the record would indeed be conclusive of the question. There may be cases, however, where it is not possible to tell from the face of the record whether or not moral turpitude was involved in the crime of which the licensee was convicted. As was said by the Supreme Court in *In re Hallinan*, 43 Cal.2d 243, 253, 272 P.2d 768, 774, "Although every conviction for violating section 145 [subdivision] (b)

may not involve moral turpitude, *some convictions may*. In such cases discipline or disbarment should be imposed by non-summary procedures. Bus. & Prof.Code, § 6106 et seq." (Emphasis added.) In the present case discipline was imposed by non-summary procedure after a full hearing.

The case of *Brainard v. State Board of Medical Examiners*, 68 Cal.App.2d 591, 157 P.2d 7, 8, (petition for hearing by the Supreme Court denied), is very similar to the present case. Petitioner therein was charged with unprofessional conduct in that he had been convicted of a crime involving moral turpitude, violation of section 11225 of the Health and Safety Code, failure to keep records of narcotics dispensed. The record of conviction was attached to the complaint, showing that petitioner had entered a plea of guilty to the charge of violating section 11225. A hearing was held at which a narcotics inspector testified that marked money had been given to an "operator", a narcotic addict, who entered petitioner's office and returned with narcotics, and that the marked money was later recovered from petitioner; that an examination of petitioner's records disclosed a shortage in his supply of narcotics.

[3] Petitioner in the cited case contended that he had not been found guilty of a crime involving moral turpitude in the municipal court of Los Angeles, pointing out that he had been given a suspended sentence of one day upon entry of his plea of guilty to the charge of failure to keep a record of narcotics dispensed. The court there said: "Whether or not the offense committed did in fact involve moral turpitude depends upon all of the surrounding circumstances. The Board of Medical Examiners was not limited by the sentence pronounced by the municipal court, but it was justified in hearing evidence concerning all of the circumstances surrounding the offense for the purpose of determining if indeed moral turpitude was involved." The court there relied on *In re Hatch*, 10 Cal.2d 147, 73 P.2d 885, and *In re Disbarment of Rothrock*, 16 Cal.2d 449, 106 P.2d 907, 131 A.L.R. 226, which involved disbarment of attorneys. Peti-

tioner in the Brainard case claimed that he had been deprived of his license without due process of law, in that the complaint before the Board charged him only with a misdemeanor. Petitioner in the present case complains also that the Accusation was insufficient to advise him that he would be called upon to defend himself against a sex crime. However, the court in the cited case held that the charge in the complaint that he had been convicted of a crime involving moral turpitude was sufficient to notify petitioner that he would be called upon to meet the accusation that circumstances surrounding the commission of the offense involved moral turpitude. That petitioner herein was sufficiently advised of the nature of the testimony he would be confronted with is evident from the fact that, although the trial took place entirely on one day, February 23, 1954, and although petitioner's counsel sought to have all evidence excluded but the bare record of the conviction, he had medical witnesses ready to testify that they had examined petitioner and had found that he had no homosexual tendencies. There has therefore, been no showing that petitioner was deprived of a full and fair hearing. Furthermore, as found by the trial court, appellant waived his right to object to the form of the Accusation since he failed to present any objection to it in the proceeding before the Board. Government Code, Sec. 11506(b).

Appellant notes that in the opinion in the Brainard case, the court concluded with the statement "It is not claimed that a charge of unprofessional conduct may not be based upon the furnishing of narcotics to an addict." However, appellant therein was charged, not with furnishing narcotics to an addict, but with the failure to keep required records. The basis of the decision was that the Board could inquire into all the circumstances surrounding the commission of the crime for which he was convicted to determine whether or not it involved moral turpitude. Although appellant argues that any offense involving narcotics is one which on its face involves moral turpitude, that is not true. A failure to keep proper records, the crime charged

in the Brainard case, might very well result from negligence alone.

It is contended that in the Brainard case, the appellant merely argued that the evidence was insufficient and did not object that the evidence of the "background" crime was outside the issues, an objection which was raised in the present case. However, appellant therein argued that he was not convicted of a crime involving moral turpitude in the municipal court, and the court therein explicitly held that the Board in determining that issue was not limited to the sentence pronounced by the municipal court but could inquire into the circumstances surrounding the commission of the offense.

The Brainard case relied upon only two California cases both involving attorneys, *In re Hatch*, supra, and *In re Disbarment of Rothrock*, supra. The Hatch case, as noted in the later Hallinan case, was not a summary proceeding. Hatch had been convicted of violation of the Corporate Securities Act. The court there said that "Conceivably not in every case of the conviction of violations of the Corporate Securities Act will the face of the record of conviction indicate conclusively whether the offense involved moral turpitude. * * * There is necessarily a field of doubtful cases where the determination as to whether moral turpitude was involved may fall on one or the other side of the line, depending upon the circumstances of the particular case. * * * This court would not be justified in holding that, because the circumstances of any one such case might indicate a mere technical omission without the stigma of moral guilt, the entire class of offenses is one not involving moral turpitude." [10 Cal.2d 147, 73 P.2d 886.]

Appellant points out that the medical cases and attorney disbarment cases are not truly parallel, in that Section 6106 of the Business and Professions Code, provides that any act involving moral turpitude is cause for disbarment whether the act is a felony or misdemeanor or not. The Medical Act has no similar provision. Thus, in *In re Hallinan*, Section 6106 was relied on as authority for the State Bar Board to inquire as to "whether in the commission of

the crime the convicted lawyer was guilty of misconduct that requires his suspension or disbarment." The court there held that the conviction did not involve intent to defraud as an essential element of the crime proscribed, and that the issue of fraud or dishonesty was not necessarily involved and was not *res judicata*. A reference to the Board of Governors of the State Bar Board was therefore ordered for a hearing "as to whether the facts and circumstances surrounding the commission of the offense" of which petitioner was convicted "involved moral turpitude or other misconduct warranting disbarment or suspension." This case holds that if the investigation disclosed that the crime of which petitioner was convicted did involve moral turpitude, the court then could disbar him for that conviction after hearing, or if other misconduct not involving moral turpitude but warranting disbarment was disclosed, the court could of course, act on that matter.

In an earlier case, *In re Richardson*, 15 Cal.2d 536, 102 P.2d 1076, 1079, a reference was ordered for an investigation "whether, under all the circumstances, moral turpitude was involved in the charge and plea." Later, in *In re Richardson*, 20 Cal.2d 894, 123 P.2d 11, the charge was ordered dismissed because the report showed that "the facts and circumstances surrounding the conviction" of petitioner did "not disclose moral turpitude to have been involved in the commission of the offense".

Respondent contends that the act of furnishing liquor to the minor who was seventeen years of age, not being excused or justified in any way, was an act of moral turpitude, since it was an act contributing to the delinquency of a minor.

Appellant argues that the evidence respecting the drink furnished to the minor will not sustain respondent's order because there is nothing in the evidence to connect the drink with the lewd conduct to which the minor testified. The minor did not testify that the drink had any effect on him, that it paralyzed his will, or that it was any inducement to what happened later. However, the Board, as well as the trial court, was entitled to infer from the

testimony of the minor that the drinking of the intoxicating liquor had some connection with what followed. It cannot be said as a matter of law that it did not. *People v. Koosistra*, 58 Cal.App. 277, 279, 208 P. 316.

[4-6] It is urged that prejudicial error was committed in making findings upon issues not presented by the administrative record, or the pleadings. It is fundamental that the review of administrative proceedings must be confined to issues appearing in the record as made out by the parties to the proceedings. *Bohn v. Watson*, 130 Cal.App.2d 24, 278 P.2d 454. It is claimed that the trial court went beyond the issues in making the finding concerning the sex crime and its connection with the liquor violation. However, the trial court was free to make its own findings on whether or not the offense involved moral turpitude, for in a trial *de novo* in this type of case the court has power to make its findings of fact and conclusions of law. *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 801, 136 P.2d 304. As was earlier noted, appellant was well aware of the nature of the moral turpitude with which he was charged, since at the beginning of the hearing he came prepared with two medical witnesses who were ready to and did testify that he had no homosexual tendencies. Appellant had the right to object to the sufficiency of the Accusation, Government Code, § 11506(a), and this he did not do. See, *Marlo v. State Board of Medical Examiners*, 112 Cal.App. 2d 276, 246 P.2d 69; *Stuck v. Board of Medical Examiners*, 94 Cal.App.2d 751, 755-756, 211 P.2d 389.

We conclude that the findings and judgment of the trial court are amply supported by the evidence and the law and that no prejudicial error appears in the record before us.

Judgment denying writ of mandate affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur because I feel bound by the rule announced in *Brainard v. State Board*

of Medical Examiners, 68 Cal.App.2d 591, 157 P.2d 7, in which the Supreme Court denied a hearing. Were it a matter of first impression I would hold that the violation of the Beverage Control Act did not *involve* the subsequent alleged sex offense of which appellant has never been convicted, and hence did not involve moral turpitude.



137 Cal.App.2d Supp. 849

Joseph G. KENNEDY and Frank Barnes,
etc., Plaintiffs and Respondents,
v.

Mr. Pierre DOMERQUE, et ux., etc.,
Defendants and Appellants.

C. A. 8804.

Appellate Department, Superior Court,
Los Angeles County, California.

Nov. 9, 1955.

Action to recover damages authorized by Civil Code in case an innkeeper refuses accommodation because of color of applicant. The Municipal Court of Santa Monica Judicial District, Harry J. Bordé, J., rendered judgment for plaintiffs, and defendants appealed. The Appellate Department of the Superior Court, Bishop, Acting P. J., held that there was no such community of interest between the two plaintiffs who had made and checked on lodging reservation and the persons for whom lodgings had been reserved as would permit of a representative suit by such plaintiffs.

Reversed.

I. Parties ⇐12

Representative action by two individuals on behalf of themselves and four others would not lie, since four persons are not so numerous that it would be impractical to have them appear as plaintiffs, should they desire to press cause of action.

2. Parties ⇐11

There was no such community of interest, between the two plaintiffs who had made and checked on lodging reservation and persons for whom lodgings had been reserved, as would permit of a representative suit by such plaintiffs for damages authorized by Civil Code section in case an innkeeper refuses accommodation because of color of applicant. West's Ann.Civ.Code, § 52; West's Ann.Code Civ.Proc. § 382.

3. Principal and Agent ⇐23(5)

Evidence, on issue as to plaintiffs' right to sue innkeeper for refusal because of color, of accommodations to four other persons, would not sustain finding that plaintiffs had acted as agents for the four persons allegedly denied accommodations. West's Ann.Civ.Code, § 52; West's Ann.Code Civ.Proc. § 382.

4. Judgment ⇐253(1)

Where complaint alleged that, by reason of innkeeper's refusal of accommodations because of color of plaintiffs, plaintiffs had suffered damages in sum of \$100 each, no plaintiff was entitled to more than \$100. West's Ann.Civ.Code, § 52; West's Ann.Code Civ.Proc. § 382.

Carl B. Sturzenacker, Hollywood, for appellants.

Carter, Flournoy & Woods, Los Angeles, for respondents.

BISHOP, Acting Presiding Judge.

This is an action to recover the damages authorized by section 52, Civil Code, in case an innkeeper refuses accommodations because of the color of the applicant. Two plaintiffs, Joseph G. Kennedy and Frank Barnes, bring the action on behalf of themselves and four others, alleging in the complaint that the others for whom they purport to act "are so numerous and in varied localities that it would be impractical to bring all before the Court as individual plaintiffs * * *"

[1,2] Section 382, Code of Civil Procedure, does not authorize this attempt at a representative action. In the first place,

four persons are not so numerous that it would be impractical to have them appear as plaintiffs, should they desire to press a cause of action. Of greater consequence, the plaintiffs and the persons on whose behalf the present action was brought, do not have a "community of interest" that brings them within the purview of the section. *Weaver v. Pasadena Tournament of Roses*, 1948, 32 Cal.2d 833, 837-840, 198 P.2d 514, 517; *Ballin v. Los Angeles County Fair*, 1941, 43 Cal.App.2d, Supp., 884, 887-888, 111 P.2d 753, 756.

[3] In support of the judgment—which provided that plaintiffs recover from defendants the sum of \$400—the plaintiffs argue that they acted as agents for the other plaintiffs in seeking lodging and as agents could bring this action. Without seeking to determine whether or not an agent may prosecute an action on his principal's behalf, in such a situation as we have here, we find plaintiffs' argument lacks convincing force because it is supported neither by the pleading nor by the evidence. The theory of the complaint was that this is a representative action, not one brought by an agent on behalf of his principal. The evidence revealed that the only connection that plaintiff Frank Barnes had with the affair was that, upon receipt of a telegram from plaintiff Bailey requesting him to reserve 1 double room and 2 single rooms, he did so—nothing more. No agency to bring an action on behalf of Bailey, or any plaintiff, can be spelled out of these facts. Plaintiff Joseph Kennedy did go around to see about the lodgings that Bailey had reserved, probably on behalf of the other plaintiffs (not including Barnes, who was not desirous of accommodations), but there is nothing in that circumstance to warrant an inference that he thereby became the agent of the others to bring this action.

[4] For another reason the judgment should be reversed. The complaint refers to the two who bring the action and the four on whose behalf it is brought, as plaintiffs. After alleging that the plaintiffs made application for lodging, which the defendants refused them solely because of their color, the complaint concluded its allegations with the statement "that by reason of the premises these plaintiffs have suffered damages in the sum of one hundred dollars (\$100.00) each." A prayer for \$500 followed. The findings, by reference, find the allegation as to damages true (except as to plaintiff Willie, who was nonsuited). But by the judgment that was entered it was ordered, etc., "that plaintiffs recover from defendants the sum of \$400.00." No plaintiff was entitled to more than \$100. The plaintiff Barnes was not refused lodging, so far as appears, and he was not entitled to any judgment in his favor. We are not passing upon the question whether those plaintiffs who did not personally appear to claim their lodgings have a cause of action.

The judgment is reversed.

SWAIN, J., concurs.

PATROSSO, Judge.

I concur, with this additional comment: Assuming that the plaintiffs, as well as the other named persons upon whose behalf the action purports to be brought, could properly be joined as parties plaintiff (See Code of Civil Procedure, section 378), and disregarding, in the absence of a special demurrer, the fact that their individual causes of action are not separately stated, a joint judgment in favor of all such plaintiffs is not authorized. *Emery v. Pacific Employers Ins. Co.*, 1937, 8 Cal.2d 663, 666, 67 P.2d 1046.

136 Cal.App.2d 887

**Ethel Leona LEGG, Plaintiff, Respondent
and Cross-Appellant,**

v.

**MUTUAL BENEFIT HEALTH AND ACCI-
DENT OF OMAHA, Defendant, Ap-
pellant and Cross-Respondent.**

Leona Ethel LEGG, Plaintiff and Appellant,

v.

**MUTUAL BENEFIT HEALTH AND ACCI-
DENT OF OMAHA, an association, and
United Benefit Life Insurance of Omaha, a
company, Defendants and Respondents.**

Nos. 20687, 20952.

District Court of Appeal, Second District,
Division 2, California.

Nov. 30, 1955.

Action to recover monthly disability benefits under policy issued to plaintiff by defendant. The jury returned a verdict in favor of plaintiff, and the Superior Court, Los Angeles County, entered judgment accordingly. Plaintiff moved for a new trial, and defendant appealed from order granting the motion. Plaintiff appealed from the judgment and from order denying her application for default judgment. The District Court of Appeal, 289 P.2d 550, affirmed the order granting the new trial and the order denying default judgment and dismissed the appeal from the judgment. On defendant's petition for rehearing, the same court held that where attack upon sufficiency of notice of motion for new trial to raise issue of sufficiency of evidence to support verdict was made for first time in petition for rehearing, and it did not appear that any objection to asserted defect had been urged in trial court, objection came too late.

Rehearing denied.

Leona Ethel Legg, pro. per.

J. Edward Haley, Los Angeles, for re-
spondent.

PER CURIAM.

In its petition for rehearing defendant-appellant Mutual Benefit for the first time attacks the sufficiency of the notice of motion for new trial to raise the issue of the sufficiency of the evidence to support the verdict. It does not appear that any objection to the asserted defect was urged in the trial court. *Bauer v. Helene Curtis Industries, Inc.*, 117 Cal.App.2d 66, 68-69, 254 P.2d 931, and it is now too late to raise the point for the first time. *Nittler v. Continental Casualty Co.*, 94 Cal.App. 498, 506, 271 P. 555, 272 P. 309—opinion on denial of rehearing.

Rehearing denied.



137 Cal.App.2d 405

**BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, a national
banking association, as Administrator
with the Will Annexed of the Estate of
Cordella McTarnahan, Deceased, Plaintiff
and Appellant,**

v.

**George E. BEARD and Irene L. Beard,
Defendants and Respondents.**

Civ. 8683.

District Court of Appeal, Third District,
California.

Nov. 30, 1955.

Appeal and Error ⇐832(4)

Where attack upon sufficiency of notice of motion for new trial to raise issue of sufficiency of evidence to support verdict was made for first time in petition for rehearing, and it did not appear that any objection to asserted defect had been urged in trial court, objection came too late.

Action by administrator on note executed by defendants in favor of deceased. The Superior Court, Shasta County, Richard B. Eaton, J., in trial without jury, entered judgment for defendants, and administrator appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to establish that deceased had

intended to, and did effectively, release obligation evidenced by the note.

Judgment affirmed.

1. Appeal and Error $\S$ 931(1), 989, 1010(1)

Issues of fact must be determined by the trial court, and an appellate tribunal is bound by the familiar rule that, before it can be justified in reversing judgment on ground of insufficiency of evidence, it must appear from record that, accepting the full force of the evidence, together with every inference which may reasonably be drawn therefrom, favorable to the prevailing party, and excluding all evidence in conflict therewith, it still appears that the law precludes such a party from recovering a judgment.

2. Release $\S$ 57(1)

In action by administrator on note executed by defendants in favor of deceased, evidence was sufficient to establish that deceased had intended to, and did effectively, release obligation evidenced by the note.

Leroy P. Anderson, Costa Mesa, for appellant.

Carlton & Shadwell, Redding, for respondents.

SCHOTTKY, Justice.

Appellant, as administrator, commenced an action against respondents to recover on a promissory note executed by respondents in favor of Cordelia McTarnahan, deceased, in the principal sum of \$1,500. Respondents filed an answer denying that the promissory note had not been paid in full and alleging "that on June 14, 1949, Cordelia McTarnahan executed and delivered to the defendants an acknowledgment that said note was paid in full and acknowledging that she had received full payment thereunder and that she no longer had any claim against said defendants because of the execution of said promissory note."

Following a trial before the court sitting without a jury, the court found in accordance with the allegations of the answer and rendered judgment in favor of respondents.

Appellant has appealed from the judgment and its sole contention is that the judgment is contrary to the evidence.

The record shows that Cordelia McTarnahan was the aunt of respondent George E. Beard. George E. Beard testified that partial payments were made on the note, in the total sum of \$204.81, by three checks dated February 1, 1949, March 1, 1949, and June 12, 1949, respectively. On or about June 14, 1949, George E. Beard paid Cordelia McTarnahan \$800 in cash, and received from her a written release signed by her, indicating that the note had been satisfied in full. This release was introduced in evidence and respondent George E. Beard testified that it was prepared at his aunt's request and that she signed it.

Appellant offered no evidence to dispute the genuineness of the release, or to show that it had been obtained by fraud, coercion or mistake. The only evidence offered to support the contention that there is still a balance due on the note was the testimony of Leroy P. Anderson, appellant's attorney at the trial. Mr. Anderson testified to conversations between Mrs. McTarnahan and respondent George E. Beard in April, 1950, made in the presence of Mr. Anderson and George McCartney, in which Mrs. McTarnahan asked respondent what he was going to do about paying the balance on the note, and in which said respondent stated that he would pay it as soon as he could make arrangements. Respondent George E. Beard denied having been asked that by Mrs. McTarnahan. He was not asked whether he had at that time promised to pay a balance still due, and there is no admission by him anywhere in the record of any such statement. George McCartney was not produced to give his version of the conversations in question. Appellant offered no other evidence.

Appellant argues that the record shows that respondent George E. Beard made statements after the date of the written acknowledgment indicating that he still owed money on the note. Appellant states:

"It is the contention of the Appellant that the Respondent, George E. Beard made declarations against interest on

April 29 and 30, 1950. That his statements of said dates were sufficient to overcome the effect of the purported receipt dated June 14, 1949.

"The declarations of George E. Beard of April 29 and 30, 1950 were proof that he owed a balance on the Promissory Note.

"The Finding of Fact that said Promissory Note was paid and satisfied in full on the 14th day of June, 1949, should be set aside on the ground that it is contrary to the evidence in the case."

[1] It is apparent that the issue on this appeal is one of fact and that the evidence is conflicting. Appellant's argument is but an argument as to the weight of conflicting evidence. Issues of fact must be determined by the trial court, and an appellate tribunal is bound by the familiar rule that before it can be justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that accepting the full force of the evidence, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment.

[2] The following from the oral opinion of the trial court is fully supported by the record:

"* * * There is affirmative testimony, not directly contradicted or apparently acceptable [susceptible] of direct contradiction at this time, that

in consideration of a payment of eight hundred dollars in cash made before such sum or the greater part thereof was due, and for the convenience in another transaction of the obligee, and further for considerations of a personal character, that the said obligee did make in writing a release in satisfaction of the obligation. The intention of the payee of the note to release it by such document is possibly somewhat impeached by the testimony of the later reference thereto, but the document itself is explicit and if genuine has in it more convincing weight than testimony respecting oral statements made at a later date. At least, I believe the law to be that if at the time the obligee did knowingly and explicitly release an obligation it would be released regardless of what she might say about it thereafter. The document is explicit in term; it is payment of a time obligation before it is due as an additional consideration. The signature appears generally compatible with that found on the checks, whose genuineness is not disputed. The lady at the time may have made a poor bargain, but considering the family relationship involved she was free if she chose to act in part for motives not commercial in character.

"I find the balance of probability to be that she at that time did intend to, and effectively did, release the obligation."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

45 Cal.2d 623

Treasure Alice ARENS, Administratrix de bonis non of the Estate of Chauncey L. Hartman, deceased, Petitioner,
v.

SUPERIOR COURT of the State of California in and for the COUNTY OF SAN BERNARDINO, Respondent.

Maude H. McLaren, Real Party in Interest.

L. A. 23765.

Supreme Court of California,

In Bank.

Nov. 29, 1955.

Proceeding on motion to vacate an order setting aside a probate homestead. The Superior Court, San Bernardino County, R. Bruce Findlay, J., denied motion, and movant petitioned for certiorari. The Supreme Court, Traynor, J., held that order setting aside a probate homestead was appealable, and certiorari was unavailable to review question whether court had jurisdiction to enter order even though petitioner had had no notice of the proceeding to have the homestead set apart.

Proceeding dismissed.

Schauer, J., dissented.

1. Executors and Administrators ⇨194(6, 7)

Order setting aside probate homestead was an appealable order and became final when time for appeal expired, irrespective of whether it was in excess of jurisdiction of court. Probate Code, § 1240.

2. Certiorari ⇨5(1)

Certiorari does not lie to review an appealable order. West's Ann.Code Civ. Proc. § 1068.

3. Appeal and Error ⇨113(1)

An order denying a motion to vacate is not appealable.

4. Certiorari ⇨5(1)

Where order sought to be set aside was appealable, certiorari did not lie to review an order denying a motion to vacate the original order. West's Ann.Code Civ. Proc. § 1068.

5. Executors and Administrators ⇨194(1)

Statute describing form of notice to be given upon petition to set aside a probate homestead does not require actual notice. Probate Code, § 1200.

6. Certiorari ⇨5(1)

Order setting aside a probate homestead was appealable, and certiorari was unavailable to review question whether court had jurisdiction to enter order even though petitioner had had no actual notice of the proceeding to have the homestead set apart. West's Ann.Code Civ. Proc. § 1068.

Krag & Sweet and Donald R. Krag, Alhambra, for petitioner.

No appearance for respondent.

Lonergan & Jordan and A. M. Sessions, San Bernardino, for real party in interest.

TRAYNOR, Justice.

On March 7, 1951, approximately 19 years after the death of Chauncey L. Hartman, a verified petition was filed in the Superior Court of San Bernardino County on behalf of his widow, Nellie May Hartman, by her son-in-law, Charles R. McLaren, alleging that the decedent had an undivided two-thirds interest in certain real property of the value of \$4,075 and that the widow had an undivided one-third interest therein. The petition prayed that the real property be set apart to the widow "for her lifetime, as a probate homestead, and for such other relief as may be proper in the premises."

On April 18, 1951, the court entered the following order:

"The verified petition of Chas. R. McLaren for an order setting apart a homestead under the provisions of Sections 660 and 661 of the Probate Code, heretofore filed in this Court, came on regularly to be heard this 23rd day of March, 1951; it appears to the satisfaction of the Court, and the Court finds, that notice of the hearing on said petition has been regularly given in accordance with the provi-

sions of Section 1200 of the Probate Code; and the Court having heard the evidence, it appearing therefrom that the allegations in the petition are true and that at the time of decedent's death, Nellie May Hartman, the surviving widow, was a member of decedent's family, and it having been duly made to appear to the Court that no homestead had been selected during the lifetime of the decedent, and it further appearing the property hereinafter described was owned, as to an undivided one-third interest, by Nellie May Hartman, the surviving widow of decedent, as her separate property, and as to the remaining two-thirds interest by decedent, as his separate property, and that said real property should be set aside to the surviving widow.

"It is hereby ordered that the land described as follows, to wit: [description omitted] * * * be and the same is hereby set apart to Nellie May Hartman, the widow of decedent, as a homestead for the use of Nellie May Hartman, and that said real property so set aside shall vest absolutely in and belong to her."

On February 3, 1952, Nellie May Hartman died leaving a will in which she sought to devise the real property to her daughter Maude H. McLaren. On September 7, 1954, petitioner herein, Treasure Alice Arens, the daughter of decedent Chauncey L. Hartman, noticed a motion to vacate the order of April 18, 1951, setting apart the probate homestead absolutely to Nellie May Hartman, on the grounds that the relief granted was in excess of that prayed for, see *Burnett v. King*, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333, and that under Probate Code section 661 the court acted in excess of its jurisdiction in setting apart the probate homestead to Nellie May Hartman absolutely instead of for life. After a hearing the court on September 23, 1954, denied the motion on the grounds that "it appears from the record that since no requests for notice were filed, the notice as given was legally adequate" and that "pe-

tioners' remedy was a timely appeal from the Order made." Petitioner seeks a writ of certiorari to review the order denying the motion to vacate the order setting apart the probate homestead.

[1-4] The order setting aside the probate homestead was an appealable order and became final when the time for appeal expired, Prob.Code, § 1240, whether or not it was in excess of the jurisdiction of the court. *Phelan v. Superior Court*, 35 Cal.2d 363, 366, 217 P.2d 951. Certiorari does not lie to review that order, for the writ can issue only when "there is no appeal." Code Civ.Proc. § 1068. Nor can this rule be avoided by means of a motion to vacate the order. Although the order denying the motion to vacate is not appealable, *Kramer v. Superior Court*, 36 Cal.2d 159, 161, 222 P.2d 874, review of that order would require a review of the order to be vacated, and the appealability of the latter prevents a review thereof by certiorari.

[5,6] Petitioner contends, however, that she could not appeal from the order setting apart the probate homestead because she received no notice of the petition filed by Charles R. McLaren or of the order made pursuant thereto, and that therefore certiorari is an available remedy. See, *Grinbaum v. Superior Court*, 192 Cal. 528, 556, 221 P. 635. It is immaterial that petitioner received no actual notice of the petition or of the court's order. Section 1200 of the Probate Code, which prescribes the form of notice to be given upon a petition to set apart a probate homestead, does not require actual notice. It provides, however, for special notice to be given to persons requesting it at their post office address given in the request for special notice. Petitioner made no such request. Section 1200 also provides: "Proof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that said notice has been regularly given, the court shall so find in its order, and such order, when it becomes final, shall be conclusive upon all persons." Since the order of April 18, 1951, quoted above, shows that the foregoing conditions were met, the order is "conclusive up-

on all persons." Since no such statutory provision was involved in *Grinbaum v. Superior Court*, supra, and since the record therein affirmatively showed that the required notice was not given, an exception to the rule prescribed by section 1068 of the Code of Civil Procedure cannot be made under the authority of that case.

Since it is clear that certiorari does not lie, we do not reach the question whether or not the order of April 18, 1951 was in excess of the court's jurisdiction.

The proceeding is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. In my opinion the trial court was without power to grant relief which exceeded that authorized by statute (Prob. Code, § 661), requested in the petition for order to set apart probate homestead, and designated in the notice of hearing on the petition as the relief sought. Furthermore, it is my opinion that the writ of certiorari should be available to Treasure Alice Arens for the reason that she lost her right to appeal from the order setting aside the homestead without fault on her part because she had no actual notice of the making of such order, and even if she had received actual notice she would have had no reason to anticipate that she should appear to oppose the granting of relief in excess of that prayed for and statutorily authorized.

The real property in question was acquired by decedent Chauncey L. Hartman by purchase prior to his marriage to Nellie May Hartman; from this it would appear to have been wholly his separate property. However, the order which purports to set it aside absolutely to Nellie May Hartman states that it appears that such property "was owned, as to an undivided one-third interest, by Nellie May Hartman, the surviving widow of decedent, as her separate property, and as to the remaining two-thirds interest by decedent, as his separate property." This language substantially follows language of the petition for an or-

der to set apart a homestead. It is apparently based upon a will of decedent which was filed with a petition for letters of administration but was not probated because proof of the signatures of the subscribing witnesses could not be obtained. The will stated that Chauncey L. Hartman and Nellie May Hartman had mutually agreed that he owned a two-thirds interest in the realty as his separate property and she owned a one-third interest as her separate property; it purported to devise decedent's two-thirds interest to Nellie May for life with remainder to decedent's two children, Treasure Alice and Donald.

The petition for order setting apart a probate homestead prays that the order set apart the property to Nellie May Hartman "for her lifetime." In the notice of hearing the relief prayed for is not stated but the "petition is hereby referred to for further particulars." The order finds "that notice of the hearing *on said petition* has been regularly given" (*italics added*). Yet the superior court proceeded to order that the real property "shall vest absolutely in and belong to" Nellie May Hartman.

Whether the decedent owned the entire fee in the real property or a two-thirds interest as his separate property, the probate court was authorized by statute to set it aside only for a limited period not exceeding the lifetime of the widow. Section 661 of the Probate Code provides, in material part, that the court must select a homestead "out of the community property or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property and no such property owned in common, then out of the separate property of the decedent. If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse * * *". Under this section the separate property interest of a decedent, whether it be the entire ownership of the property or an interest in common with the survivor entitled to the homestead, can be

set apart for a limited time only. (In re Estate of Maxwell (1935), 7 Cal.App.2d 641, 642, 46 P.2d 777.)

It has been stated and held that an order setting aside absolutely a probate homestead to a widow from separate property of the deceased husband, although erroneous, is not void. (In re Estate of Bette (1915), 171 Cal. 583, 585-586, 153 P. 949; In re Estate of Huelsman (1899), 127 Cal. 275, 276, 59 P. 776; In re Moore (1892), 96 Cal. 522, 531, 31 P. 584; Fergodo v. Donohue (1919), 40 Cal.App. 670, 671, 181 P. 819; see also In re Estate of Burns (1880), 54 Cal. 223, 227-228; Rountree v. Montague (1916), 30 Cal.App. 170, 176-178, 157 P. 623.) The foregoing cases, however, did not concern an attack by certiorari upon the order setting apart the homestead, nor did they concern the effect of an order which granted relief in excess of that prayed for in the petition and designated in the notice as the relief which would be sought.

For the purpose of determining the right to review by certiorari, action contrary to that authorized by statute (here, the granting of relief in excess of that authorized by section 661 of the Probate Code) is action in excess of jurisdiction. (See, e. g., Burtnett v. King (1949), 33 Cal.2d 805, 807, 205 P.2d 657, 12 A.L.R.2d 333; Abelleira v. District Court of Appeal (1941), 17 Cal. 2d 280, 288, 109 P.2d 942, 132 A.L.R. 715; Rodman v. Superior Court (1939), 13 Cal. 2d 262, 270, 89 P.2d 109.) Furthermore, in a proceeding instituted in the probate court by statutorily authorized posted notice, where interested persons have no actual notice, policy should demand that the relief granted *cannot* exceed that which, according to the notice, will be sought. Such policy is analogous to that which underlies the rule that in civil default actions a decree which grants relief in excess of that prayed for exceeds the court's jurisdiction and is void. (Burtnett v. King (1949), *supra*, 33 Cal.2d 805, 808, 205 P.2d 657, 12 A. L.R.2d 333.)

I agree with petitioner's contention that, despite the theoretical availability of the remedy of appeal, certiorari should be available because without any fault on her part

she had no actual knowledge of the proceeding to set apart the homestead and therefore could not appeal. (Grinbaum v. Superior Court (1923), 192 Cal. 528, 556, 221 P. 635; see also Lee v. Small Claims Court (1939), 34 Cal.App.2d 1, 4, 92 P.2d 937, and cases there cited [the statute which resulted in a situation where the time for appeal from the judgment of the small claims court might well expire without defendant having notice of entry of judgment against him has been since amended (Code Civ.Proc., § 117, am. Stats. 1951, ch. 1143, p. 2912, § 1; Stats.1951, ch. 1737, p. 4087, § 20; Stats.1955, ch. 566, § 1)].)

For the foregoing reasons, I would annul the order of April 18, 1951, which sets apart the homestead absolutely.



137 Cal.App.2d 477

Clifford H. ECHOLS and Lenore Echols,
Plaintiffs and Appellants,

v.

Carl C. Fabyunkey, Sr., Defendant
and Respondent.

Civ. 8662.

District Court of Appeal, Third District,
California.

Dec. 2, 1955.

Parents' action against truck owner for wrongful death of their son, age 2 years and 10 months. The Superior Court, Yuba County, Warren Steel, J., entered judgment for truck owner and parents appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that truck driver was not negligent as to lookout immediately preceding accident in which truck struck boy as he was running across a lightly traveled gravel road.

Affirmed.

1. Appeal and Error ⇨110

Order denying motion for new trial is nonappealable, and appeal therefrom must be dismissed. West's Ann.Code Civ.Proc. § 963.

2. Automobiles ⇨244(7)

In parents' action to recover for wrongful death of their son, age 2 years and 10 months, evidence sustained finding that truck driver was not negligent as to lookout immediately preceding accident in which truck struck boy as he was running across a lightly traveled gravel road.

3. Appeal and Error ⇨1010(1)

On issues of fact, trial court and appellate tribunal are bound by the familiar rule that before a judgment may be reversed on the ground of insufficiency of evidence, it must appear from record that accepting full force of the evidence, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment.

Erling S. Norby, Marysville, for appellants.

Rich, Fuidge & Dawson, Marysville, for respondent.

SCHOTTKY, Justice.

[1] Plaintiffs commenced an action for damages alleging that the death of their son, Thomas Echols, aged 2 years, 10 months, was caused by the negligent operation of defendant's 1948 pickup truck. Defendant filed an answer denying any negligence on his part and also setting up the defense that plaintiffs were negligent in that they failed to exercise due care for the safety of their son and were themselves guilty of negligence and contributory negligence. The action was tried before the court sitting without a jury and the court found that "said accident occurred without negligence on the part of either said decedent or of said defendant and was unavoidable in character." Judgment was entered in favor of defendant, and plaintiffs made a motion for a new

trial which was denied. Plaintiffs have appealed from the judgment and from the order denying that motion for a new trial. The order denying the motion being nonappealable, Code Civ.Proc., sec. 963; *Pipoly v. Benson*, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515, the appeal therefrom must be dismissed.

The only issue involved upon this appeal is the sufficiency of the evidence to support the judgment. Appellants' argument may be summarized in their own words as follows:

"* * * it is the contention of plaintiffs that the defendant was negligent as a matter of law in that he utterly failed to keep a proper lookout ahead; that the defendant at the time of and preceding the accident was not exercising that degree of prudence and watchfulness—a proper lookout ahead—that the law requires of him in the operation of a motor vehicle."

The accident occurred a little after 5 o'clock of the afternoon of March 15, 1953, on a lightly traveled, unpaved but graveled foothill road, 28 feet 2 inches of flat surface across, with about an 18 foot graveled portion in the center. At the place of impact the generally traveled path followed by vehicle traffic was westerly of the center of the graveled portion so that a vehicle following the more firmly packed down traffic tracks, and going northerly, would have its left wheels 5 or 6 feet from the left edge of the graveled portion. This is known as the Texas Hill road and runs in a straight northeasterly direction from the point at which respondent entered upon it for over 100 yards to the point of impact and for some distance beyond. Going northerly the road is upgrade to the extent that respondent was proceeding in second gear and at a speed of 15 miles per hour. For at least 100 yards respondent had a clear view of the road and meadow on each side, and he saw three children playing just off the edge of the shoulder of the road on the left (decedent was the fourth child). He traversed this road two to three times a day and often saw children playing in the vicinity of the road near this location.

About ten minutes before the accident, decedent, his half-brother Jerry, aged 8, and two younger children had been playing about a little cave-like indentation and a piece of tin material, off the right side of the road. Then Jerry and two of the children crossed over to the left side of the road where they were playing when respondent saw them. The decedent, Tommy, remained on the right side. Although the testimony of Jerry is confusing, the court found that when respondent was approximately 30 feet from the point of impact, decedent ran across the road from right to left and after reaching safety, Jerry, who was confused because of the imminent peril, advised him to "go back," when he meant to say "come back", and Tommy again ran out into the road from left to right and was struck. At the time of impact respondent's vehicle had passed Jerry and was between Jerry and Tommy and Jerry did not see the collision. Respondent saw no child on the road at any time. He only saw a "flash like a bird" directly ahead of his right headlight and going from right to left. He didn't know that he had struck a child until he stopped the car, got out and looked back. When he picked the child up his head was where the left wheel would come.

Respondent was 68 years of age, wore glasses and had had an operation for cataract on one eye in 1947 and on the other in 1950. However, he demonstrated to the satisfaction of the court that his eyesight was satisfactory.

[2,3] We are unable to agree with appellants' contention that respondent was negligent as a matter of law. We believe that the evidence presented an issue of fact and that the court's determination that respondent was not guilty of negligence is supported by the record. As is so often stated in instructions to juries in negligence cases, negligence is not an absolute term but a relative one and in deciding whether there was negligence in a given case the conduct in question must be considered in

the light of all the surrounding circumstances as shown by the evidence. Appellants' argument upon the question of the sufficiency of the evidence is but an argument as to the weight of conflicting evidence. Issues of fact must be determined by the trial court and an appellate tribunal is bound by the familiar rule that before it can be justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that accepting the full force of the evidence, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment.

It would serve no useful purpose to review the cases cited by appellant as the factual situations in those cases were different from those in the instant case. Each case must be determined upon its own facts. In the instant case the court found that respondent did all he was required to do under the circumstances and that the tragedy was an unavoidable accident. The trial court in denying appellants' motion for a new trial stated: "I can't see anything at all as far as liability is concerned. I think it is just one of those unavoidable accidents that could have happened to you or me or anyone else driving along at that rate of speed. * * * It was just a question of whether or not he acted as a reasonable, prudent driver would have under the circumstances as they developed there and to hold him negligent would be wrong in my opinion."

In view of the foregoing we are satisfied that the conclusion reached by the trial court finds substantial support in the record.

The judgment is affirmed and the purported appeal from the order denying the motion for a new trial is dismissed.

VAN DYKE, P. J., and PEEK, J., concur.

**Maurice Wilson ALLEN, Plaintiff and
Respondent,**

v.

**JIM RUBY CONSTRUCTION COMPANY, a
California corporation et al., Defendant
and Appellant. ***

Civ. 20937.

**District Court of Appeal, Second District,
Division 3, California.**

Nov. 30, 1955.

Rehearing Granted Dec. 27, 1955.

Action by employee against contractor for injuries sustained when employee fell into pit which contractor had excavated on employer's premises. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment upon the verdict for employee, and contractor appealed. The District Court of Appeal, Shinn, P. J., held that, where employee had actual knowledge of existence of the pit, contractor's failure to barricade the pit would not constitute negligence as to such employee.

Judgment reversed with instructions to enter judgment for defendant.

1. Negligence ⇨50, 52

Even if presence of rod on ground by pit being dug by contractor on employer's premises created a dangerous condition, and contractor knew, or, in exercise of ordinary care would have known, of such conditions, such facts would not impose upon contractor any duty toward employee, who fell into pit, to remedy the condition or give warning of it.

2. Negligence ⇨32(2.10)

Employee, who had not been forbidden to use certain part of employer's premises, and whose presence on such part of premises was to be expected as incidental to his work, was, in regard to such part of the premises, an invitee of employer, but, as to contractor making excavation on such part of the premises, employee was at most a bare licensee.

3. Negligence ⇨32(1)

Where employee was on mission personal to himself as he walked beside pit

which contractor had excavated on employer's premises, contractor, in suffering employee to be there, did not assume any duty toward employee except to refrain from causing employee injury by willful or wanton negligence or by actions which would constitute active negligence.

4. Negligence ⇨105

Where person goes upon another's premises without invitation and simply as a bare licensee, and property owner passively acquiesces in his coming, if an injury is sustained by reason of mere defect in the premises, owner is not liable for negligence, since such person has taken all the risk upon himself.

5. Negligence ⇨51

Where employee, who was on way to a washroom, fell into pit which contractor had excavated on that part of employer's premises over which employee was expected to go as incidental to his work, and employee had actual knowledge of existence of the pit, contractor's failure to barricade the pit would not constitute negligence as to such employee.

Schell, Delamer & Loring, Louis M. Welsh, Los Angeles, for appellant.

Levy, Russell & De Roy, George De Roy and Jack Levine, Los Angeles, for respondent.

SHINN, Presiding Justice.

In this action for personal injuries the complaint alleged that Jim Ruby Construction Company (a fictitious name under which Jim Ruby was doing business), while doing construction work for Freuhauf Trailer Company upon the latter's property caused an opening, hole, and excavation to be so carelessly and negligently left open and unguarded that plaintiff, while lawfully on the premises, fell into said opening and received injuries; defendant answered denying the material allegations of the complaint. The cause was tried to a jury and verdict and judgment were in favor of plaintiff for \$6,000; defendant appeals from the judgment.

* Opinion vacated 291 P.2d 991.

There was evidence of the following facts. In the course of the work in which defendant was engaged it was necessary to make an excavation which involved a breaking up of concrete, the cutting off and removal of steel rods and the removal of all material necessary in the excavation of a pit. Removal of the concrete was done by Air Power Tools Company, subcontractor of defendant, and it had been completed several days before the accident occurred. In this work the concrete was broken up, rods were cut, and the material was thrown out of the pit by hand onto the ground where it was picked up by hand and thrown into trucks to be hauled away. Defendant's contract was not completed; he still had to lower the pit to a uniform depth of 10 feet and line it with concrete. At the time of plaintiff's accident there was in existence an excavation 33 feet by 11 feet, which was at ground level at the west end and graduated to a depth of 9 feet at the east end. Plaintiff was an employee of Freuhauf, assembling trailers, and had come to work about 4 p. m., November 2, 1951, while some of defendant's employees were still at the location. Plaintiff was working on the northerly side of the pit about 10 feet distant therefrom when he decided to walk past the pit on the north side to a washroom. As he proceeded he stumbled on a steel bar or rod 3 or 4 feet long, which was lying on the ground 4 or 5 feet north of the pit and about midway between the easterly and westerly ends of the pit. His foot struck the bar; he lost his balance and went forward into the pit. There was no barrier around the pit. No witness observed plaintiff's fall into the pit. Plaintiff had observed work on the pit for about a week, had looked into it and knew how deep it was. He testified that he believed the rod was a reinforcement rod; it had ridges on it; it was 3 or 4 feet long and maybe an inch thick. As he stumbled he did his best to light on his feet in the bottom of the pit and he did light on his feet but his legs doubled under him. There was a pile of dirt across the west end of the pit; there were some air hoses lying on the ground and some electric cords, which were not closer than 6 to 10 feet from the pit,

and these were used in Freuhauf's work; he had not seen the iron rod before; he saw it from some distance after he was assisted and "hobbled" out of the hole but not before; he didn't examine the rod to see what it was. He glanced at it after he came out of the hole. He was in excruciating pain at the time. He was not sure whether the rod was something that was used by the Freuhauf people; it could have been, but he did not know.

As we have seen, the complaint charged negligence of defendant in failing to maintain a barricade around the pit. In plaintiff's brief it is argued that this was negligence. We shall dispose of this contention after we have discussed the claim of negligence in allowing the rod to lay on the ground.

The briefs argue the question whether there was sufficient evidence that defendant was guilty of a breach of duty. Plaintiff argues (1) it could have been inferred that the rod had been left by workmen of defendant or his subcontractor, since plaintiff testified it had ridges on it, and presumably was the type of rod the subcontractor had been removing with the concrete; (2) if this were true defendant was chargeable with knowledge that the rod was there; (3) if some one else placed the rod there it could have been inferred that it had been there long enough for defendant to discover it; (4) as a necessary conclusion defendant was negligent in failing to remove the rod.

It is unnecessary to notice at length defendant's replies to these arguments. It is sufficient to state that it is contended that plaintiff's version of the accident was incredible because he could not have stumbled into the pit and yet landed on his feet; defendant's witness McSweeney, Freuhauf employee and lead man on plaintiff's shift, testified that plaintiff received his injuries while he and fellow employees Montes and Bustamente were jumping in the pit from the shallow end into sand toward the deeper end; also there was no evidence from which it could have been inferred that defendant was responsible for the placing of the rod on the ground or that he had actual or constructive knowledge of its presence.

Although the defendant's arguments are somewhat impressive, it is unnecessary to discuss them.

[1-4] Even if it be assumed that the presence of the rod on the ground created a dangerous condition on the premises and that defendant knew or in the exercise of ordinary care would have known of that condition, those facts did not impose upon him any duty toward plaintiff to remedy the condition or to give warning of it. Both in his complaint and in his brief plaintiff assumes that he was an invitee of defendant, although he mentions no fact indicative of the existence of that relationship. His sole theory of the case is illustrated by his citation of *Louie v. Hagstrom's Food Stores*, 81 Cal.App.2d 601, 184 P.2d 708, which he says is a case exactly in point. In that case the defendant, operating a food market, was held to a high quantum of care to keep his premises in a safe condition for his customers and chargeable with knowledge of an unsafe condition. There was no such relationship between plaintiff and defendant. It may be granted that defendant was an occupier of the portion of the premises he was using in the course of his work and as such had a duty toward those who might come upon the property, but the assumption that plaintiff was defendant's invitee is clearly in error. To be sure he was an invitee of Freuhauf, his employer, and it is not questioned that he had a right to traverse the area around the pit, inasmuch as he had not been forbidden to use it, and his presence there was to be expected as incidental to his work. While plaintiff was an invitee of Freuhauf, as to Ruby he was, at most, a bare licensee. While both Freuhauf and Ruby had duties toward plaintiff they were not the same because the relationships were different. Plaintiff's presence in the vicinity of the pit was of no concern to defendant. They had no business together. Plaintiff was on a mission personal to himself as he walked beside the pit and in suffering him to be there defendant assumed no duty toward him except to refrain from causing him injury by wilful or wanton conduct or by actions which would constitute active negligence. There is, of course,

no contention there was a breach of any such duty. The sole claim is that defendant tolerated an unsafe condition on the premises. The law with respect to licensees is " * * * where a person goes upon the premises of another without invitation and simply as a bare licensee, and the owner of the property passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence for such person has taken all the risk upon himself." *Fisher v. General Petroleum Corp.*, 123 Cal.App.2d 770, 777, 778, 267 P.2d 841, 845; see, also, *Koppelman v. Ambassador Hotel Co.*, 35 Cal.App.2d 537, 540, 96 P.2d 196; *Oettinger v. Stewart*, 24 Cal.2d 133, 139, 148 P.2d 19, 156 A.L.R. 1221; *Saba v. Jacobs*, 130 Cal.App.2d 717, 279 P.2d 826; *Palmquist v. Mercer*, 43 Cal.2d 92, 272 P.2d 26.

The facts previously stated suggest the further question whether defendant had any duty to keep the premises surrounding the pit free from material such as broken concrete, pieces of metal rods and earth that was removed from the pit. Was it his duty to clean up the premises whenever his workmen quit for the day or did he have a right to assume that Freuhauf employees would use the premises as they found them, knowing that the work was going on and uncompleted? We mention the question only to remark that in our discussion we do not assume that defendant would have had a duty even toward a business invitee to keep the premises clean and safe. As to plaintiff the question is not presented.

[5] The claim of negligence in failing to barricade the pit falls for the reason previously stated. An additional ground of untenability would be that plaintiff had actual knowledge of the existence of the pit and therefore could not complain of the absence of a barrier as a warning of its presence.

It is unnecessary to discuss other contentions of defendant.

The judgment is reversed with instructions to enter judgment for defendant.

PARKER WOOD, J., and NOURSE, Judge pro tem., concur.

137 Cal.App.2d 408

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Earl Wayne ELLIS, Defendant and
Appellant.
Cr. 2637.

District Court of Appeal, Third District,
California.

Nov. 30, 1955.

Defendant was convicted of sodomy. The Superior Court, Stanislaus County, Gregory P. Maushart, J., entered judgment and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Schottky, J., held that under the circumstances the failure of trial court to give instructions on subject of accomplices and as to necessity for corroboration of their testimony constituted reversible error.

Judgment and order reversed.

1. Criminal Law §742(2)

In prosecution for sodomy, evidence as to whether prosecuting witness was coerced and forced to submit to defendant's attack in fear of great bodily harm and as to such witness' resistance raised question for jury as to whether prosecuting witness was accomplice whose testimony must be corroborated. Pen.Code, §§ 26, 286, 1111.

2. Criminal Law §824(7)

In sodomy prosecution, even though defendant did not request specific accomplice instruction, the court should not only have instructed jury fully as to law relating to testimony of accomplices but should have instructed the jury that they should decide as to accomplice status of prosecuting witness upon whose testimony the State must rely to obtain a conviction. Pen.Code, §§ 286, 1111.

3. Criminal Law §780(1), 1173(2)

In prosecution for sodomy, where there was not sufficient corroboration of prosecuting witness' testimony to support judgment of conviction, the failure of trial court to give instructions on the subject of accom-

plices and necessity for corroboration of their testimony constituted reversible error. Pen.Code, §§ 286, 1111.

Muir Woolley, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellant was charged with a violation of section 286 of the Penal Code, it being alleged in the information that he "did wilfully, unlawfully and feloniously commit the infamous crime against nature upon the person of Wallace Richard Page, a human being and a male person." He pleaded not guilty and a jury trial resulted in a verdict of guilty. His motion for a new trial was denied and judgment was pronounced against him. He has appealed from the judgment and from the order denying his motion for a new trial.

Appellant urges two major grounds for a reversal of the judgment: 1. That the evidence is insufficient to support the verdict because it consisted entirely of the uncorroborated testimony of the witness, Page, who, appellant contends, by submitting himself to the act of perversion, became an accomplice within the meaning of section 1111 of the Penal Code; 2. That the court erred in failing to give the jury proper or any instructions with regard to accomplices and the necessity of corroborating their testimony. Before discussing these contentions we shall give a brief summary of the evidence.

Wallace Richard Page, the victim of the offense charged in the information, was taken to the Stanislaus County Road Camp on January 25, 1955, to serve a sentence for burglary. At about five o'clock of the afternoon that Page arrived, he encountered the defendant Earl Wayne Ellis, also an inmate of the road camp, in front of Page's barracks. At this first meeting Page asked the defendant about a disturbance which had occurred at Page's mother's cafe and defendant replied that they would talk about it later. After supper of the same day, defendant went to Page's barracks and engaged Page in a conversation about his

sentence. During this conversation Page and defendant left the barracks and walked behind the latrine. While there, defendant told Page that defendant had served three months in the road camp because he had assaulted a girl in Page's mother's cafe. Defendant offered to fight but Page refused, offering defendant money if defendant wouldn't bother him. Appellant then told Page that Page would have the option of committing one of two types of sex perversion with him, and also that unless Page agreed to one or the other of these acts, defendant would get three or four men and force him to do so. When Page refused, defendant became angry and ordered Page to go to defendant's barracks. While in defendant's barracks, Trager, a friend of defendant, asked Page if he had "fixed Ellis up." When Page said that he had not, Trager made the threat that unless Page did so three or four men would hold him and force him to do so. Then Trager told Page to leave and that Trager and defendant would come to get him later.

After the roll call the appellant came over to Page's barracks where they talked about a burglary for a while and then walked out together, meeting Trager on the outside of the building. The appellant led the way and they sneaked around to a boiler room. The appellant and Page went into the boiler room first, Trager following. Page testified that he accompanied both appellant and Trager to the boiler room in fear of being beaten up and having the acts committed anyway if he refused to go peacefully. In the boiler room, following the orders of appellant, Page submitted to the commission of the act denounced by said section 286, first by appellant, then by Trager, and again by defendant. All three men then left the boiler room and Page, who was the last to leave, returned to his barracks.

The following morning Page requested the director of the road camp to transfer him back to jail. He testified that he was afraid to reveal the acts done by defendant and Trager the night before as a reason for wanting a transfer, and since he had no other reason to give, his request was denied.

On January 29, 1955, Page left the road camp and started in the direction of Modesto. He testified that he left the road camp because of his fear that he would be further attacked by appellant's friends, although Ellis had left the camp on the night of the 26th. He was apprehended by officers on the way and taken to the county jail where he revealed for the first time what defendant had done to him.

Appellant did not testify but called two witnesses for the purpose of impeaching the complaining witness, Page, as to his reasons for leaving the road camp. Both testified to conversations with Page in which he made no mention of any improper acts by appellant but gave other reasons for desiring to leave the road camp. Appellant's father was called and testified that he had never heard that appellant was abnormal sexually.

It is apparent from the foregoing that the judgment of conviction depends upon the testimony of Page and that therefore the principal question presented upon this appeal is whether or not it can be held as a matter of law that Page was not an accomplice. Section 1111 of the Penal Code provides:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

In *People v. Featherstone*, 67 Cal.App.2d 793, at page 796, 155 P.2d 685, at page 687, an attempted sodomy case involving a 15 year old boy, the court said:

"Undoubtedly, where the persons participating in an offense of this character do so without compulsion, each is an accomplice of the other, and is liable to prosecution as such. * * *

In such case there is a common intent to unite in the attempt to commit the offense."

Appellant argues that Page's testimony shows that during the time appellant was at Page's barracks after roll call and they met Trager outside and went to the boiler room where the acts were committed, there were no threats made. Appellant argues that these facts establish that Page voluntarily participated.

In answer to respondent's contention that Page was not an accomplice because he was coerced and forced to submit to appellant's perverted attack in fear of great bodily harm, appellant cites Section 26 of the California Penal Code:

"All persons are capable of committing crimes except those belonging to the following classes:

* * * * *

"Eight. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The appellant contends, in effect, that not only was there a lack of evidence of immediate threats to Page, but also that there was no evidence of threats of danger to Page's limb or life. Appellant argues that the record only shows statements that Page was told that if he didn't conform to the other parties' wishes they would do it anyway, and that these statements were made several hours before the acts occurred.

Appellant also cites the case of *People v. Hart*, 98 Cal.App.2d 514, 220 P.2d 595 (hearing denied), which was a prosecution for sex perversion in which the evidence showed that the defendant displayed a knife while he proposed the commission of the act. The prosecution contended that the witness being in such a position was not an accomplice when he acquiesced because acting under coercion. In holding contrary to the People's contention that the witness was not an accomplice, the court said, 98

Cal.App.2d at page 515, 220 P.2d at page 596:

"An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

"Under this definition M is an accomplice unless the evidence is sufficient to support a finding bringing the case as to him within subd. 8, sec. 26, Penal Code, above quoted, i. e. that M did believe that his life would be endangered if he refused. [Citing cases.]

"The People argue that the evidence shows that M was afraid that if he resisted it would endanger his life. Not only did M not testify at any point that he feared that his life was in danger but he expressly twice testified:

"* * * I did participate because I was afraid to break my leg over again and didn't want to fight him back."

"I didn't want to break my leg over again."

"A reading of the entire evidence satisfies us that it is not sufficient to support a finding that M actually believed that his life was in danger."

Appellant argues that the Hart case above was a much stronger case than the present for finding duress, as there was no weapon involved here and no threats near the time of the act. Respondent, in reply, contends that appellant's assertion that Page must have feared that his life was in danger in order not to be an accomplice is not a complete statement of law and cites *People v. Battilana*, 52 Cal.App.2d 685, at page 697, 126 P.2d 923, at page 930, in which the court stated:

"* * * It is clear that a victim who consents to the perpetration of sodomy or fellatio upon himself, solely because of the infliction of physical violence or on account of threats of great bodily harm, is not an accomplice to the crimes. The consent to participate in a crime, which constitutes one an accessory thereto, must be knowingly,

willingly and voluntarily given, with full appreciation of the nature of the act."

Respondent asserts that *People v. Peterman*, 103 Cal.App.2d 322, 229 P.2d 444, 446, decided subsequent to the Hart case, refutes the appellant's theory that the Hart case, supra, established that a fear of death is necessary to hold that Page was not an accomplice, in holding:

"* * * Where a violation of said section 288a is committed without the consent of the prosecuting witness, it is not necessary that the testimony of such witness be corroborated. * * * A person who participates in an act in violation of said section solely because such person has been threatened with, and is in fear of, great bodily harm, is not an accomplice. *People v. Battilana*, supra, 52 Cal.App.2d [685, 695] at page 697, 126 P.2d 923."

However, in the *Peterman* case defendant accomplished rape and fellatio by pushing her into the back seat of his car and threatening to kill her.

Respondent asserts that there is no pat definition for what will constitute great bodily harm, but it may result from an attack with hands and fists, *People v. Bumbaugh*, 48 Cal.App.2d 791, 120 P.2d 703; *People v. McCaffrey*, 118 Cal.App.2d 611, 258 P.2d 557, and it has been held that a person may have a reasonable fear of great bodily harm even though no spoken threats as to possible consequences are made. *People v. Flores*, 62 Cal.App.2d 700, 145 P.2d 318.

[1] We believe that under the evidence in the instant case it was for the jury to determine, under proper instructions, whether or not Page was an accomplice of appellant. We do not believe that, as a matter of law, the evidence compels the conclusion that Page participated in the acts charged against appellant only because of fear of great bodily harm, nor do we believe that the degree of resistance shown by him was sufficient, as a matter of law, to compel a finding that he was not an accomplice.

As stated in *People v. Coffey*, 161 Cal. 433, at page 436, 119 P. 901, at page 902, 39 L.R.A.,N.S., 704:

"When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact."

Appellant offered a number of instructions regarding the testimony of accomplices but the court refused to give any of them. The only instruction given by the court which can be considered as relating to accomplices was as follows:

"Any person who, with full appreciation of the nature of the act, voluntarily, willingly or knowingly consents to the commission of the infamous crime against nature upon his body and thus intentionally participates in the conduct, is equally guilty with the other participant."

Nowhere in the court's instructions does the word "accomplice" appear.

Respondent argues that "the court did not err in refusing to submit instructions on accomplices to the jury because there was no conflict in the evidence." However, we are satisfied that under all the facts and circumstances shown by the record there was a reasonable basis for an inference that Page's participation in the crime charged was not because of fear of great bodily harm, and that his failure to ask the authorities in charge of the road camp for protection after he had been informed of appellant's intention to commit the act, his failure to tell the same authorities of the commission of the act, his failure to tell about it until after his escape from the road camp and his apprehension, were circumstances that the jury might well have taken into consideration, together with the remainder of the evidence, if they had been instructed as to the rules of law applicable to the testimony of accomplices and that they should determine from the evidence whether or not Page was an accomplice.

[2] Even though appellant did not request the specific instructions that should have been given in this case, we believe that the court should not only have instructed the jury fully as to the law relating to the testimony of accomplices but should have instructed the jury that they should decide whether or not Page was an accomplice. For as stated in *People v. Hughes*, 107 Cal.App.2d 487, at page 492, 237 P.2d 64, at page 67:

"* * * [U]ndoubtedly it is the law that in a criminal case the jury should be instructed on the general principles of law which apply to the case, and even though not requested by the parties, the court of its own motion, should give such instructions."

And as stated in *People v. Buffum*, 40 Cal.2d 709, at page 724, 256 P.2d 317, at page 325:

"Defendants did not request an instruction based upon section 1108. In a criminal case, however, the trial judge is required to instruct the jury of his own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence. [Citing cases.] Under this rule it has been held that, in an appropriate case, the jury must be instructed as to sections 1110 and 1111 of the Penal Code, which, like section 1108, provide that the testimony of certain witnesses must be corroborated. [Citing cases.] It follows, therefore, that the trial court erred in failing to give an instruction on its own motion with respect to section 1108."

[3] In the instant case it is not contended that there was sufficient corroboration of Page's testimony to support the judgment of conviction. We therefore conclude that the failure of the trial court to give proper instructions on the subject of accomplices and as to the necessity for corroboration of their testimony constituted reversible error.

The judgment and order are reversed.

VAN DYKE, P. J., and PEEK, J., concur.

137 Cal.App.2d 461

Jose Angel MENDEZ, Petitioner,

v.

The SUPERIOR COURT of The State of California, IN AND FOR The COUNTY OF LOS ANGELES, The Honorable David Coleman, Presiding Judge, Respondent.

Civ. 21332.

District Court of Appeal, Second District, Division 3, California.

Dec. 2, 1955.

Rehearing Denied Dec. 27, 1955.

Hearing Denied Jan. 25, 1956.

Proceeding by a state prison inmate for a writ of mandate requiring the clerk of the Superior Court in and for the County of Los Angeles to file a notice of appeal from an order of such Court, David Coleman, P. J., denying petitioner's motion to vacate a judgment sentencing him to the prison and to prepare and certify a record on appeal. The District Court of Appeal, Shinn, P. J., held that petitioner's mailing to the clerk of a notice of the motion, together with the written motion and notice that petitioner appealed to the District Court of Appeal from the order, if Superior Court denied motion, was sufficient to cause an appeal to be lodged in the District Court of Appeal.

Writ granted.

1. Criminal Law ⇨1081

A state prison inmate's mailing to Superior Court clerk of notice of motion to vacate judgment sentencing him to prison, together with the written motion and notice that he appealed to District Court of Appeal, if Superior Court denied motion, was sufficient to cause appeal to be lodged in District Court of Appeal.

2. Criminal Law ⇨1081

Ordinarily, failure to file notice of appeal from judgment or order in criminal case within ten days after rendition of judgment or making of order, as required by rule, is fatal to appeal. West's Ann. Rules on Appeal, rule 31.

3. Criminal Law ⇨998, 1144(17)

Notice of Superior Court's ruling on state prison inmate's motion to vacate judg-

ment sentencing him to prison is not required by law to be given him, and it may not be presumed that notice will be given.

Jose Angel Mendez, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

4. Criminal Law §1081

The limitation of time for filing of notice of appeal from judgment or order to ten days after rendition of judgment or making of order by rule on appeal in criminal cases goes to reviewing court's jurisdiction to entertain appeal, and its purpose to facilitate disposition of appeals is defeated when notice is not given in manner and within time prescribed by rule, but not by treating as valid a notice offered for filing conditionally in advance of ruling. West's Ann.Rules on Appeal, rule 31.

SHINN, Presiding Justice.

Jose Angel Mendez, an inmate of a state prison, seeks a writ of mandate requiring the clerk of the superior court to file a notice of appeal from an order denying his motion to vacate a judgment sentencing him to state prison and to prepare and certify a record on appeal. Petitioner mailed to the clerk a notice of a motion together with a written motion to vacate the judgment, enclosing therewith a notice that he "hereby appeals to the District Court of Appeal of the State of California, Second Appellate District, from the Order If the aforementioned Superior Court denies the petition in the above entitled cause. This Notice of Appeal, Grounds of Appeal and Application for Clerk's and Reporter's Transcript on Appeals, is to be dated and Filed Only in the event that the above entitled cause is denied." The notice was addressed to the court, the county clerk and the district attorney. The motion was duly heard and denied and the minutes say "The Court finds that the purported notice of appeal is premature and does not constitute a notice of appeal."

5. Criminal Law §1144(19)

A state prison inmate's notice of appeal, delivered to Superior Court clerk for filing, if court denied inmate's motion to vacate judgment sentencing him to prison, is deemed to have been filed after court's denial of motion, though clerk did not endorse it as filed before such ruling. West's Ann.Rules on Appeal, rule 31.

6. Criminal Law §1081

Filing of notice of appeal, held by Superior Court clerk in such capacity, from order denying state prison inmate's motion to vacate judgment sentencing him to prison, was not invalidated by his instructions to clerk that such notice, enclosed with mailed written motion and notice thereof, was to be dated and filed only if motion were denied. West's Ann.Rules on Appeal, rule 31.

[1] The question is whether the steps taken were sufficient to cause an appeal to be lodged in this court. We think they were sufficient.

7. Criminal Law §1081

A notice of appeal, given by prisoner through only facilities available to him, cannot be denied validity because of failure to file it within ten days after rendition of judgment or making of order appealed from, as required by rule, since prisoner is not required to hazard right of appeal on chance that he may have opportunity to forward timely notice after learning of court's ruling. West's Ann.Rules on Appeal, rule 31.

[2,3] Rule 31 of Rules on Appeal in Criminal Cases provides that a notice of appeal be filed within ten days after the rendition of the judgment or the making of the order. Under ordinary circumstances failure to file a notice within the limited time after rendition of the judgment or making of the order would be fatal to an appeal. But inmates of state prisons encounter difficulties and handicaps which may not be ignored in the decision of our question. As a rule they are not represented by counsel and have prepared their moving papers in the prison in accordance with restrictive prison rules. The law does

not require that notice of the court's ruling on a motion be given to the prisoner and it may not be presumed that notice will be given. The prisoner's situation is to be considered with respect to his right to notice; and he has no such right. If the clerk voluntarily sends him a notice it may or may not be received in time for him to prepare and forward a notice of appeal. He may or may not receive the prompt assistance of prison authorities in the forwarding of a notice of appeal. If he relies upon but does not receive voluntary cooperation in these matters he is helpless and without means to prevent the loss of his right of appeal through the expiration of time.

[4-7] The problem is not a new one. It is a somewhat common practice for prisoners to mail a notice of appeal with their moving papers on motions to vacate judgments or orders. Some trial courts cause the notices of appeal to be filed and treat them as valid; others decline to permit them to be filed for the reason that they have been presented prematurely, and in the latter cases the notices are regarded as if they had been filed too late. The two situations are obviously quite different, since the limitation of time for filing the notice goes to the jurisdiction of a reviewing court to entertain an appeal. Its purpose, of course, is to facilitate the disposition of appeals, and that purpose is defeated when notice is not given in the manner and within the time prescribed by the rules on appeal. *People v. Figuieredo*, 136 Cal.App.2d 171, 288 P.2d 271. But the purpose is not defeated by treating as valid a notice that is offered for filing conditionally in advance of the ruling. The petitioner here had a right to appeal and he availed himself of a practice that has been prevalent for many years. If that practice is to be condemned and held for naught, petitioner will not be the only one to suffer the loss of his right of appeal. There will be many others whose efforts to appeal will fail for the same reason, even if they make use of the facilities which are available to them. We could not be satisfied to hold prisoners to a procedure that would compel them to rely upon the assistance of others who are under

no legal duty to render assistance. A similar situation was before the court in *People v. Rameriz*, 137 Cal.App. 472, 30 P.2d 577, 578. *Rameriz*, confined in state prison, forwarded a written motion to vacate a judgment, accompanying the same with a brief, a motion to be brought into court at the time of hearing, a notice of appeal and a request for a transcript, the notice of appeal containing a statement that it was to be entered only in the event the court denied the motion. The motion was denied and in the reviewing court a motion was made by the Attorney General to dismiss the appeal. At that time under section 1239 of the Penal Code an appeal could be taken from an order denying a motion only by announcement made in open court at the time the order was made. The prisoner was not represented by counsel and his application for leave to be brought into court was denied. Of this situation the court, through Presiding Justice Barnard, spoke as follows: "Under such circumstances he filed in advance a written notice of appeal with the request that it be entered in the event his motion was denied. This was the only thing he could do and the only way in which it was possible for him to claim the right to which he was entitled under the statute. Under such circumstances, we think the written notice of appeal filed was such a substantial compliance with the statute as should be considered sufficient." We are in full agreement with this conclusion. When the court made its ruling in the instant case denying petitioner's motion the notice of appeal was in the hands of the clerk. Having been delivered to the clerk for filing it was deemed to have been filed even though the clerk had not, prior to the ruling, endorsed it as having been filed. In *re Estate of Sankey*, 199 Cal. 391, 396, 249 P. 517. The clerk held the notice in his capacity of clerk and filing was not invalidated by the instructions that were given with respect to the time when it was to be deemed filed. Both reason and justice forbid denying validity to notices of appeal given by prisoners through the only facilities available to them. *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868. They are not required

to hazard the right of appeal upon the chance that they may have an opportunity to forward a timely notice after learning of the court's action.

Let a writ of mandate issue as prayed.

PARKER WOOD and VALLÉE, JJ.,
concur.



137 Cal.App.2d 378

J. Paul CAMPBELL and Paul W. Campbell,
co-partners, doing business under the firm
name and style of Trojan Lumber and Sup-
ply Company, Plaintiffs and Respondents,

v.

PONTICOPOULOS, Inc., a corporation,
Defendant and Appellant.

Civ. 20904.

District Court of Appeal, Second District,
Division 1, California.

Nov. 30, 1955.

As Modified on Denial of Rehearing
Dec. 22, 1955.

Hearing Denied Jan. 25, 1956.

Action by lumber dealer against con-
tractor to recover for lumber sold on con-
tract and for wrongful breach thereof.
The Superior Court of Los Angeles County,
Herbert V. Walker, J., entered judgment
for lumber dealer and contractor appealed.
The Court of Appeal, Doran, J., held that
evidence supported findings that contractor,
who claimed to have received an inferior
grade of lumber, had wrongfully breached
contract.

Affirmed.

Sales 6-383

In action by lumber dealer against con-
tractor to recover for lumber sold on con-
tract and for wrongful breach thereof, evi-
dence sustained finding that contractor,
who claimed to have received an inferior
grade of lumber, had wrongfully breached
the contract.

Lehman & Van Buskirk, M. Lewis Leh-
man, Wayne L. Van Buskirk, Los Angeles,
for appellant.

Thompson, Thompson & Olson, Burbank,
Henry F. Walker, Los Angeles, for re-
spondents.

DORAN, Justice.

This is an appeal from the judgment.

The action is for money due for lumber
sold and delivered to defendant and for
damages for breach of contract. The com-
plaint, in four counts, alleges in Count I
that defendant wrongfully terminated the
contract. Count II is a common count for
goods sold and delivered. Count III is up-
on an account started and for damages and
Count IV is an action upon an open book
account.

Defendant and appellant filed an answer
denying the material allegations of the
complaint as they pertain to the damages
and the performance of the contract by re-
spondents. Appellants also set up in its an-
swer a second and separate defense, the
right of defendant to cancel the contract
should plaintiffs default in their perform-
ance and such default continue for 24 hours,
and further alleges that plaintiffs failed to
deliver lumber of the specified grade, which
caused defendant to perform extra labor
and carpentry in the construction of its
houses, all to its damage in the sum of
\$30,950.00, and that defendant was compell-
ed to purchase lumber of the proper grade
elsewhere and was thereby damaged in the
sum of \$36,967.00. Said second defense
further contained the item of damage that
the lumber delivered was of less value than
the amounts contracted for, and that, as a
result, defendant was damaged in the sum
of \$11,838.99.

Appellant's answer also contained a third
and separate defense, alleging that the in-
ferior lumber delivered caused delay in the
construction schedule and increased the in-
terest on defendant's loans and increased
defendant's overhead for maintaining a
large project, all to defendant's damage in
the sum of \$12,741.72.

Defendant also filed a cross-complaint,
wherein it is alleged that the provisions of

the agreement pertaining to the size and grades of lumber were violated, and the fact that a substantial portion of the lumber delivered in the later stages of the contract was one to two grades below that specified in the contract; that extra carpentry had to be used; that lumber was purchased at a higher price from another firm, after cancellation; and alleged substantially the same items of damages as set forth in the separate defenses of defendant's answer.

Plaintiffs filed an answer to the cross-complaint, alleging that they had performed under the terms of the contract; that said contract was wrongfully terminated by defendant.

It is argued by appellant that,

"The findings hereinbelow set forth are unsupported by and contrary to the substantial evidence at the trial"; "The trial judge did not keep an open mind, he prejudged the issue, he assumed facts not in evidence, and committed other acts of prejudicial error"; "Evidence improperly admitted" and "Evidence improperly excluded"; "The law applied by the court in interpreting the rights of the parties in and under the written contract was not applicable and was contrary to the facts"; and "The trial court erred in not applying the law of implied warranty."

The contract in question, dated February 29, 1952, was for the purchase and sale of lumber to be used "for the construction of approximately seven hundred units, being individual dwelling houses and appurtenances, proposed to be built by said defendant in three subdivisions or tracts of land". September 23, 1952 defendants notified plaintiffs by letter that, "it would take no more lumber from plaintiffs, but was going to secure the balance of the lumber requirements elsewhere".

As recited in respondent's brief, "In reply to this September 23rd letter, plaintiffs wrote a letter September 25, 1952, which was stipulated to have been received by defendant, denying the lumber was not of proper grade, stating they were ready, willing and able to furnish lumber for the remaining units and their intent to hold de-

fendant liable for damages if it refused to permit them to do so, and demanded payment of the balance due and unpaid as heretofore billed. Despite plaintiffs' demands for payment, defendant paid nothing on the \$154,659.72 balance until January 13, 1953. Defendant then paid \$74,903.73 and no more." Plaintiffs were awarded judgment of approximately \$91,000.

In connection with the above noted contention, "That the trial judge did not keep an open mind, he prejudged the issue", etc., appellant cites a number of incidents that occurred during the trial and the comments of the trial judge in connection therewith. The argument on the subject concludes as follows:

"It is apparent from the above examples that the trial court went far beyond the rules cited in the various cases; that his frequent comments indicated that he had prejudged and made up his mind concerning a number of the issues; and that his thinking either intentionally or unintentionally was against the interests and cause of the defendant."

Appellant also argues that, "it should be kept in mind that this trial extended over a period of approximately seven months, being tried at intervals of thirty to sixty days with three or four days of trial on each occasion. It is obvious that the attitude of the trial court changed during this lengthy period of time." In connection with this argument it is important to bear in mind that the case was tried without a jury. An examination of the record refutes appellant's contention in this regard and discloses nothing whatever in support of the argument that the trial judge did not keep an open mind, prejudged the issue, assumed facts not in evidence and committed acts of prejudicial error.

The findings of fact are comprehensive and fully cover the issues involved and the conclusions of law are correct in the circumstances.

A review of the record reveals that no prejudicial errors resulted from the admissibility or exclusion of evidence.

Appellant's contention relating to "the law of implied warranty" is highly technical and discloses no prejudicial error.

The evidence of course is conflicting as to some questions, but a review thereof shows it sufficient, as a matter of law, to support the judgment.

There being no prejudicial errors in the record, the judgment is affirmed.

WHITE, P. J., concurs.

NOURSE, J. pro tem., concurs in the judgment.



137 Cal.App.2d 321

SAINT FRANCIS MEMORIAL HOSPITAL,
a nonprofit corporation, Plaintiff and
Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a political subdivision of the State of California, a body corporate and politic, Defendant and Appellant.

No. 16430.

District Court of Appeal, First District,
Division 1, California.

Nov. 29, 1955.

Rehearing Denied Dec. 29, 1955.

Hearing Denied Jan. 25, 1956.

Action by hospital to recover taxes which were paid under protest and which were levied on three parcels of hospital realty which hospital alleged were exempt under welfare exemption statute. The Superior Court, City and County of San Francisco, I. L. Harris, J., held that the property came within the welfare exemption and the city and county appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was sufficient to support finding that hospital was organized and operated for hospital and charitable purposes and was not organized to operate for profit, and fact that operation of part of hospital property, not claimed as wel-

fare exemption, resulted in a surplus, did not warrant conclusion that all hospital properties were operated with intent of making profit thereon and consequently were not entitled to exemption under the taxation welfare exemption statute.

Judgment affirmed.

1. Taxation $\S$ 241(1)

The test indicated by the phrase "operated for profit" or "conducted for profit" contained in charitable tax exemption tax statutes is not necessarily whether there is or may be a profit but whether the claimant is operated or conducted for the purpose of making a profit; that is, whether the charges are fixed with the intention of yielding a surplus over and above operating expenses. Revenue and Taxation Code, $\S$ 214(1, 3).

See publication Words and Phrases, for other judicial constructions and definitions of "Conducted for Profit" and "Operated for Profit".

2. Taxation $\S$ 241(2)

Where hospital had annual budget of nearly \$3,000,000 with a payroll in excess of \$1,600,000, a surplus of \$130,400 did not necessarily token a calculated plan to operate the institution for profit within meaning of tax exemption law. Revenue and Taxation Code, $\S$ 214.

3. Taxation $\S$ 251

In action by hospital to recover taxes paid under protest which were levied on three parcels of hospital realty, evidence was sufficient to show that owner of property for which exemption was claimed was organized and operated for hospital and charitable purposes and was not organized to operate for profit. Revenue and Taxation Code, $\S$ 214(1, 3).

4. Taxation $\S$ 251

In action by hospital to recover taxes levied on three parcels of hospital realty, evidence was sufficient to support finding that hospital properties, part of which were operated as doctors' offices, a pharmacy, a parking lot, and coffee shop were not operated for profit within meaning of exemption provision of tax code providing that

to be eligible for the exemption an owner must not be organized or operated for profit and that the property used or operated by owner must not be operated for a profit. Revenue and Taxation Code, § 214(1, 3).

5. Taxation $\S$ 241(2)

Under welfare exemption statute providing that property used exclusively for hospital purposes shall be exempt from taxation if owner is not organized or operated for profit, or property is not used or operated by owner or by any other person for profit, even if part of hospital premises used as medical offices, pharmacy building, parking lot and coffee shop were purposefully operated for profit and thus not exempt for that year, such fact did not affect exemptability of main hospital building, living quarters for resident personnel, and building used for hospital school nursing. Revenue and Taxation Code, § 214.

6. Taxation $\S$ 241(2)

Under welfare exemption statute providing that property used for hospital purposes shall be exempt from taxation if no part of net earnings of owner inures to benefit of any private or general individual, fact that plaintiff negotiated promissory notes upon which interest was paid during tax year in question for payment of part of purchase price of hospital plant at interest rate not greater than $4\frac{1}{2}$ per cent per annum payable semi-annually from net earnings did not constitute a violation of statute and prevent hospital property from claiming welfare exemption. Revenue and Taxation Code, § 214(2).

7. Taxation $\S$ 241(2)

Under welfare exemption statute providing that property used exclusively for hospital purposes shall be exempt from taxation if "irrevocably dedicated" to religious, charitable, scientific or hospital purposes, there is no requirement that a hospital corporation own and operate no property which is not exempt under the welfare exemption statute but rather the requirement is more concerned with ultimate purposes as shown in the articles of

incorporation of the institution claiming the welfare exemption. Revenue and Taxation Code, § 214(6).

See publication Words and Phrases, for other judicial constructions and definitions of "Irrevocably Dedicated".

8. Taxation $\S$ 241(2)

Under taxation welfare exemption statute providing that property used exclusively for hospital purposes and owned and operated by corporation for hospital purposes shall be exempt from taxation if irrevocably dedicated to hospital purposes, fact that part of hospital property was operated for purposes which were not specific hospital functions, but which were closely related, did not deprive hospital from successfully claiming it was organized and operated for hospital or charitable purposes and entitled to welfare exemption, where hospital's articles of incorporation showed an irrevocable dedication to operation as a hospital. Revenue and Taxation Code, § 214(6).

9. Taxation $\S$ 251

Fact that hospital had timely filed its welfare exemption claim with city and county assessor and had included in its claim for exemption certain lots numbers 2 and 3 did not preclude hospital from filing a revision of claim after deadline, withdrawing lots 2 and 3 from scope of its original claim. Revenue and Taxation Code, § 254.5

Dion R. Holm, City Atty., Agnes O'Brien Smith, Jerome Cohen, Deputy City Attys., San Francisco, for appellant.

Clark, Heafey & Martin, by Leon A. Clark and Gerald P. Martin, Oakland, for respondent.

FRED B. WOOD, Justice.

In this action brought by the Saint Francis Memorial Hospital to recover taxes which had been levied by the City and County of San Francisco upon three separate parcels of real property in 1951 and had been paid under protest, the trial court found and concluded that each of the properties and the hospital as owner of

each met the requirements prescribed by section 214 of the Revenue and Taxation Code for the "welfare exemption" which section 1c of article XIII of the state Constitution authorized the Legislature to grant.

The principal question is whether or not the evidence supports the findings and conclusions.

The properties in question are lot 10, which is the site of the six-story main hospital building and of a building that is used as a nurses' residence; lot 13, which has a three-story building used as living quarters for residents and externes with about 15% of the ground floor space used as a barber shop; and lot 21, which has a four-story building used for the hospital's school of nursing.

We entertain no doubt that these properties were "used exclusively for * * * hospital * * * or charitable purposes," a requirement imposed by the Constitution and the statute as a condition for the granting of the welfare exemption. Precisely such facilities were involved in *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal.2d 729, 735-742, 221 P.2d 31, 15 A.L.R.2d 1045, and were there determined to be used exclusively for hospital purposes.

The city and county conceded during the trial that the revenues and expenditures in relation to these properties and functions in 1951 were such that the hospital would have been entitled to the exemption that year but for a surplus of \$130,400 which resulted principally, if not entirely, from the conduct of certain other functions and properties by the hospital.

The other properties and functions included lots 2 and 3, improved to a medical building which houses a pharmacy operated by the hospital and contains a number of offices which are rented to various doctors and dentists, and a coffee shop which is operated by a tenant;¹ also, a parking lot

which is operated by a tenant for the use of doctors who patronize the hospital.

This overall \$130,400 "surplus" furnishes the nub of the present controversy. The city and county contends that such a surplus furnishes proof irrefutable that in 1951 both the "property" and the "owner" of the property were "operated for profit," and thus failed to meet the requirements of subdivisions (1) and (3) of section 214. There are several fallacies in this argument.

[1] The fact that a surplus results in a given year does not necessarily mean that either the property or its owner was operated "for" profit. There is an element of *intent* involved. "In relation to tax laws, the phrase 'conducted for profit,' which appears to be the equivalent of 'operated for profit', has presented some difficulty but has been generally held to convey the meaning of operated or conducted for the *purpose* of making a profit. [Citations.] Accordingly, the test indicated by such phrases, as so construed, is not necessarily whether there is or may be a profit but whether the claimant is operated or conducted for the purpose of making a profit; that is, whether the charges are fixed with the intention of yielding a surplus over and above operating expenses. [Citations.]" *Sutter Hospital of Sacramento v. City of Sacramento*, 39 Cal.2d 33, 37, 244 P.2d 390, 392.

[2] A surplus might be accidental, not calculated. When an institution, such as this, has an annual budget of nearly \$3,000,000, with a payroll in excess of \$1,600,000, a surplus of \$130,400 (about 4.4% of gross receipts) does not necessarily token a calculated plan to operate the institution for profit. It quite persuasively tokens prudent management. No one could seriously contend that a hospital must show a deficit at the end of each year in order to qualify as not operating for profit.

Here, the owner of the property is a nonprofit corporation organized under the

1. In 1951 the coffee shop showed a loss, not a gain. It was started that year and

was operated for a time by the hospital, until a tenant could be found.

laws of this state. Its articles clearly spell a nonprofit nature and, not inconsistently therewith, declare how "any receipts in excess of expenses shall be applied."²

There is evidence that the charges for patients' rooms at the hospital were less than the payroll expense per patient day; that the rates are not fixed with the idea or purpose of creating a profit in operation; they are set to cover operating expenses and provide necessary funds for maintenance in compliance with licensing laws; plaintiff's expenses including salaries are not excessive; the hospital had charity patients in 1951; it cared for 252 patients on a free or a part-pay basis; in addition, obstetrical and arthritic clinics and an obstetrical out-patient clinic were established for patients unable to pay the full cost of private hospital care.

[3] It seems abundantly clear that the plaintiff, the owner of the properties for which the exemption is claimed, was organized and operated for hospital and charitable purposes and was not organized or operated for profit. Certainly, the evidence supports the trial court's findings thereon and no reviewing court may disturb them.

2. Article II declares the following purposes: To carry on the business of a nonprofit hospital association, to conduct schools for nurses, to provide facilities for the care and hospitalization of those patients unable to pay for such services; that none of its objects or purposes contemplates the distribution of any gains or projection dividends to any member of the corporation "but any receipts in excess of expenses shall be applied by the Board of Trustees to the care of free or part pay or entirely charity patients, to the equipment and enlargement of its institutions, and to the carrying out of the purposes of this corporation in such manner as in the judgment of the Board of Trustees may be deemed desirable and profitable." (Art. II of the original articles.) Here, the word "profitable," quite obviously, is used in the sense of "useful, helpful, beneficial."

Article III was amended in 1946 to provide: "This corporation shall have no capital stock, is not formed for profit, does not contemplate pecuniary gain or

[4] The same test we have just applied in respect to the "owner" should be used in determining whether a particular item of "property" was "operated * * * for profit" as that term is used in subdivision (3) of section 214. Use of that test convinces us that the evidence supports the trial court's finding on this subject. The administrative head of the hospital testified that without the income from the properties for which the welfare exemption is not claimed (office rentals, parking lot rentals, coffee shop rental, pharmacy proceeds) there would have been a deficit, and some of the exhibits tend to support him. However, defendant questions his conclusion in that regard, calling attention to the fact that on plaintiff's books the interest paid that year (about \$33,000) was all charged to the hospital proper, none to the nonexempt properties. Defendant also claims that some of the hospital's insurance and overhead should be charged, in due proportion, to one or more of the nonexempt properties.³ We find merit in such suggested readjustments but do not believe they would effect a change in the conclusions properly to be drawn. The resultant "surplus" thus accruing from the operation of the exempt properties would not furnish an adequate

profit to the members thereof, and no part of its net earnings shall inure to the benefit of any member or individual and no part of its activities shall be devoted to carrying on propaganda or otherwise attempting to influence legislation. The property of this corporation is irrevocably dedicated to charitable, scientific or hospital purposes and upon the liquidation, dissolution or abandonment thereof will not inure to the benefit of any private person, but shall be distributed to a fund, foundation or corporation organized and operated for charitable, scientific or hospital purposes."

3. It does not clearly appear that plaintiff charged the pharmacy for the value of the use of the space in the medical office building which it occupied. If not, and such a charge were to be made, the pharmacy's excess of receipts over operating expenses would be reduced without charging the amount of the overall "surplus." The difference would be credited to rentals.

basis for a reviewing court to hold, as a matter of law, that the exempt properties were operated with the intent of making a profit therefrom.

Whether or not the other properties were operated with such an intent, we need not decide. If they were (it is quite conceivable that the offices and the parking lot rental rates were fixed with knowledge that they would produce a net income) the only immediate consequence would be that of rendering those particular properties ineligible for the welfare exemption in view of the provisions of subdivision (3) of section 214. Thus, in *Young Men's Christian Ass'n of Los Angeles v. County of Los Angeles*, 35 Cal.2d 760, 221 P.2d 47, the disallowance of the welfare exemption for properties and portions of properties devoted to restaurants, clothing shops and similar services did not render the properties and portions of properties devoted to dormitories ineligible, nor was the owner deemed ineligible to claim the exemption for the dormitories. Similarly, in *Cedars of Lebanon Hospital v. County of Los Angeles*, supra, 35 Cal.2d 729, 221 P.2d 31, the ineligibility of the "thrift shop" did not prevent the owner from obtaining the welfare exemption for the nurses' training school property or the residences for nurses, student nurses, internes, resident doctors and other essential personnel, or the tennis court.

[5] We are not holding that the medical offices and pharmacy building and the parking lot were purposefully "operated * * * for profit" in 1951 or that plaintiff was not entitled to claim the welfare exemption for them. We hold simply that even if they were so operated for profit and thus not exempt that year, those facts do not under the circumstances of this case adversely affect the exemptability of the main hospital building, the living quarters for resident personnel, and the building used for plaintiff's school of nursing. Any institution or-

ganized in whole or in part for a charitable purpose must obtain money from some source with which to defray the costs of carrying on its charity function. That source might be public subscriptions, private donations,⁴ endowment funds invested in revenue producing properties⁵ whether the revenue comes as interest, dividends, rentals, net returns of a business enterprise, or revenue in some other form, or a combination of several varied types of income. The purposeful pursuit of such income, devoting it, when received, to the financing of the charitable function to which dedicated, does not, we think, make the institution any the less a hospital or charitable institution, despite defendant's urge to the contrary.

In passing, we note that the income producing activities in question are not foreign to plaintiff's hospital and charitable functions. An off-street parking area for the convenience of doctors who use the hospital bears an obvious relation to those functions. A pharmacy is a necessary adjunct to any hospital. The operation of a coffee shop for the convenience of resident personnel and visitors would seem to be a reasonable incidental activity. The renting of offices to doctors and dentists bears a less obvious relation. But these offices are in the same building as the pharmacy and this building, it would seem, was acquired as a part of an entire hospital plant from plaintiff's predecessor in ownership. In the prudent management of plaintiff's affairs it would seem reasonable and desirable to continue this rental service.

[6] Defendant makes the further contention that plaintiff is disqualified to claim the exemption because, defendant asserts, a "part of the net earnings of the owner", plaintiff herein, "inures to the benefit" of "private shareholder[s] or individual[s]." § 214, subd. (2). This assertion is predicated upon the fact that in 1951 interest was paid upon certain promissory notes which plaintiff issued in 1938 in payment of

4. Donations would produce nearly 100% net income. The cost of solicitation and of entering their receipt upon the books of the donee probably would be negligible.

5. Interest and dividends derived from securities owned would involve somewhat greater operating expenses (the cost of managing the investments, deciding what and where to buy or sell) but still should be largely net in their return.

part of the purchase price of its plant. These notes, dated August 1, 1938, are payable on or before 20 years after date, bear interest at a rate not greater than $4\frac{1}{2}\%$ per annum, and are payable semiannually from the "net earnings" of plaintiff as ascertained and determined by plaintiff's board of trustees to be applicable to said interest payments.

It seems obvious that we are dealing here with a debtor-creditor relationship. If this debt were in the usual form of an absolute, unqualified obligation to pay $4\frac{1}{2}\%$ interest per annum, no one would question its payment as a legitimate operating cost, ahead of the ascertainment and declaration of "net earnings," a charge and a payment not within the purview of subdivision (2) of section 214. We do not believe that the mere fact that plaintiff negotiated more favorable terms respecting the payment of this particular obligation brings it within the purview and proscription of subdivision (2). It is somewhat akin to the public debenture known as the "revenue bond," which is distinguishable from the "general obligation bond" because payable only out of a specific fund or out of the revenues of a particular revenue producing facility. But the revenue bond is still a "bond," a debt, not an ownership interest. The very use of the word "shareholder" in subdivision (2) of section 214 suggests an intent there to deal with an ownership not a debtor-creditor relationship.

[7,8] Defendant makes the further argument that "all of the property is not irrevocably dedicated to hospital and charitable purposes," apparently invoking subdivision (6) of section 214. It inferentially if not explicitly, contends that thereby plaintiff became and is incapable of successfully claiming it is organized and operated for "hospital or charitable purposes." There are several fallacies here. The "irrevocably dedicated" feature of subdivision (6) is a quality which "property" must possess in order to have the "welfare exemption." There is no requirement that a "hospital or charitable" corporation own

and operate no property that is not exempt under section 214. Also the "requirement of irrevocable dedication is concerned with ultimate purposes rather than with present uses. Thus, the claimant's manner of operation and its use, past or present, of its properties are wholly immaterial. The critical factor is its powers with respect to its properties; and these powers, in the case of a corporate claimant, must ordinarily be ascertained from its articles of incorporation." *Pacific Home v. County of Los Angeles*, 41 Cal.2d 844, 849, 264 P.2d 539, 541. We think that article III⁶ of plaintiff's articles of incorporation, as amended in 1946, clearly effects the irrevocable dedication which subdivision (6) of section 214 requires property to have as a condition for the granting of the "welfare exemption"; as clearly as, if not more clearly than, the articles of incorporation of the plaintiff did in *Pacific Home v. County of Los Angeles*, supra, 41 Cal.2d 844, 849-852, 264 P.2d 539.

Plaintiff places considerable reliance upon a former judgment between these parties, one which found and declared these same properties tax exempt under section 214 during the fiscal years 1945-46 through 1948-49. This judgment, coupled with testimony that there has been no change in the condition or manner of operation of plaintiff or of these properties, plaintiff claims calls into play the doctrine of res judicata as to most if not all of the issues here involved. We entertain some doubts on that subject but deem it unnecessary to determine that question in view of our conclusions based upon the evidence herein, which we have found supports the judgment herein without the aid of the doctrine of res judicata.

[9] Plaintiff filed its welfare exemption claim with the city and county assessor on March 18, 1952, as required by section 254.5 of the Revenue and Taxation Code, claiming as exempt lots 2 and 3 and the building thereon known as the medical offices and pharmacy building, in addition to lots 10, 13 and 21 and the structures

6. See text thereof in footnote 2, above.

thereon which comprise the main hospital building, the nursing school, and the living quarters for resident personnel.

Later, plaintiff filed a revised financial statement and a letter dated June 26, 1952, withdrawing its welfare exemption claim for lots 2 and 3 and the improvements thereon. The financial statement was designed to show certain adjustments incident to this withdrawal. Then, on June 30, 1952, apparently in response to a suggestion from the assessor's office, plaintiff filed a letter and statement comparing the original and the revised claims and furnishing considerable explanatory detail.

The parties have discussed at some length the right, if any, of the plaintiff to file a revision of claim after April 1, 1952, the deadline prescribed by section 254.5 of the code. We entertain no doubt of the right of plaintiff to withdraw lots 2 and 3 from the scope of its claim. The owner certainly had the power to waive as to those lots by not claiming the exemption for them in the first instance. We find in the statute no mandate prohibiting waiver after the filing of an exemption claim therefor. The revised financial statement is not pivotally important to the effective withdrawal or waiver of such a claim but in the instant case it did contain some information that was helpful though not indispensable in considering the remaining properties.

The principal new item in the revised statement was a change in the method of depreciation, from the original cost plus additions to the replacement value method. This would have increased the depreciation to such an extent as to produce an overall deficit instead of a surplus. However, that change in method had not yet been made at the time of the filing date (April 1, 1952); indeed, it apparently was not made or entered on plaintiff's books, if at all, until after the fiscal year which ended June 30, 1952. Accordingly, without holding that method unavailable to plaintiff for the 1951 tax year, we have made our analysis and have drawn our conclusions upon the basis of the depreciation

method reflected in the claim as first filed. We understand that defendant does not question this method. During the trial defendant's counsel said it was permissible to use it in 1951.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



137 Cal.App.2d 259

**DIVISION OF LABOR ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS, State of California, Plaintiff,**

v.

Mrs. Albert GIFFORD, Defendant.

**Mrs. Albert GIFFORD, Cross-Complainant
and Appellant,**

v.

**DOCTORS HOSPITAL, Milton E. Denmark,
John M. Hohl, First Doe, Second Doe,
Third Doe, Frances E. Faulkner, Cross-Defendants and Respondents.**

Civ. 16365.

District Court of Appeal, First District,
Division 2, California.

Nov. 28, 1955

Action by widow of deceased against hospital, doctor and nurses for alleged negligence in causing deceased's death and for damages against doctor on account of performance of autopsy on deceased without permission. From adverse judgments of the Superior Court, County of Santa Clara, Leonard P. Avilla, J., widow appealed. The District Court of Appeal, Kaufman, J., held that where written permission for autopsy named doctor who was present at autopsy, permission was sufficient to authorize performance thereof by surgeon with whom doctor was associated, and evidence sustained finding that there was no negligence by hospital, doctor or nurses which caused the post-operative

death of deceased who was suffering from hypertension and obesity.

Judgment affirmed.

1. Hospitals ⚖8

Physicians and Surgeons ⚖18(8)

In action against doctor, hospital and nurses for damages on account of alleged negligence which caused deceased's death, evidence sustained findings that no negligence or malpractice on the part of any of the defendants contributed to post-operative death of deceased who was suffering from hypertension and obesity.

2. Dead Bodies ⚖1

Since 1955 amendments to statutes respecting performance of autopsies, written permission is necessary for all autopsies performed by doctors in hospitals or elsewhere. West's Ann. Health and Safety Code, §§ 7113, 7114.

3. Dead Bodies ⚖9

In widow's action for damages against doctor for performance of unauthorized autopsy on deceased, evidence, including written permission to other doctor who participated in autopsy, sustained finding that autopsy was performed by doctor with widow's consent. West's Ann. Health and Safety Code, §§ 7113, 7114.

4. Appeal and Error ⚖1050(1)

In widow's action against doctor for damages for malpractice in allegedly causing decedent's death, there was no prejudicial error in admitting in evidence doctor's electrocardiograms taken of deceased, even though such electrocardiograms were not among the medical records produced by hospital custodian pursuant to subpoena. West's Ann.Code Civ.Proc. § 2055.

5. Evidence ⚖553(4)

Although hypothetical questions which are based on facts not shown by the evidence are not competent, minor variances between the facts assumed and the facts in evidence do not render the question incompetent.

6. Evidence ⚖553(4)

In widow's action against doctor for alleged malpractice for causing decedent's

death, hypothetical question which assumed deceased's blood pressure to be the same for a four week period when only one blood pressure reading was in evidence for that period, was not incompetent as being unsupported by sufficient evidence.

7. Appeal and Error ⚖1054(1)

In a trial before the court, admission of incompetent evidence will not be deemed prejudicial if other competent evidence in the record adequately supports the findings and judgment.

John B. Kramer, Hildebrand, Bills & McLeod, Oakland, for appellant.

Lamb, Hoge & Killion, San Francisco, for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of the County of Santa Clara decreeing that defendant and cross-complainant take nothing, and that cross-defendants have judgment for costs on cross-complainant's action for damages for performance of an unauthorized autopsy on the body of cross-complainant's deceased husband by cross-defendant physician, and for negligence and malpractice causing his death.

A complaint for wages for certain nurses was filed against Mrs. Albert Gifford, by the Division of Labor Law Enforcement of the Department of Industrial Relations. She filed an answer and a cross-complaint consisting of four causes of action, the first for negligence on the part of the cross-defendant Doctors Hospital through its agents, servants and employees in regard to facilities, care and treatment; the second against Doctors Hospital and cross-defendant Dr. Milton E. Denmark for performance of an unauthorized autopsy; the third for malpractice on the part of Dr. Denmark in advising surgery, in the performance thereof and in the post-operative care; the fourth was for negligence against cross-defendant Frances Faulkner, a nurse, who was alleged to be an agent and employee of Dr. Denmark and the Doctors Hospital.

Mr. Albert Gifford entered Doctors Hospital in San Jose, California, on January 30, 1952, under the care of Dr. Denmark. He was examined by Dr. Denmark and Dr. Irene Gayus. He was suffering from high blood pressure and a pyloric ulcer which was leaking into the pancreas. There appeared to be no severe heart damage at the time the operation was decided upon, and there was no abnormal condition detected in the kidneys. Dr. Denmark decided that a gastrectomy was necessary, and with his assistance this operation was performed on Mr. Gifford on February 1, 1952 by Dr. Denmark and his assistant, Dr. Kumera. Mr. Gifford was a man of forty-one years of age; five feet four inches in height, and weighed 230 pounds. He had been treated for high blood pressure and obesity at Doctors Hospital in the autumn of 1951.

Following the operation, Mr. Gifford's condition was poor and thereafter became progressively worse. He died on February 9, 1952. Doctor Denmark stated that the cause of death was lower nephron syndrome which is kidney failure. There was testimony that the operation was normal and skillfully done.

There was medical testimony to the effect that decedent's very high blood pressure could cause kidney damage and that such a patient had less chance of recovery from this type of major surgery than does a patient with normal blood pressure. Fatalities after such operations average between two and four per cent.

Dr. Denmark performed an autopsy upon the remains, and testified that in his opinion death was due to a lower nephron syndrome. Dr. Gayus also participated in the autopsy.

The case was tried by the court without a jury. The court made detailed findings of fact on each cause of action. None of the alleged acts of negligence were found to be true, except that the special nurses did fail to chart all medicines administered. It was found that no acts or omissions of the cross-defendant Doctors Hospital contributed in any way to proximately cause the death of Albert Gifford. The court found that it was not true that Dr. Denmark performed the autopsy without the consent

of Mrs. Gifford; that it was not true that Doctors Hospital or Dr. Denmark failed to disclose the results of the autopsy to Mrs. Gifford, nor that she was deprived of the means of establishing the cause of death of said Albert Gifford. As to the third cause of action it was found that there was no act of negligence on the part of Dr. Denmark or any failure to exercise the degree of skill ordinarily possessed by surgeons in the San Jose area or similar communities, in the performance of the operation, or in the care and treatment of Mr. Gifford. As to the fourth cause of action against the nurse Mrs. Faulkner, it was found that judgment in favor of Mrs. Faulkner had been stipulated to, and no proof of negligence on her part had been made.

[1] The only one of the above findings of fact that is directly attacked as unsupported by the evidence is that Dr. Denmark performed the autopsy with permission. There is abundant evidence in the record to support the findings of fact that no negligence or malpractice on the part of Dr. Denmark or the hospital employees contributed to causing Mr. Gifford's death, and such findings could not therefore be directly attacked. Appellant's complaint is that the evidence on which these findings were based was so inconsistent, contradictory, evasive and incredible as to not meet the required standard of substantial testimony.

At the time this action arose, sections 7113 and 7114 of the Health and Safety Code, dealt with the matter of autopsies. Section 7113 then read as follows:

"When autopsy permitted: Liability for autopsy. A cemetery authority or a licensed funeral director may permit an autopsy of any remains in its or his custody upon the receipt of a written authorization of a person representing himself to be any of the following:

"(a) The surviving spouse. * * *

Section 7114 of the same code provides:

"Performance of autopsy without written authorization.

"Any person who performs an autopsy on a dead body without having first obtained the written authorization required by Sec-

tion 7113 of this code is guilty of a misdemeanor, except that this shall not be applicable to the performance of an autopsy by the coroner or other officer authorized by law to perform autopsies."

In 1955 section 7113 was amended to read: "A cemetery authority or licensed funeral director or a licensed hospital or its authorized personnel may permit or assist, and a physician may perform, an autopsy of any remains in its or his custody upon the receipt of a written authorization from a person representing himself to be any of the following: (a) The surviving spouse; * * *." Section 7114 was also amended to conform with the change in the foregoing section.

[2,3] It is contended that since Section 7114 was added in 1949, after an opinion by the Attorney General of California in 1948 (11 Op.Atty.Gen. 150) to the effect that oral permission was sufficient to permit a post mortem examination of a body in a Veterans Home, that it is clear that Section 7114 required written authorization directly to Dr. Denmark in this case. However, even if Section 7114 was enacted for that purpose, it does not appear to have accomplished it. A reasonable interpretation of the section is that it established a penalty for violation of Section 7113, for it refers to performance of an autopsy on a body without the "written authorization required by Section 7113", and that section is concerned only with autopsies of remains in the custody of cemeteries or funeral directors. Since the 1955 amendments to these sections, it is now clear that written permission is necessary for all autopsies performed by doctors in hospitals or elsewhere. But even if it is assumed that written permission for the performance of an autopsy by a doctor in a hospital was required by the law as it existed at the time this case arose, it does not specifically require that the permission must run directly to the person performing the autopsy. If a funeral director had written consent to an autopsy by the spouse of a deceased person, certainly any doctor performing that autopsy would be within the law. In the instant case Dr. Denmark

requested Dr. Gayus, with whom he worked on this case, and who was a personal friend of Mrs. Gifford, to get written permission. Both of them took part in the autopsy, although the writing mentioned only Dr. Gayus' name. However, Dr. Denmark had discussed with Mrs. Gifford the fact that he would want to perform such an examination if her husband did not survive, and she had consented. Dr. Denmark was a surgeon, and Dr. Gayus apparently was not practicing surgery. Dr. Gayus used stationery of Dr. Denmark's on which to have Mrs. Gifford record the written permission. The finding that Dr. Denmark performed the autopsy with Mrs. Gifford's consent is therefore adequately supported.

What the law is concerned with is that the body is not mutilated without the consent of the person having the right to its disposition. Appellant says that written permission is not required for a post mortem examination but is required for an autopsy, because an autopsy is an examination to determine the cause of death, and the state has concern for what caused a person's death but has less interest in an examination for other purposes. However, it is to be noted, that where the State has reason to be concerned, as in cases where there is suspicion of death by criminal means, the coroner has the right to perform an autopsy without written permission. § 7114, Health & Safety Code. The opinion of the Attorney General cited by appellant clearly stated that Section 7113 made it necessary for a cemetery or licensed funeral director to obtain a written authorization before permitting an autopsy, but not for a hospital. Despite this opinion, it was not until 1955 that licensed hospitals and physicians were included in the statute.

Appellant maintains that prejudicial error was committed in admitting in evidence Defendant's Exhibits A and B, two electrocardiograms, which had been made after the operation. Appellant had subpoenaed all the medical records of Mr. Gifford from Doctors Hospital. The custodian brought these records but the EKG's were not among them. The custodian stated that it was the practice of the hospital to include the EKG

tracings in the person's medical record if the patient was confined in the hospital at the time they were taken. Dr. Denmark testified that they were kept in the hospital records part of the time and in his own office in a locked file part of the time. He also stated that such tracings were the property of the physician who orders them, and may be kept in the physician's personal file.

[4] It is difficult to see how appellant can seriously contend that she was prejudiced by the introduction of the EKG's by respondents. Immediately after the absence of the EKG's from the file was noted upon examination of the custodian of the records at the beginning of the trial, Dr. Denmark was called by appellants under Section 2055, Code of Civil Procedure. He was questioned at length about the EKG's that he had ordered, he stated that they had been referred to Dr. Hayden for his opinion, and discussed their value to a doctor in examination and treatment of this type of case. Appellant was aware of the existence of the EKG's at least since the taking of Dr. Gayus' deposition prior to trial. They made no request to see the EKG's when they were examining Dr. Denmark, nor did they ask him where they were then located although they then knew they were not in the hospital file. Dr. Ralph Hayden, a specialist in Internal Medicine, who had examined the electrocardiograms, was called as a witness on behalf of appellant. He stated that he recalled that the EKG's had shown heart damage, and that he definitely felt the deceased had coronary disease. He was then asked: "Now, I assume that you could give a much more complete analysis if you could see the tracings, could you not?" He answered "Yes". If counsel was seriously interested in having the EKG's available to Dr. Hayden, he might have asked Dr. Denmark as to their whereabouts and availability. When the point was argued before the court, counsel for appellant accused respondents of concealing evidence. Counsel for respondents stated that Dr. Denmark had the cardiographs out when he was testifying under Section 2055. The court took a short recess in order to go over his notes on some of the testimony, and upon his return ordered the exhibit

admitted for identification. They were later admitted in evidence. Clearly, the court's ruling was correct, as under these facts no showing of prejudice was made.

Appellant contends that a hypothetical question on a material matter which was lacking in essential elements was permitted over objection. The following question was asked: "Doctor, assume for approximately four weeks, while Mr. Gifford, the hypothetical man we have been talking about, was confined at Doctors Hospital, that he had this blood pressure of 250, 280, over 140. Also, assume, Doctor, that he was discharged. He left the hospital and then returned again in January of 1952, for an operation for this ulcer; that at that time his blood pressure was approximately 220 over 130.

"Now, with those facts in mind, Doctor, and that time limit I have put on that, can you determine or could you say that that would have any effect on Mr. Gifford's kidneys?" Counsel for appellant objected that there was no evidence in the record that Mr. Gifford had a blood pressure of 250 to 280 for a period of four weeks. Dr. Gayus, who had taken care of Mr. Gifford in his four week stay at Doctors Hospital in the autumn of 1951, testified that he came to the hospital at that time suffering from hypertension and obesity. She was asked what was his blood pressure when admitted to the hospital, and she said "between 250 and 280 over, and the diastolic was about 140." Appellant says the basis of the objection is that there is no testimony that that was the blood pressure for the four week period referred to, and that this was an attempt to establish kidney failure upon high blood pressure of long standing.

[5-7] Although there is just the one reading for the four week period referred to, there is abundant evidence in the record that the deceased was suffering from high blood pressure or hypertension during the four weeks of his first stay at the hospital. He was still suffering from it on his admission in January 1952, though the reading was then somewhat lower. It is true that hypothetical questions which are based on facts not shown by the evidence are

not competent. However, minor variances between the facts assumed and the facts in evidence do not render the question incompetent. (19 Cal.Jur.2d 30-31, sec. 301). In the case of *Forbis v. Holzman*, 5 Cal.2d 407, 55 P.2d 201, it was charged that error was committed in the asking of a hypothetical question which was not based on facts developed by the testimony. There it was assumed that the patient's blood pressure had been normal during the anaesthesia. Defendant's evidence pointed to a drop in pressure before death. It was said that the last blood pressure reading that had been taken had been normal, and that the exact time of cessation of respiration was not observed. Hence it was possible there had been no drop in blood pressure. The question was held not to be prejudicial. The court there cited with approval the case of *Treadwell v. Nickel*, 194 Cal. 243, 267, 228 P. 25, a case in which it was observed that considerable latitude is allowed in framing a hypothetical question. It appears that the question asked herein had sufficient background in the evidence. Furthermore, even if incompetent, in a trial before the court it would not be deemed prejudicial, if other competent evidence in the record adequately supports the findings and judgment. *Jaffe v. Vitz*, 84 Cal.App.2d 810, 813, 191 P.2d 802. The findings in the case herein do not depend for their support upon this particular item of evidence.

Appellant contends that the testimony of Dr. Denmark was so evasive, contradictory, inconsistent and incredible as not to meet the requirement of substantial testimony, and cites *Herbert v. Lankershim*, 9 Cal.2d 409, 71 P.2d 220 to the effect that although an appellate court will not interfere when a judgment is entered where there is a substantial conflict in evidence, this rule does not relieve the appellate court from its duty of analyzing the evidence in the light of reason and human experience. This case does not, however, sanction a disregard of genuine conflicts in the evidence.

See, *Roeder v. Roeder*, 118 Cal.App.2d 572, 582, 258 P.2d 581; *Ventimiglia v. Hodgen*, 112 Cal.App.2d 658, 662, 247 P.2d 123. Appellant herein has devoted some thirty pages of her brief to numerous short excerpts from the testimony of Dr. Denmark, and references to portions of testimony by medical experts to prove that the evidence establishes without substantial conflict that the patient died of shock because of insufficient administration of fluids. A chart is included to show that the total of fluids in the days following the operation totaled 2405 cc's less than the total intake. It is to be remembered that the trial judge found that the special nurses did not chart all of the medicines administered. Dr. Denmark tried to estimate at the time of trial, nearly two years after the patient's death, how much more fluid was given than had been recorded by the nurses, and these estimates were included in the chart. There was considerable testimony that the patient was so irrational and difficult during the last few days of his life that the nurses had difficulty in keeping him in bed, hence could not always chart items immediately. This condition also made it harder for the nurses to keep the intravenous fluid running. Dr. Denmark testified that considering the condition of the patient it was fortunate that any records were kept. Both doctors, Denmark and Gayus, visited the patient several times a day and talked with the nurses.

A reading of the record discloses substantial evidence supporting the trial court's finding that neither Doctors Hospital nor Dr. Denmark were guilty of negligence or malpractice in the treatment of appellant's deceased husband.

We conclude that the findings and judgment find support in the record before us.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

137 Cal.App.2d 382

Myron M. KINLEY, Plaintiff and
Respondent,
v.

Ford I. ALEXANDER, Defendant and
Appellant.
Civ. 20754.

District Court of Appeal, Second District,
Division 2, California.

Nov. 30, 1955.

As Modified on Denial of Rehearing
Dec. 23, 1955

Action by patent licensor to recover royalties. The Superior Court, Los Angeles County, William J. Palmer, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, Acting P. J., held, *inter alia*, that where action for damages for fraud in depriving plaintiff of patent license royalties was brought within three-year limitation period, it was not barred by laches, even though plaintiff had once previously filed an action and dismissed it without prejudice.

Affirmed.

1. Appeal and Error ⇨931(1)

On appeal, evidence is viewed in light most favorable to sustaining judgment.

2. Patents ⇨219(5)

In action for patent license royalties, evidence sustained findings adverse to defendant.

3. Fraud ⇨38

Where action for damages for fraud in depriving plaintiff of patent license royalties was brought within three-year limitation period, it was not barred by laches, even though plaintiff had once previously filed an action and dismissed it without prejudice. West's Ann.Code Civ.Proc. § 338, subd. 4.

4. Dismissal and Nonsuit ⇨42

The mere filing of an action and dismissing it without prejudice is not a bar to the filing of a subsequent action, within statutory period, predicated on same cause of action.

5. Patents ⇨219(5)

In action against patent licensee for royalties of which plaintiff allegedly had been deprived on account of defendant's fraud in inducing plaintiff to sell his in-

terest in patent to third party, who had agreed to reconvey the interest to defendant, there was no evidence to support defendant's contention that defendant and third party were joint tort-feasors.

6. Patents ⇨219(2)

That patent licensor cashed licensee's checks for unpaid royalties due was no bar to licensor's action for subsequent royalties.

7. Compromise and Settlement ⇨23(3)

In action by patent licensor to recover royalties, evidence sustained finding that check which licensor had received and cashed had been for royalties past due, rather than in settlement of differences.

8. Trusts ⇨95

Where patent licensee fraudulently induced third party to buy licensor's interest, licensor was not obligated to attempt to rescind license agreement upon discovery of fraud, but was entitled to stand upon his right to have constructive trust declared, with a concurrent equitable monetary adjustment made by court.

9. Patents ⇨219(5)

In action by patent licensor for royalties, of which licensor allegedly had been deprived on account of licensee's fraud in inducing licensor to sell his interest in patent to third party, who had agreed to reconvey interest to licensee, evidence supported finding that licensor did not, by his dealings with third party, intend to waive, affirm or acquiesce in licensee's fraudulent act.

10. Patents ⇨218(1)

Where patent license entitled licensor to royalties from patent and the invention, licensor was entitled to share in royalties which licensee received from foreign company and which licensee testified were royalty payments.

11. Patents ⇨219(5)

In action by patent licensor for royalties, evidence sustained finding that amounts licensee had received as "commissions" from a certain corporation were in fact royalties in which licensor was entitled to share.

12. Patents ⇨219(5)

In patent licensor's action for royalties, licensee had burden to establish his affirmative defense that amounts refunded by licensee to sub-licensee were royalties,

with which licensee should be credited in accounting with licensor.

13. Patents ⇨219(5)

In action by patent licensor for royalties, evidence supported finding that amounts which licensee had refunded to sub-licensee had not been royalties, and that licensee was not entitled to be credited with such amounts in accounting with licensor.

14. Patents ⇨218(5)

Where patent licensee fraudulently induced licensor to sell his interest to third party, who had agreed with licensee that interest would be reconveyed to licensee, licensee, in accounting for royalties, was entitled to credit only for one-half of amount which licensor had received from third party in payment.

15. Patents ⇨218(5)

Where patent licensee, by fraud, induced patent licensor to sell his interest to third party, who had agreement with licensee that third party would reconvey patent to third party in return for a license agreement, licensee, in accounting to licensor for royalties, was entitled to credit for amount received by licensor from third party, but was not entitled to credit for amount licensee had been obliged to repay third party.

16. Patents ⇨219(1)

Where patent licensee is deprived of royalties by licensee's fraud, an allowance of interest is proper. West's Ann.Civ. Code, §§ 3287, 3288.

17. Witnesses ⇨275(6)

In action by patent licensor arising out of transaction wherein licensee fraudulently induced licensor to sell patent to third person, who had agreed with licensee to reconvey patent to licensee in return for license agreement, licensee was properly prevented from cross-examining licensor as to whether licensor had been satisfied with price received from third party, in view of

facts that material question was whether licensor was satisfied with price and also satisfied to let licensee retain licensor's interest in patent, and that licensee had already examined into licensor's state of mind relative to purchase price.

Pines & Walsh, Adele Walsh and Harry A. Pines, Los Angeles, for appellant.

Landon Morris, Los Angeles, for respondent.

McCOMB, Acting Presiding Justice.

From a judgment decreeing that (a) plaintiff was the owner of a right to participate in certain patent license royalties; (b) defendant holds title to such royalty interest in trust for plaintiff; (c) plaintiff was entitled to recover the sum of \$196,263.96 from defendant for accrued royalties; and (d) plaintiff was entitled to one half of the royalties thereafter accruing on such patent rights, defendant appeals.

[1] Facts:* On December 15, 1942, United States Patent No. 2,305,261 was issued to plaintiff covering the method of removing sections of pipe which became stuck in an oil well. This is referred to as the "back-off" patent. About September 9, 1946, plaintiff learned that defendant was successfully using a similar back-off method in California and wrote him to notify him of the existence of the back-off patent. Up to this time plaintiff had made no successful use of his discovery and had been unable to persuade the oil industry in the mid-continent area to use it.

Following negotiations between plaintiff and defendant, on September 9, 1946, they entered into an agreement by which plaintiff assigned the legal title to the patent and the invention to defendant upon the understanding that defendant would exploit and develop its use for their joint benefit and would pay plaintiff one half the royalty proceeds from the use of the patent, exclud-

* The evidence is viewed in the light most favorable to sustaining the judgment, pursuant to the rule set forth in *Re Estate of Isenberg*, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424 (hearing denied by the

Supreme Court), and *Murphy v. Ablow*, 123 Cal.App.2d 853, 858 [1b] et seq., 268 P.2d 80 (hearing denied by the Supreme Court).

ing revenues from its use in the states of California, Oregon and Washington.

Defendant violated the obligations imposed upon him by the agreement by secretly and fraudulently acquiring plaintiff's interest in the patent. This was accomplished in the following manner:

Commencing shortly after the agreement of September 9, 1946, was entered into, defendant falsely represented to plaintiff on numerous occasions that he believed the patent was weak and unenforceable. Plaintiff had reason to believe that the McCullough Tool Company was infringing upon the patent, and several times told defendant of his suspicions. Defendant replied that he could not proceed against the company unless plaintiff supplied him with evidence of its infringement. At these very times defendant not only knew this company was infringing the patent, but he was actually assisting it in its unlicensed use of the patent.

During this period of time, defendant attempted to buy out plaintiff's interest in the patent for himself, but plaintiff refused to sell to defendant, telling him that if the patent was good enough for defendant it was good enough for him. Realizing he could not acquire plaintiff's interest in the patent directly from plaintiff, defendant finally told plaintiff that he himself was going to sell out and had a buyer, to wit, the Houston Oil Field Material Company, hereinafter referred to as "Homco", which would buy each of their interests for the same sum, that is, \$50,000. Plaintiff told defendant that if he were selling out and they were both receiving the same price, namely \$50,000 each for their respective interests in the patent, he would sell.

The fact was that in the negotiations between Homco and defendant, concerning which plaintiff knew nothing, the least amount for which defendant had offered to sell his one-half interest was the sum of \$450,000. At the meeting in which defendant told plaintiff he was willing to sell to Homco, he offered to act as plaintiff's agent in negotiating and consummating a sale of plaintiff's interest to Homco, and specifically instructed plaintiff to stay away from

Homco and not enter into negotiations with it. Plaintiff agreed to this and in fact stayed away, believing defendant was acting as his agent.

Plaintiff, believing defendant was selling his interest in the patent to Homco, upon defendant's instructions, gave an option to said company to purchase his interest in the patent for a total of \$50,000. Thereafter, plaintiff assigned the same to Homco, still believing defendant also was selling his interest to the company for the same amount. Knowing that plaintiff had given his option to Homco in the belief that defendant was also selling his interest in the patent to that company for the same amount, defendant entered into an agreement with Homco, which he concealed from plaintiff, by which he agreed to grant Homco a license to use the patent for a royalty of 10% of their charges for its use, with a minimum annual royalty of \$20,000, provided that as a condition precedent to his granting the license, Homco would exercise plaintiff's option to purchase plaintiff's interest in the patent and then assign it to defendant.

This transaction was consummated without the knowledge of plaintiff with the result that defendant not only did not sell his patent to Homco in accordance with his representation to plaintiff, but retained it and also acquired plaintiff's interest therein for nothing, thereby securing for himself alone all the benefits of the license agreement with Homco.

On October 21, 1947, defendant entered into a so-called "Commission Agreement" with the Ford Alexander Corporation, which was in fact a disguised agreement for the payment of additional royalties to defendant for the use of the patent. Defendant concealed the existence of this agreement from plaintiff, and concealed the extra royalty he received thereunder, by cutting off the accounting sheets which he submitted to plaintiff those parts which disclosed payment to him of such extra royalties.

Defendant's Contentions

First: *There is not any substantial evidence to sustain the trial court's material findings of fact.*

This contention is devoid of merit. In his brief, defendant has set forth only the evidence favorable to his contentions and has utterly disregarded conflicting evidence which supports the findings in favor of plaintiff.

It is not the province of a reviewing court to present by way of opinion a detailed argument on the sufficiency of the evidence to support a judgment, where, as here, it appears that the question is one of resolving a conflict in the evidence, and determining which witnesses are to be believed or disbelieved. Mr. Justice Vallée, in *Overton v. Vita-Food Corp.*, 94 Cal.App. 2d 367, 370, 210 P.2d 757, 759 (hearing denied by the Supreme Court), apropos of this rule, pertinently said:

"André Gide once observed: 'Everything has been said already; but as no one listens, we must always begin again.' With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen." (See *Murphy v. Ablow*, 123 Cal.App.2d 853, 858 [1b], et seq., 268 P.2d 80 (hearing denied by the Supreme Court); *Marson v. Rand*, 107 Cal. App.2d 466, 468 [3], 237 P.2d 18 (hearing denied by the Supreme Court); see also numerous cases cited in 6 West's Calif. Digest (1951) Appeal and Error, ¶989, p. 606.)

[2] We have examined the record and are of the opinion there was substantial evidence which, when considered with such inferences as the trial court may have reasonably drawn therefrom, sustains each and every material finding of fact upon which the judgment in favor of plaintiff was necessarily predicated. A detailed recital of the evidence supporting the findings in favor of plaintiff would serve no useful pur-

pose. (*Thatch v. Livingston*, 13 Cal.App. 2d 202, 203, 56 P.2d 549.)

Second: *The trial court erred in finding against defendant's affirmative defenses.*

This contention is devoid of merit.

A. The first affirmative defense was that plaintiff was guilty of laches in prosecuting his action.

[3, 4] This proposition is erroneous. The fraud against plaintiff was consummated in May of 1949. The present action was instituted on December 27, 1951, approximately 2 years and 7 months after the actual commission of the fraud. Thus it is apparent the action was brought within the three year period provided by the statute of limitations (Sec. 338, subd. 4, Code Civ. Proc.) Defendant's claim that since plaintiff had filed a previous action and dismissed it without prejudice before he instituted the present action, plaintiff was barred from filing the instant case is untenable. The mere filing of an action and dismissing it without prejudice is not a bar to the filing of a subsequent action, within the statutory period, predicated upon the same cause of action.

B. The second affirmative defense alleged by defendant was that he and Homco were joint tort-feasors.

[5] The trial court found against this contention, which finding the record discloses was sustained by substantial evidence. The fact is there was an entire absence of evidence in the record to support a contrary finding.

C. The third to sixth, inclusive, affirmative defenses are predicated upon the theory that a settlement of the differences between the parties had been made by plaintiff's cashing on June 20, 1949, a check from defendant for \$2,901.80.

[6, 7] Clearly the cashing of this check did not constitute a bar to the present action, nor does it sustain defendant's contentions, because the check was given by defendant to plaintiff for unpaid royalties due him, and, as later appears, this occurred before plaintiff discovered the fraud. This is fully demonstrated and borne out by the

following correspondence between the parties. On June 27, 1949, the check was mailed to plaintiff by defendant, accompanied by this letter:

"Dear Mr. Kinley:

"Upon his return to the city, Mr. Alexander contacted us and has asked that we transmit to you the enclosed accounting covering royalties due you from him under the agreement of September 9, 1946, for the months of January, February, March, April and May, 1949, together with his check to your order in the sum of \$2901.80 in payment of your share of said royalties."

In response to the foregoing letter, plaintiff wrote defendant on June 29, 1949, as follows:

"Dear Mr. Alexander:

"After I talked with our attorney regarding the 'Receipt' which you sent with the royalty check, I do not feel that I need to sign this instrument as the check sent represented back royalty which was already due.

"The check has been deposited and the cancelled check will act as your receipt. I do not quite understand why this 'Receipt' was sent."

D. A seventh affirmative defense was predicated upon the theory that plaintiff by his dealings with Homco affirmed the previous actions of defendant and waived any fraud upon the latter's part.

[8,9] This contention is clearly fallacious. Plaintiff was not obligated to attempt to rescind upon discovery of the fraud, *Mabry v. Randolph*, 7 Cal.App. 421, 426, 94 P. 403; 12 Cal.Jur.2d p. 784, sec. 50; he was entitled to stand upon his right to have a constructive trust declared, with a concurrent equitable monetary adjustment made by the court. There is ample evidence in the record which sustains the finding that plaintiff did not intend to waive, affirm or acquiesce in the fraudulent acts of defendant.

Third: *The trial court erred in settlement of the accounting in the following particulars:*

A. In treating amounts received by defendant for services rendered to Petro-

Tech Service Company in Venezuela as royalties, subject to the accounting.

[10] This proposition is not sound for the reason that the license agreement between plaintiff and defendant gave plaintiff one half the royalties from licenses of the "patent," the patent being expressly defined in the license agreement to include both the United States patent and the invention itself. Defendant testified that the money he received and was receiving from Petro-Tech was royalty payments to him. Therefore this sum was properly included in the accounting.

B. In classifying "commissions" received by defendant from the Ford Alexander Corporation as royalties, subject to accounting.

[11] This classification was correct. The trial court properly held the amount received by defendant from the Ford Alexander Corporation was *royalty* for the use of the patent, and not commissions to defendant for other services. The evidence sustains this finding as appears in the statement of facts, *supra*.

C. In disallowing to defendant a credit for one half the commissions and royalties refunded to the Ford Alexander Corporation.

[12, 13] Defendant's assertion is fallacious for the reason that there is no evidence in the record, as contended, that the litigation which defendant settled with the Ford Alexander Corporation involved a dispute over royalties for the use of the patent, and therefore plaintiff should be charged in the accounting with one half of such amount. The burden was upon defendant to establish by competent evidence this affirmative defense. He introduced none and none was received in evidence. Therefore the trial court properly found against defendant's contention on this issue.

D. In disallowing to defendant a credit in the sum of \$45,000, representing the purchase price payable by Homco to plaintiff.

[14] Defendant argues that although plaintiff received only \$35,000 from Homco,

he should be credited with one half of \$45,000, which was the sum Homco originally agreed to pay plaintiff. This theory is unsound because all that plaintiff actually received from Homco was \$35,000; hence defendant was properly credited with one half this amount, which is in accordance with the rule announced in *Schwartz v. Artel*, 40 Cal.App.2d 433, 441.

E. In disallowing to defendant a credit for the refund adjustment to Homco.

[15, 16] It is defendant's contention that he should have received credit for the entire \$35,000 which plaintiff received from Homco and plaintiff charged with one half the \$30,000 he subsequently agreed to repay Homco. The trial court found it would be inequitable for plaintiff to have restored to him his royalty rights and also retain the \$35,000 received by him. He therefore gave defendant credit for the \$35,000 received by plaintiff; disallowed defendant credit for the \$30,000 he was obliged to pay Homco. This was equitable. It is to be noted that plaintiff prayed for interest at the rate of 7% per annum, to be added to the amounts due him. An allowance of interest would have been proper, but was not awarded. (Civil Code, §§ 3287, 3288.) Interest on plaintiff's share of royalties from dates due to date of judgment, after allowing defendant credit for interest on one half the \$35,000, would have amounted to \$15,974.51 more to plaintiff. It appears that the trial court dealt fairly and equitably with the parties.

Fourth: *The trial court erroneously excluded material testimony on cross-examination.*

This final contention is likewise devoid of merit. One of the issues presented was whether plaintiff, after being made aware of all the facts, preferred to keep the \$45,000 obligation from Homco rather than to set the transaction aside and repossess himself of his royalty rights of unknown value.

During the course of the cross-examination of plaintiff the following occurred:

"Q. By Mr. Houck: When you learned about the transaction entirely, which you testified was on August 23, 1949, were you

then dissatisfied with your \$45,000 price for your patent rights?

"The Court: Do you object, counsel?

"Mr. Morris: No, I decided not to object, your Honor.

"The Court: Your question is rather vague and indefinite, but we will let the witness answer it.

"Q. By Mr. Houck: Well, let me rephrase it. I am referring now to the period when you learned about the entire transaction by having examined the documents in Mr. O'Leary's office. That I think was August 23, 1949. Now, going back to that time were you then satisfied with your \$45,000 price for your patent rights?

"Mr. Morris: Well, now, again I want to object on the grounds that that is incompetent, irrelevant and immaterial.

"The Court: I will sustain the objection to that question, counsel. It is a question that has too many possibilities for misinterpretation.

"Q. By Mr. Houck: Were you then willing to return the money to Homco if you got your rights back?

"Mr. Morris: Now just a moment. I object to that again on the ground it is a hypothetical question.

"The Court: Sustained.

"Q. By Mr. Houck: All right. Isn't it a fact, Mr. Kinley, that when you learned about the entire details of the Homco-Alexander transaction on August 23, 1949, you were still satisfied with the price that you received for your rights, and you weren't willing to give up that price in return for your rights?

"Mr. Morris: Of course the question is complex and compound, but I think I understand what he is driving at, and furthermore it is immaterial.

"The Court: Objection sustained, counsel."

Defendant contends that the trial court ruled to his prejudice in sustaining the objections set forth above. Defendant's thesis is not well taken for the following reasons:

I. The questions objected to and concerning which defendant now complains re-

lated to whether or not plaintiff was dissatisfied with the \$45,000 he received from Homco, and whether or not he was willing to give back the \$45,000 to Homco if he got his patent rights back as of August 23, 1949, at which time plaintiff learned the truth concerning the transaction between Homco and defendant. As of August 23, 1949, defendant had neither paid \$45,000 nor any other sum for plaintiff's rights in the patent, nor was he under any obligation to do so. It was not until August, 1950, that he agreed fraudulently with Homco to repay part of this sum. Plaintiff could have answered these questions only affirmatively or negatively. Had he answered either way, it could not have been material so far as defendant was concerned because plaintiff's state of mind towards Homco on August 23, 1949, since Homco was not a joint tort-feasor with defendant, had no probative value concerning plaintiff's state of mind toward defendant's fraud.

The material question was whether or not plaintiff at that time was satisfied with the \$45,000 and satisfied to let defendant retain plaintiff's interest in the patent also. Such a question was actually asked, no objection was made, and it was answered.

[17] II. Defendant had already examined into plaintiff's state of mind relative to the purchase price he received from Homco, speaking as of April, 1949, plaintiff testified:

"Q. And you thought that was a good idea? A. I thought it was a good idea. Also, I asked him about how he was going to handle it for income and he told me that he was going to handle his as capital gains. We probably talked about something else, but anyway I consented. I said, 'Well, if you are going to sell and figure that it is good to get out, why, I will get out too.'

"Q. And, 'If you will sell for \$50,000, so will I.'? A. I will sell for \$50,000.

"Q. You were satisfied with the \$50,000 price then at that time? A. That's what he was getting.

"Q. And you were satisfied with it under those circumstances? A. If he was getting fifty, yes."

From the foregoing, it is apparent that the trial court's rulings were correct.

In view of our conclusions no useful purpose would be served by discussing other minor points urged by defendant, since it would not result in a reversal of the judgment.

Affirmed.

FOX, J., and ASHBURN, Justice pro tem., concur.



Howard A. CLARK, Plaintiff and Appellant,
v.

**Dean S. LESHER, Daniel B. Halcomb, and
Roy Wolfe, Defendants and
Respondents.***

Civ. 8613.

District Court of Appeal, Third District,
California.

Nov. 29, 1953.

Hearing Granted Jan. 25, 1956.

Action by surviving partner against newspaper publisher, his manager, and receiver of assets of partnership, which had published competing newspaper, for alleged conspiracy whereby defendants compelled cessation of publication of the competing newspaper and sale of partnership assets to publisher at depreciated price. The Superior Court, Madera County, Sherrill Halbert, J., entered judgment for defendant, and surviving partner appealed. The District Court of Appeal, Van Dyke, P. J., held that, where assignment provided that, in consideration of concurrent entry of judgment in certain action then pending and in trial, partner and his wife assigned to publisher all their interest in certain estate and claims they had filed against estate or might thereafter assert against estate and all their interests in partnership and partnership assets, such assignment did not pass to pub-

* Opinion vacated 299 P.2d 865.

lisher the cause of action for the alleged conspiracy.

Judgment reversed and cause remanded for retrial as to certain issues and for entry of judgment for plaintiff on pleas of *res judicata*.

See also, 106 Cal.App.2d 403, 235 P.2d 71.

1. Partnership ⇨104

In absence of statutory permission, action at law, as distinguished from one in equity, cannot be maintained between partners in regard to partnership's transactions, even though dissolution of partnership has taken place before action is brought.

2. Partnership ⇨258(2)

Where, after partnership had been dissolved except for liquidating purposes by death of one partner, and after third party had purchased all interest in partnership assets except those owned by surviving partner, third party allegedly damaged and in part destroyed value of the assets and then purchased depreciated assets from surviving party, actions of third party and of his alleged co-conspirators were not partnership transactions, and damages which might be covered by surviving partner against third party would be surviving partner's property and would not feed the partnership assets.

3. Appeal and Error ⇨916(1)

Where, in tort action, affirmative defenses were tried first, and evidence concerning alleged fraud and conditions under which it was committed were not permitted to be shown, allegations of complaint would be taken on appeal as stating the truth. West's Ann.Code Civ.Proc. § 597.

4. Contracts ⇨176(1)

Trial ⇨136(3)

Question of interpretation of contract or other written instrument is one of law if there is not extrinsic evidence properly admitted thereon, or if evidence is without conflict and not susceptible of conflicting inferences.

5. Contracts ⇨147(2)

In interpreting the contract or other written instrument, undisclosed intention of

parties is immaterial, and outward manifestation of expression of assent is controlling.

6. Contracts ⇨176(1)

Construction of a contract is always a matter of law for court, regardless how ambiguous, uncertain, or difficult are its terms, and jury can only assist court by determining disputed questions of fact.

7. Assignments ⇨138

In determining affirmative defense that plaintiff's cause of action had passed to one defendant in certain assignment, question of interpretation of contract of assignment as to whether it included within its terms the cause of action sued upon was one for the court.

8. Appeal and Error ⇨1008(3)

Where construction of contract is based solely on terms of written instrument without aid of evidence, reviewing court is not bound by such construction.

9. Assignments ⇨80

Where assignment provided that, in consideration of concurrent entry of judgment in certain action then pending and in trial, plaintiff and his wife assigned to defendant all their interest in certain estate and claims they had filed against estate or might thereafter assert against estate and all their interests in partnership and partnership assets, such assignment did not pass to defendant a cause of action against defendant and others for alleged conspiracy to bring about bankruptcy and elimination of newspaper which had been operated by partnership of which plaintiff had been a member. West's Ann.Code Civ.Proc. §§ 1908, 1910, 1911.

10. Trial ⇨350(3)

In tort action in which affirmative defenses were tried first, it was error to submit to jury question whether plaintiff was estopped to deny that he had transferred his cause of action to one defendant by representations made by him before execution of assignment to such defendant and entry of judgment thereon, in view of fact that plaintiff had not been allowed opportunity to prove truth of his allegations of fraudulent conspiracy which involved transactions relating to the assignment.

11. Judgment Ⓒ958(2)

Where former judgment is set up as a bar or estoppel, question whether there is identity of parties and of subject matter or cause of action necessary to support plea of res judicata is one of law for court if it is determinable from an inspection of record alone.

12. Judgment Ⓒ958(2)

Where extrinsic evidence is required to establish necessary identification of parties or of subject matter or cause of action for purpose of supporting plea of res judicata, or such evidence was necessary to escape effect of judgment set up as a bar or estoppel, question whether there is such identity becomes one of fact for jury unless proof admits of only one conclusion or unless right to have issue tried by jury has been waived.

13. Judgment Ⓒ958(2)

It is for court to decide and declare effect which shall be given to former judgment as evidence in subsequent action or as bar to maintenance of subsequent action.

14. Judgment Ⓒ524

It is always court's duty to construe judgment and interpret its meaning the same as any other written instrument that may be offered in evidence, and, in determining meaning, reference must be had to pleadings and issues tried.

15. Estoppel Ⓒ61

Party may assert a counter estoppel against estoppel offered by adverse party, and, where estoppel exists against an estoppel, matter is set at large or left as if neither estoppel had been offered, and the two estoppels destroy each other.

16. Judgment Ⓒ585(3)

Where newspaper publisher, his manager, and receiver of assets of partnership which had published competing newspaper allegedly conspired to compel cessation of publication of a competing newspaper and sale of partnership assets to publisher at depreciated price, surviving partner was not obligated to litigate such cause of action in action against him by administrator of deceased partner or in action against him by receiver, and, therefore, judgments in

such action were not res judicata in subsequent action by surviving partner against publisher, manager, and receiver for such conspiracy.

17. Judgment Ⓒ713(2), 735

Generally, judgment is conclusive not only as to that actually determined but also to every other matter which parties might have litigated in the action, but such general rule is not applicable to independent matters which parties might have, but were not required to and did not in fact plead or rely upon, or to new rights which were acquired while the action was pending and which might have been but were not required to be injected into the case

Stutsman, Hackett & Nagel, and H. A. Savage, Fresno, for appellant.

Green, Green & Plumley, Madera, for respondent Leshner.

S. Everett Phillips, Fresno, for respondent Halcomb.

Everett Coffee, Madera, for respondent Wolfe.

VAN DYKE, Presiding Justice.

Plaintiff appeals from a judgment in favor of defendants in an action brought by him to recover damages alleged to have been suffered by him through defendants' tortious acts.

His third amended complaint alleged the following: For more than twenty-eight years before he began this action "The Madera Daily Tribune and Mercury" was a daily newspaper of general circulation published in Madera by plaintiff and his father, George A. Clark, as a partnership enterprise; George A. Clark died September 7, 1944, and by his will plaintiff, who owned a one-half interest as a partner in the partnership and its assets, became the owner of an additional one-sixth interest; the remainder of the father's interest was devised to plaintiff's brother and sister; as surviving partner plaintiff continued publication of the paper; before the death of George A. Clark defendant Dean S. Leshner, hereinafter called "Leshner" was the owner and publisher of a newspaper in

Merced, California, which circulated in the County of Madera; after George A. Clark died Leshner purchased "The Madera Daily News", a newspaper published in Madera; both the Merced paper and the Madera Daily News competed with plaintiff's paper; Leshner appointed defendant Halcomb as manager of his Madera Daily News; thereupon Leshner and Halcomb conspired together and agreed they would eliminate plaintiff's paper and cause it to cease publication, to the end that Leshner would be the owner and publisher of the sole newspaper published in Madera; in furtherance of the conspiracy Leshner first purchased the interest of defendant's brother and sister in plaintiff's paper, subject to administration in the estate of George A. Clark; one R. S. Jay was appointed as administrator with the will annexed of the estate of George A. Clark, deceased; after that appointment Leshner, without the knowledge and consent of Jay, caused an action to be started in the Superior Court of Madera County, entitled "R. S. Jay, Administrator, etc., v. Howard A. Clark"; this suit had for its purpose and as a part of the conspiracy aforesaid to bring about the bankruptcy and consequent elimination of plaintiff's paper from competition in the Madera County field; the two conspirators succeeded, through the medium of said administrator's action, in having a receiver appointed to take charge of the assets of the former partnership; defendant Wolfe qualified as such receiver; thereafter he joined said conspiracy, all three agreeing they would contrive to cause plaintiff's paper to cease publication and thus eliminate its competition with Leshner's papers; Wolfe, as receiver, procured an order in the action of Jay, as Administrator, v. Clark, that he take possession of all the assets of the former partnership, including the newspaper and the job printing business conducted in connection therewith and sell the assets including the newspaper; this order, however, required that the receiver sell the newspaper as a going concern and directed the receiver to continue to operate it until sale; Wolfe went into possession as receiver and then obtained a second order, which order was obtained by falsely and

fraudulently representing to the judge of the superior court, presiding in the cause of Jay, as Administrator, v. Clark, that it was impossible to continue to publish the newspaper because there were no funds with which to pay expenses for labor and supplies and that it was immediately and imperatively necessary that publication of the newspaper cease; these representations were made for the purpose of carrying out the conspiracy and accomplishing through fraud the cessation of publication, with the further purpose of destroying in large part the value of the newspaper so that it could be purchased by Leshner at a depreciated value; said second order so obtained ordered the receiver to sell the partnership assets, including the newspaper, within a period of 30 days following publication of a notice of sale and in the meantime and within ten days from the date of the second order to cease publication; thereupon Wolfe stopped publication of the paper and continued with the sale thereof and of the partnership assets and Leshner purchased the whole for the sum of \$30,550; had the newspaper been sold as a going concern, the partnership assets would have been worth much more; after Leshner's bid was accepted and the sale was confirmed to him the partnership assets were transferred to him; by reason of said wrongful acts of the conspirators plaintiff was damaged in the sum of \$50,000.

Wolfe answered the complaint. He denied the conspiracy and the fraud. He set up affirmative defenses as follows: 1. That all of the acts complained of were done by him as receiver pursuant to valid court orders and that plaintiff had no cause of action against him except such as would have to be necessarily advanced in the matter of the receivership. 2. That all of the issues raised by the complaint had been determined in a prior action (that of Wolfe as receiver v. Clark, et al.) and were *res judicata*. Leshner and Halcomb also answered, raising the general issue and likewise asserting special defenses as follows: 1. That before this action was begun there was pending an action brought by Roy Wolfe as receiver against appellant, Leshner, and others and that while it was so

pending appellant had executed a written assignment to Leshar, for valuable consideration, which provided as follows: That in consideration of the concurrent entry of a certain stipulated judgment in said action Clark transferred and assigned to Leshar all his right, title and interest in the properties of the estate of George A. Clark, deceased, and all claims which Clark had filed against said estate or might thereafter assert against said estate; that he further assigned to Leshar all his interest in the partnership of Clark & Clark and in the assets of said partnership; that the cause of action asserted in plaintiff's complaint here, if any there was, had constituted an asset of said former partnership and passed to Leshar by the assignment. 2. That the judgment entered in the action of Roy Wolfe, Receiver, v. Howard A. Clark was res judicata of the issues tendered by the complaint herein. 3. That plaintiff herein was equitably estopped to assert that the cause of action sued upon had not passed by the assignment and had not been barred by said judgment in the action of the receiver against Clark, because he had led Leshar to believe that such would be the result of the assignment and the judgment. 4. That the things alleged to have been done by the receiver to the damage of plaintiff were done under valid court orders and that plaintiff was limited to said receivership action for relief, if entitled to any. 5. That certain orders entered in the action of Jay, as Administrator, v. Clark were res judicata of the issues raised by plaintiff's complaint.

This action was called for trial before a jury and defendants moved that, pursuant to the provisions of Section 597 of the Code of Civil Procedure, the affirmative defenses be first tried. The motion was resisted by plaintiff, but was granted by the court. In support of the defenses of res judicata the judgment rolls in the subject actions were introduced in evidence. No evidence was otherwise taken. In support of the defense of equitable estoppel evidence was taken as to the conversations preceding the assignment and Leshar testified that therefrom he had gained the understanding that the assignment constituted in substance a

general release. No evidence was permitted concerning the fraud alleged in the complaint.

The following instructions in substance were given to the jury, after general instructions, sometimes called stock instructions: The court told the jury that the complaint alleged a conspiracy between the defendants to procure the cessation of publication of the Madera Daily Tribune and Mercury prior to its sale by means of fraudulently procuring an order therefor and that these allegations had all been denied by the defendants; that the case had been heard only as to the special defenses alleged by the defendants and that the determination of a conspiracy or of a fraud in procuring said order was not before the jury; that it would be improper for them to consider the truth or falsity of the allegations of conspiracy as stated in the complaint since no evidence had been given or permitted on either side on such issue; that the sole duty of the jury was to consider the evidence tending to prove or disprove the allegations set forth in the special defenses; that defendants Leshar and Halcomb had set up four special defenses and defendant Wolfe had set up two; that Leshar and Halcomb claimed that before the commencement of the action plaintiff had assigned to Leshar all his interest in the properties in the estate of his father, all his interest in the assets of the former partnership of Clark & Clark, all his interest in the assets of the Madera Daily Tribune and Mercury and that said defendants claimed as a result of such assignment that plaintiff had no basis for the action, since the cause of action, if any existed, actually belonged to Leshar and not to the plaintiff; further that defendants Leshar and Halcomb claimed that Leshar had consented to the entry of the judgment in the case of Wolfe, Receiver, v. Clark, relying upon the representations of plaintiff and his counsel that by doing so all litigation between plaintiff and defendant Leshar would be terminated and that Leshar would not have so consented otherwise; that this defense was sometimes known as "the defense of equitable estoppel". Further, on this subject of equitable estoppel the court

told the jury that the vital principle thereof was that he who by his language or conduct leads another to do what he would not otherwise have done should not subject such person to loss or injury by disappointing the representations upon which he acted; that such a change of representation involves fraud and falsehood, abhorrent to the law. The court further told the jury that Leshner and Halcomb claimed as a special defense "that the gravamen of Plaintiff's cause of action grows out of acts by the Defendant Wolfe, as a Receiver, and that if Plaintiff has any cause of action, it should be against the Defendant Wolfe as a Receiver"; that in respect of this defense said defendants specifically referred to the case of "Wolfe, Receiver, v. Clark, et al.", and alleged that any remedies open to plaintiff should have been taken in that action; that this particular defense actually consisted of two parts, namely that said defendant should be exonerated from liability in connection with these matters because Wolfe was so acting as receiver and not as an individual, and, second, the plea of *res judicata*. The court further told the jury that defendants Leshner and Halcomb claimed as a further defense that all of the issues "raised by the Plaintiff in this case were adjudicated and determined in the case of 'Jay v. Clark,' which is Action No. 6555 in this Court", and again this defense was a plea known as "*res judicata*". Similar instructions were given covering Wolfe's special defense based on his status and actions as a receiver and the plea of *res judicata* in respect of the judgment in the action he brought against Clark. The court defined "*res judicata*" as being a matter settled by judgment, and quoted to the jury portions of section 1908 of the Code of Civil Procedure concerning the effect of a final judgment. The court also quoted a portion of sections 1910 and 1911 of the Code of Civil Procedure. The court then gave to the jury the following instruction: "If you find against the Defendants on all of the special defenses now on trial before you, then you should return a verdict for the Plaintiff. On the other hand, if you find for all of the Defendants on any one or more of the special defenses now on

trial before you, then I instruct you that you shall return a verdict in favor of the Defendants." There was then given to the jury two forms of verdict, and the jury, after deliberation, returned one of them, reading as follows: "We, the Jury, find for the Defendants, Dean S. Leshner, Daniel B. Halcomb and Roy Wolfe, on the trial of the special defenses." Judgment was thereupon entered. That judgment recited that after hearing the evidence the jury was instructed, the cause submitted to it, and that it returned the aforesaid verdict. The judgment then concluded as follows: "Wherefore, It is Ordered, Adjudged and Decreed, that Judgment be, and the same is hereby rendered in favor of Defendants, Dean S. Leshner, Daniel B. Halcomb and Roy Wolfe, on the special defenses and against Plaintiff Howard A. Clark * * *".

It is apparent from the foregoing that the trial court submitted to the jury for its determination the following issues: 1. Did the plaintiff by executing the assignment to Leshner assign to him, in addition to the matters specifically mentioned in the instrument, the cause of action sued upon by him in this case? 2. By reason of the circumstances shown in the evidence, was the plaintiff estopped to deny that he transferred his cause of action to Leshner by said instrument of assignment and estopped to deny the *res judicata* effect of the stipulated judgment? 3. Was the stipulated judgment in the case of Wolfe, Receiver, v. Clark *res judicata* as to the issues tendered by Clark's complaint herein? 4. Were the orders entered in the case of Jay v. Clark et al. *res judicata* as to the issues tendered by appellant's complaint?

We will discuss first the question of the legal effect of the assignment instrument. The provisions of this document may be summarized as follows: In consideration of the concurrent entry of a judgment in the action of Wolfe, Receiver, v. Clark, then pending, and which action was then in trial, Clark and his wife assigned to Leshner all of their interest in the properties of the estate of George A. Clark, deceased, all of their interest in all claims they had

theretofore filed against that estate or which they might thereafter assert against that estate, all of their interest in the partnership of Clark & Clark, all of their interest in the assets of that partnership; they also expressly waived "all interest in said assets and in said partnership." At the time this instrument was executed the action here under review had not been filed. It was filed about two and one-half weeks after the execution of the assignment and the entry of the stipulated judgment. The assignment says nothing about a transfer of any cause of action which Clark might have against Leshar, Halcomb or Wolfe and nothing in its language justifies the inference that if such a cause of action existed it was thereby being transferred to Leshar. However, the assignment was executed concurrently with the entry of a stipulated judgment in the action then on trial and purports to be, in part at least, in consideration of the entry of that judgment. The judgment must, therefore, be considered. That judgment contained the following recitals: "* * * [A]ll parties having in open Court stipulated and agreed to the entry of this judgment in this form; and all counsel having waived Findings of Fact and Conclusions of Law and having waived an accounting by the Receiver; and the said Howard A. Clark and the said Anita L. Clark having agreed, in consideration of this stipulated Judgment, to transfer and assign to the said Dean S. Leshar all of the claims in this proceeding and against the Estate of George A. Clark, Deceased, and all of their interest in the Estate of George A. Clark, Deceased, and all of their right, title, and interest in and to the partnership of Clark & Clark, dba Madera Daily Tribune and Mercury * * *." It was then decreed that the receiver should out of moneys in his hands pay to Clark and his wife the sum of \$5,000; that a certain life insurance policy was an asset of the partnership and was transferred to Leshar who was adjudged to be its owner; That certain items of personal property which had been claimed by the receiver as constituting partnership assets were in fact the personal property of Mrs. Clark. The judgment directed: "That said Re-

ceiver, Roy Wolfe, be not required to render an accounting." Concerning what had been assigned to Leshar this judgment was a restatement of the assignment. On the face of the assignment, therefore, read in connection with the judgment therein referred to, there is a specific description, although in general terms, of the property and claims passing to Leshar by the assignment, and the cause of action here sued on is conspicuously absent from that statement. We have no plea for reformation of the assignment. On its face, therefore, the written assignment does not transfer the cause of action herein to Leshar. Was it shown by evidence in aid of interpretation that such transfer was in fact intended and effected by the instrument? Defendants placed three witnesses on the stand. They were Harold M. Child, Dean S. Leshar and Roy E. Wolfe. Mr. Child was the first witness sworn. When he began to testify to the execution of the instrument of assignment and to the transactions between the parties antedating the entry of judgment, objection was made that to permit him to so testify would permit him to substitute his testimony in the place of the judgment which was entered and in place of the provisions of the assignment. Thereupon it was stated to the court that the purpose of the defendants in introducing oral testimony of Mr. Child was to establish the equitable estoppel. Said Mr. Green, the attorney for Leshar: "The purpose of the question, Your Honor, is to go to the matter of estoppel that has been pleaded as an affirmative defense, and as to the representations made by the parties to this action that were relied upon by the Defendant Leshar in executing the documents that have been introduced in evidence in support of it, the files." Said the court: "It is my understanding of the statement by Mr. Green that this is offered only as to their special defenses in the nature of estoppel, where Mr. Leshar claims that he would not have signed the document if he had not understood that it settled all of the matters in question. It is a question of fact for the Jury to determine whether or not that is the situation. * * * I will overrule the objection, but it is limited to that

aspect of the matter, and that is the evidence that will be received." Although Mr. Child gave a good deal of testimony concerning conversations between counsel as to statements made to the court before the entry of the judgment in the receivership action, since his testimony was limited to the defense of estoppel we need not here narrate it. Mr. Leshner was next called to the stand. At the outset of his examination the following occurred: "Mr. Nagel: If Your Honor please, may the record reflect that we voice the same objection to these questions and this line of testimony as heretofore stated? The Court: The objection will be overruled at this time." Mr. Green had previously stated: "Now, Mr. Leshner, will you please confine your testimony in this regard to one or two points, * * *, so that we can attempt to confine it within the limits of the 'special defenses'." When the witness sought to relate a conversation antedating the execution of assignment, attorneys for the appellant objected again as follows: "Your Honor, I dislike making objections like this, but I feel that this is going beyond the scope of the defense in this matter. I have no objection to the evidence coming in, if we will have opportunity to rebut the statements that are being made as purported facts. However, I feel that it goes beyond the scope of the defense * * *. The Court: This, I understand, is a conversation, is that right, Mr. Leshner? The Witness: That is correct, Your Honor. The Court: I will permit the conversation, but I will not permit any evidence about the facts. * * *." The witness went on to relate conversations between the parties and then the further question was asked: "Q. Mr. Leshner, if it had not been for the conversation with Mr. Savage which you have just related here, regarding the settlement and the release of all claims and the termination of all litigation, would you have executed the document entitled, 'Assignment', in which you released your right to an accounting by Howard Clark?" The witness answered that he would not, except for the conversation he had related, have executed the assignment, nor have stipulated to the entry of the judgment. We think it cannot be held otherwise than that, just as

the testimony of Mr. Child was limited to the defense of estoppel, so was the testimony of Mr. Leshner. The next witness was Mr. Wolfe, but his testimony was confined to matters of record and when objection was made that said matters were immaterial the court asked of his attorney the following question: "And now, you are going into your defense of *res judicata*? Mr. Coffee: That is right, Your Honor." Appellant Clark was called to the stand in rebuttal, but his evidence was solely confined to equitable estoppel. We find nothing in the record which would throw light upon the proper interpretation of the contract of assignment. Therefore it was for the court to determine as matter of law whether or not the assignment included the cause of action sued upon. We therefore hold that the assignment, read in connection with the stipulated judgment, did not pass title to the cause of action unless, as respondents argue, it passed by the assignment to Leshner of the *assets of the partnership*.

[1] Respondents argue that the cause of action sued upon, assuming that a cause of action existed, would, so far as the damages inflicted by the conspiracy be concerned, constitute an asset of the partnership; that even if, as we held in *Clark v. Leshner*, 106 Cal.App.2d 403, 235 P.2d 71, Clark had a right to sue individually for said damage, a recovery would feed the partnership assets; that he could not recover in his own individual right. These contentions of the respondents cannot be sustained. It is a generally-accepted rule that, in the absence of statutory permission, an action at law as distinguished from an action in equity cannot be maintained between partners with respect to partnership transactions; and that the mere fact that dissolution of the partnership has taken place before the action is brought does not change the rule that no action at law can be maintained between partners. Nevertheless, this partnership had been dissolved except for liquidating purposes by the death of George A. Clark, and when thereafter Leshner, having purchased all of the interest in the partnership assets except those owned by appellant, tortiously and secretly damaged and in part destroyed the value of the

assets and then purchased the depreciated assets from appellant, his actions and those of his alleged co-conspirators were not in any sense actions with respect to partnership transactions. When appellant here sold his interest in the assets of the partnership to Leshner at, so far as anything appears here to the contrary, their full value at that time and thereafter determined as he alleged in his testimony he did, and in his pleadings, that these assets had been depreciated by the fraudulent conduct of Leshner, Wolfe and Halcomb, he was not compelled to set aside what had been done but could sue for the deceit practiced upon him and the damages thereby inflicted. *Johnstone v. Morris*, 210 Cal. 580, 292 P. 970. We quote the following from the case of *Laughlin v. Haberfelde*, 72 Cal.App.2d 780, 790, 165 P.2d 544, 549, where in a similar case that court said:

"While the facts in the instant case are somewhat different the basic principles are essentially the same and, under the authorities above cited, it must be held that this case comes within one of the exceptions to the general rule and that the trial court was in error in concluding that this action for damages could not be maintained separate and apart from an action for an accounting. In a very real sense, the acts of which the appellant complains were not acts 'with respect to partnership transactions'. While the formation of the partnership furnished the opportunity, the acts constituting the tort were entirely outside of and apart from the partnership business."

[2,3] By purchasing the assets of the partnership Leshner did not purchase the appellant's cause of action; and by selling the appellant did not sell said cause of action nor his right to recover damages for the fraudulent conduct of Leshner as alleged in the appellant's complaint, measured by his proportionate ownership of the partnership. Such damages when recovered would be his property and would not feed the partnership assets. In testing this matter we must remember that, because the evidence as to the alleged fraud and as to the conditions under which it was committed were not permitted

to be shown, we must take the allegations of plaintiff's complaint as stating the truth.

[4-6] Before leaving this question of the proper construction of the contract of assignment, it is well to recall that the interpretation of a contract or other written instrument, if there is no extrinsic evidence thereon properly admitted, or if the evidence is without conflict and not susceptible of conflicting inferences, is a question of law. In *re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825. It is also settled that the undisclosed intention of the parties is immaterial and that the outward manifestation of expression of assent is controlling. *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133, 48 P.2d 13; 1 *Restatement of Contracts*, sec. 20. Further, the construction of a contract is always a matter of law for the court, no matter how ambiguous or uncertain or difficult its terms, and the jury can only assist the court by determining disputed questions of fact. *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 207 P. 527. The same case holds that it is error to submit to the jury the question of intention, to be derived in part from the language of the contract and in part from extrinsic evidence. We quote the following from, 189 Cal. at page 18, 207 P. at page 532 of said opinion:

"* * * If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury, and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances. On the other hand, if such circumstances are in dispute, and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury, but in no case can the proper construction of the contract be left to a jury." See also *California W. D. Co. v. California M. O. Co.*, 178 Cal. 337, 341, 177 P. 849.

[7-9] It is apparent from the foregoing that the court erred in submitting the in-

terpretation of the contract of assignment to the jury for its general verdict, as to whether or not it included within its terms the cause of action sued upon. But, in view of the long history of this litigation, the legal effect of the assignment ought to be here determined. The special defense based upon respondents' claims as to its proper meaning has been tried and respondents did not see fit to present extraneous evidence. We may here construe the assignment. "An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence." In re Estate of Platt, *supra*, 21 Cal.2d at page 352, 131 P.2d at page 830. This court's construction is that by the assignment the cause of action herein did not pass.

[10] We take up next the second question asked the jury when the cause was submitted: Is the plaintiff estopped to deny that he transferred his cause of action to Leshar by representations made by him before the execution of the assignment and the entry of the accompanying judgment? We think it apparent that there was error in submitting this issue to the jury without having given to the appellant an opportunity to prove the truth of his allegations of fraudulent conspiracy. The issue could not be fairly and fully tried without going into the merits of the action as set out in plaintiff's complaint. Mr. Child testified concerning the circumstances under which the assignment was executed. He related that at the time the parties were in trial in the action which Wolfe, as receiver, had brought against Clark, Leshar and others, there was also pending the action of Jay, as Administrator, v. Clark. He said that Mr. Savage, Clark's attorney, proposed that the litigation all be settled. He testified that so far as any causes of action by Clark against Leshar were concerned, he had intended that all of them should be settled and that such was the conversation between the parties. Leshar testified much to the same effect; in fact, he went further and said that general language was used to the effect that if he would agree to do as Clark wanted him to in settling matters, Clark would forego any and every claim which he might

have against Leshar. (No language of general release appeared in the assignment.) It is Leshar's claim, therefore, that upon such evidence he had shown appellant was estopped to deny that he had released the cause of action here sued upon. He claimed that he knew nothing about the existence of that cause of action and that nothing was specifically mentioned about it; he said that if any hint had been made that further litigation would ensue he would not have entered into the agreement of assignment; that he was shocked and amazed when some two and a half weeks after the assignment had been executed and the stipulated judgment entered this action was begun. We will assume, for purpose of argument, that this proof would have been sufficient to sustain a holding of estoppel. But it becomes immediately apparent that if we also assume to be true, as we must in approaching this question, all of the allegations of the complaint which appellant was not permitted to prove, then, although Leshar testified he knew nothing of the claim of appellants here sued upon, yet that was false for he was in fact guilty of the fraudulent acts with which he has been charged and was in no position to urge an equitable estoppel. Since he committed the tort he must have known that thereby he created in appellant a cause of action for damages for his deceit. In so far as Wolfe and Halcomb are concerned, and in so far as they seek to find shelter behind the plea of equitable estoppel advanced by Leshar, what we have said applies also to them. Therefore, if the general verdict of the jury was based upon the defense of equitable estoppel, the judgment must be reversed for error in the rejection of rebuttal evidence.

We pass now to the pleas of *res judicata*.

[11-13] "When a former judgment is set up as a bar or estoppel, the question whether there is such an identity of the parties and of the subject matter or cause of action as will support the plea of *res judicata* is a question of law for the court when it is determinable from an inspection of the record alone; but if extrinsic evidence is required to effect the necessary identification, or to escape the effect of a judgment set up

as a bar or estoppel, it becomes a question of fact and must go to the jury unless the proof admits of only one conclusion or the right to have the issue tried by the jury has been waived. *In any case, when this point is established, or if it is not disputed, it is for the court to decide and declare the effect which shall be given to the former judgment as evidence in the pending action or as a bar to its maintenance.* (Italics ours). 50 C.J.S., Judgments, § 846, p. 420.

[14] “* * * It is always the duty of the court to construe the judgment and interpret its meaning the same as any other written instrument that may be offered in evidence, and in determining what is meant by the language used in the judgment reference must be had to the pleadings in the case, and the issues to be tried must be ascertained before it can be determined what the judgment means.” *Raney v. Home Ins. Co.*, 213 Mo.App. 1, 246 S.W. 57, 60-61. See *Koontz v. Whitaker*, Mo.App., 111 S.W.2d 197, and cases cited in 34 C.J., page 1080, note 93; see, also, *California W. D. Co. v. California M. O. Co.*, supra, 178 Cal. at page 341, 177 P. 849.

At the trial herein and in support of the pleas of res judicata the proof consisted of the introduction in evidence of the entire clerk's file in the cases of *Jay v. Clark* and *Wolfe v. Clark*.

During the course of administration of the estate of George A. Clark, deceased, his administrator, R. S. Jay, filed an action against appellant herein and it is claimed that orders entered in that action constitute adjudications of the issues tendered by the complaint herein. The complaint in *Jay v. Clark* alleged that appellant had continued as surviving partner to carry on the partnership affairs; that he had failed to keep accounts and was for that reason unable to render accounts to Jay, as administrator, concerning his handling of the partnership business; that Jay had been unable to obtain a settlement of partnership affairs and the payment to him of sums due de-

ceased from partnership assets. The relief asked was that Clark be compelled to account, that the partnership assets be sold, the debts of the partnership paid and the surplus distributed. To this pleading Clark filed his answer and also a cross-complaint. He admitted he had continued to carry on the partnership business, and had not theretofore rendered an account. He denied he had failed to keep accounts and alleged that after the settlement of partnership debts there would be nothing due the plaintiff administrator. By his cross-complaint he asserted that he had a claim against his father's estate for something in excess of \$2,000 for services rendered and he prayed for a judgment in that amount, but the cross-complaint was dismissed by court order on motion of the plaintiff administrator. The cause was tried and the court found that Clark had been guilty of failing to wind up the partnership affairs and of failing to account for his activities as surviving partner; that there had never been any settlement of partnership accounts during the lives of both and that the value of the interest of deceased could not be ascertained without an accounting, which accounting had been refused. The court thereupon, by an interlocutory judgment or order, directed the surviving partner to account and ordered that all of the property of the partnership be sold and that all obligations be paid. It was further decreed that a receiver was necessary to wind up the partnership affairs; that when that had been accomplished and when the accounts of the receiver had been settled final judgment should be entered in the administrator's favor as to any sum found to be due the estate of deceased. Appellant herein appealed from said interlocutory judgment and this court affirmed the same. See *Jay v. Clark*, 85 Cal.App.2d 88, 192 P.2d 462. It appears from the file of the cause that thereafter Wolfe was appointed as receiver and that he thereafter reported to the court he had taken possession of the partnership assets, including the newspaper, and had sold all of the assets to Leshar; that he had received from the sale the sum of \$30,750, which he had on hand, less claimed expenses;

that he had filed a suit as receiver against appellant herein, his wife and various Does. (We will examine the record of the judgment in said receiver's action hereinafter.) He also reported that a stipulation had been entered into whereunder he was, from assets in his hands, to pay to appellant herein and to his wife a total sum of \$5,000 in full satisfaction "of all claims and demands against said receiver and against the Estate of George A. Clark, Deceased" and he reported said sums have been paid as stipulated. He further reported that all interested parties had agreed as follows: 1. To the waiver of any account by the receiver in the receivership proceedings. 2. To the entry of an order discharging the receiver as though a full and complete accounting had been made. 3. To permit the receiver to draw a check from the receiver's assets in the sum of \$1,800 to himself as receiver in compensation for his services as such. 4. To pay certain sums to a Mr. Coffee in compensation for his services as attorney for the receiver. 5. To pay all remaining sums to Jay, as administrator of the estate of Clark. He reported it was further agreed that without notice orders carrying out the agreements could be made. It appears that orders were made in the receivership in accordance with the receiver's said report and that, without accounting, he was discharged upon making the disbursements aforesaid. It appears from the clerk's file received in evidence that no final judgment in the action of Jay, as Administrator, v. Clark was made.

An examination of the file in the case of *Wolfe v. Clark*, which was the action filed by Wolfe as receiver against appellant herein, and which is pleaded as res judicata of the issues tendered in appellant's complaint in this action, discloses that the receiver by his complaint alleged the following matters: That pursuant to court orders he had as receiver sold and delivered all of the assets of said partnership to Leshner and had received the price therefor from him; that Clark and others, however, claimed an interest in and to that part of the assets consisting of the newspaper and the proceeds from the sale there-

of adverse to the receiver, which claims were without right. He prayed a decree declaring that such claims of adverse interests were without right. Appellant herein as defendant in the receiver's action answered the complaint and admitted that he did claim an interest in the funds and property in the hands of the receiver as such and affirmatively alleged that he had a claim against the assets of the receivership for services rendered in conducting the newspaper, both before and after the appointment of the receiver; that he also held a certain life insurance policy which he claimed belonged to him, but which the receiver refused to give over. He asserted his half interest in the partnership assets and that he was, therefore, entitled upon conclusion of liquidation proceedings to receive one-half the net proceeds. Leshner also filed an answer in said action alleging that he appeared as having been sued as Doe One. He admitted the allegations of the complaint, but said he had not received the assets which he purchased at the receiver's sale and that he also claimed the life insurance policy as a part of those assets. He further alleged his purchase of all partnership assets; that he had not received delivery of the same and had been damaged thereby. He also cross-complained against the receiver and against the other parties, but his cross-complaint was based on the same matters referred to in his answer. The receiver filed answers to the various counter pleadings and thereafter the stipulated judgment hereinbefore referred to was entered in the cause. The exact form of the judgment to be entered was stipulated to and the form was adopted by the court and entered as the court's judgment.

[15-17] It is apparent from an examination of the two causes claimed to have resulted in adjudication of the issues tendered by the complaint in this action that said judgments do not in any way expressly adjudicate said issues. No mention, direct or inferential, is made therein concerning the claim herein sued upon, that is, appellant's claim that Leshner, Halcomb and Wolfe had fraudulently conspired to compel cessation of publication of the

Madera Daily Tribune and Mercury and to compel its sale to Leshar at a depreciated price and that they had succeeded in consummating their conspiracy. Respondents make no claims to the contrary, but they say that such issues, nevertheless, could have been, by the appellant herein, affirmatively tendered in various ways in the action brought against him by Jay, as administrator, and in the action brought against him by the receiver and by way of opposing the receiver's account; that, therefore, since appellant did not so tender such issues, but on the contrary withheld them he is now estopped to litigate such issues in this action. Of course all this assumes that when the stipulated judgment was entered in the receiver's action, when accounting by the receiver was waived, and when the issues of fraudulent conspiracy were not injected into the administrator's action that appellant herein knew that he had been damaged by the conspirators and had a cause of action against them, for, of course, if he did not have such knowledge then nothing done or not done by him in said actions could estop him from seeking redress in this action. It is equally true that if his ignorance was due to the conspirators' having concealed their nefarious activities behind the shield of the receivership, they would themselves be estopped to rely upon estoppel by judgment. "A party may assert a counter estoppel against an estoppel offered by the adverse party. Where an estoppel exists against an estoppel, the matter is set at large, or is left as if neither estoppel had been offered; the two estoppels destroy each other and the interest of justice requires that both parties be liberated therefrom." 31 C.J.S., Estoppel, § 65. Thus as against the claim that what he did and failed to do in the actions counted upon as affording support for the plea of res judicata, he could have shown the fraud alleged in his complaint and his ignorance thereof at the time he might have urged the same in said pending actions. This he was not permitted to do since by the orders of the trial court no

evidence would have been received touching upon the matters alleged in the appellant's complaint. However, we think that in any event the plea of res judicata is not borne out by the evidence here, consisting, as it does, solely of the record in the two pending actions. We have hereinbefore said that by virtue of the situation existing when the alleged tort was committed its commission gave to appellant a right of action completely separate from the partnership affairs and constituting no part of partnership assets. Therefore, he was not obliged to litigate that cause of action in either of the two pending actions.

"* * * '[T]he general rule that a judgment is conclusive, not only as to that which is actually determined, but also as to every other matter which the parties might have litigated in the action, is not always applicable literally.' It has no application to those independent matters which the parties may, but are not required to and do not in fact plead or rely upon, such as other causes of action which may be joined or independent matters which might form the basis of a counterclaim or cross-complaint, or constitute an equitable defense to an action at law; nor does it apply to new rights acquired pending the action which might have been but were not required to be injected into the case * * *" (15 Cal.Jur. "Judgments", sec. 194, p. 145.)

We hold that the pleas of res judicata were as a matter of law not sustained by the evidence offered in support thereof.

In accordance with the foregoing it is ordered that the judgment appealed from be and the same is hereby reversed and the cause is remanded for the limited purpose of retrial as to the issues of equitable estoppel and as to the merits. It is further ordered that judgment be entered in favor of plaintiff on the pleas of res judicata.

PEEK and SCHOTTKY, JJ., concur.

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Meier SCHNEIDER, Appellant,

v.

CIVIL SERVICE COMMISSION of the COUNTY OF LOS ANGELES, acting ex officio as the Civil Service Commission of the Air Pollution Control District of the County of Los Angeles, State of California, and Winston W. Crouch, Harry Albert and Hayden F. Jones, constituting the members of the said Commission, Air Pollution Control District of the County of Los Angeles, Air Pollution Control Board of the Air Pollution Control District of the County of Los Angeles, State of California, and Roger W. Jessup, Herbert C. Legg, John Anson Ford, Burton Chace and Kenneth Hahn, constituting the members of the said Board, and Gordon P. Larson, Air Pollution Control Officer and Director of said District, Respondents.

Civ. 21145.

District Court of Appeal, Second District,
Division 1, California.

Nov. 28, 1955.

Proceeding for writ of mandate to review a decision of the Civil Service Commission of Los Angeles County sustaining the discharge of an employee from his civil service position as chemist. The Superior Court of Los Angeles County, Arnold Praeger, J., affirmed the action of the commission and the employee appealed. The District Court of Appeal, White, P. J., held that in view of evidence that employee had violated orders and office procedure, had criticized and ridiculed his supervisors, and criticized his fellow employees, had engaged in deliberate and disturbing loud talking, and had refused to make an analysis, commission did not abuse its discretion in sustaining discharge of employee.

Judgment affirmed.

1. Appeal and Error ⇨931(8)

On appeal, findings of fact must be read together, and so construed as to uphold rather than to defeat the judgment, and ambiguities or uncertainties in findings must, if reasonably possible, be construed to support the judgment.

2. Appeal and Error ⇨1026

Where appellant has not been injured or prejudiced by claimed error, a reversal is not warranted.

3. Officers ⇨72(1)

The findings of a majority of the county civil service commission constitute the findings of the commission, while the findings of the dissenting commissioner do not.

4. Officers ⇨72(2)

Upon review of decision of county civil service commission upholding discharge of employee, sole question before trial court was whether there was substantial evidence in record to support findings of commission. West's Ann.Code Civ.Proc. § 1094.5

5. Mandamus ⇨187(9)

In proceeding before county civil service commission relating to discharge of chemist of air pollution control district, where trial court found that all allegations of paragraphs of petition for writ of mandate were true, and paragraph 12 thereof related to statements by dissenting commissioner, and court also found that there was substantial evidence to support commission's findings, contradiction between court's findings was neither material nor prejudicial. West's Ann.Const. art. 6, § 4½; West's Ann.Code Civ.Proc. § 475.

6. Mandamus ⇨70

The Civil Service Commission of Los Angeles County is a local administrative tribunal exercising quasi judicial powers, and its actions may be reviewed by mandamus.

7. Mandamus ⇨172

Upon review by mandamus of decision of county civil service commission, the chief issues are whether the person affected has been accorded a fair hearing, and whether there is any substantial evidence to support determination of commission and the court must confine itself to the showing made before the commission with regard to the sufficiency of the evidence.

8. Officers ⇨72(1)

The power to make the determination whether or not there is a basis for the dis-

charge of the employee is vested in the county civil service commission.

9. Mandamus ☞172

In the absence of a claim that the county civil service commission proceeded without or in excess of jurisdiction, or that the trial was not full or fair, or that there was a prejudicial abuse of discretion in some other respect, the court is confined to question whether decision of commission is supported by findings, and whether the findings are supported by substantial evidence in the light of the entire record.

10. Evidence ☞83(4)

In proceeding to review by writ of mandate a decision of the county civil service commission sustaining discharge of employee, the ruling of the commission comes before the court attended by a strong presumption that official duty has been regularly performed.

11. Officers ☞69.7

In proceeding before county civil service commission relating to discharge of chemist, in view of evidence that employee had violated orders and office procedure, had criticized and ridiculed his supervisors, and criticized his fellow employees, had engaged in deliberate and disturbing loud talking, and had refused to make an analysis, commission did not abuse its discretion in sustaining discharge of employee. West's Ann.Rules on Appeal, rule 10(b).

12. Officers ☞69.7

Under civil service, fitness and suitability include a disposition to refrain from creating disorder or inciting dissension, and the qualities of self-discipline and cooperation in maintaining standards of public service, and, a tendency to foment strife and discontent is a proper ground of unsuitability as basis for discharge of employee.

13. Officers ☞72(2)

Only where there is no difference of opinion, and the charge appears clearly unsupported, will the court hold that the county civil service commission has acted arbitrarily or capriciously in sustaining the discharge of an employee.

14. Officers ☞72(2)

Where civil service commission had sustained discharge of employee, though dissenting commissioner thought a 30 day suspension was sufficient punishment, and findings of commission were supported by substantial evidence, the court would not act to change penalty, since the determination of the penalty to be imposed is vested in the commission and not in the court.

Preston D. Orem, Pasadena, for appellant.

Harold W. Kennedy, County Counsel,
Andrew O. Porter, Deputy County Counsel,
Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal from a judgment of the Superior Court of Los Angeles County denying a peremptory writ of mandate and discharging an alternative writ theretofore issued, thereby affirming the action of the Civil Service Commission of Los Angeles County sustaining the discharge of appellant from his civil service position as Senior Air Pollution Chemist of the Air Pollution Control District of said county.

On March 31, 1954 appellant was served with an amended letter of discharge containing 15 charges upon which his discharge was predicated. Appellant answered said letter and requested a hearing before respondent Civil Service Commission. The matter was tried before said commission at a formal two-day hearing at which witnesses testified under oath, the testimony was recorded by a court reporter, and documentary evidence was received. The reporter's transcript of the commission hearing and the original exhibits were in evidence before the superior court, and, pursuant to Rule 10(b), Rules on Appeal, have been transmitted to this court.

The foregoing amended letter of discharge set forth, "Your attitude, inability and refusal to carry out orders, violation of direct orders, your approach to the air pollution control program and your actions in regard to the supervisors and fellow employees are such that your continued em-

ployment is a detriment to the Air Pollution Control District." Then follows fifteen specific charges, each set up in a numbered paragraph.

At the hearing before respondent commission, several of the charges were dismissed, while others were found "not true" or "not established", leaving charges 1, 2, 5, part of 12, 13, 14 and 15, upon which the question arises as to whether the evidence supports respondent commission's finding that appellant's discharge was justified.

Following the hearing before respondent commission the latter made findings upon the charges preferred against appellant from which the following conclusions were made:

"The Commission therefore concludes that said employee, Meier Schneider, refused to carry out orders, violated direct orders. A majority of the Commission concludes that said employee was guilty of actions making his continued employment in the District a detriment to the District.

"The majority of the Commission therefore concludes that the facts and reasons stated justify the discharge of said Meier Schneider.

"Dated this 8th day of July, 1954.

"/s/ Winston W. Crouch
"President

"/s/ Hayden F. Jones

"I concur in the statement of facts and in the conclusion that said employee refused to carry out orders and violated direct orders, but dissent from the conclusion that his actions made his continued employment a detriment. I believe a thirty day suspension is sufficient punishment for the acts alleged, many of them being trivial, and that the facts do not justify the discharge of Meier Schneider.

"Dated this 8th day of July, 1954

"/s/ Harry Albert"

Appellant's first contention is that the Findings of Fact upon a material issue are contradictory and irreconcilable, and therefore the judgment must be reversed. The claimed contradictory finding concerns the

truth or falsity of Paragraph XII of appellant's petition for writ of mandate which reads as follows: "That, as stated by Civil Service Commission Member Harry Albert in his dissenting opinion Exhibit 'C', (page 4), the 'facts do not justify the discharge of Meier Schneider', nor did petitioner's actions make 'his continued employment a detriment.'"

Paragraph I of the Findings of Fact by the trial court reads in part, "That all the allegations of Paragraphs * * * XII * * * of the Petition for Writ of Mandate are true * * *".

It is appellant's contention that by adopting Paragraph XII of the Petition for Writ of Mandate as "true" the court found, quoting from said Paragraph XII, that the "facts do not justify the discharge of Meier Schneider", nor did appellant's actions make "his continued employment a detriment". Appellant insists that this finding is contradictory of and irreconcilable with that portion of Paragraph III of the Findings of Fact which states, "That there was substantial evidence to support each and every one of the findings made by the Civil Service Commission, and the finding support the Commission's conclusion that Petitioner's discharge was justified". Appellant insists that the court below adopts both the "findings of the majority of the Commission and the findings of Commissioner Albert in that the sentence quoted does not specify the findings of a 'majority of the Commission,' but specifies the 'findings made by the Civil Service Commission,' which included the minority findings of Commissioner Albert."

[1-5] The weight of authority supports the rule that on appeal findings of fact must be read together and so construed as to uphold rather than to defeat the judgment. Ambiguities or uncertainties in findings must, if reasonably possible, be construed to support the judgment. *Woodbine v. Van Horn*, 29 Cal.2d 95, 109, 173 P.2d 17; *City of Signal Hill v. Wyse*, 9 Cal.App.2d 641, 642, 50 P.2d 1076; *Ensele v. Jolley*, 188 Cal. 297, 302, 204 P. 1085. In the case at bar, although the findings might well be improved, the claimed in-

consistency appears to be one of words rather than ideas. Having in mind the prevailing rule of liberal interpretation of findings and reading them in their entirety, we are persuaded that the claimed conflict is not material and certainly could not result in a miscarriage of justice, Calif.Const. art. VI, sec. 4½; Civ.Code Proc. sec. 475. Manifestly, no prejudice occurred to appellant and unless injury or prejudice to appellant ensued from the claimed error a reversal is not warranted. *Tupman v. Haberkern*, 208 Cal. 256, 263, 280 P. 970. Paragraph XII of appellant's petition alleged that Commissioner Harry Albert made certain statements which are quoted from the conclusions arrived at by respondent commission and the court merely found that it was "true" that he made such statements. The court found "That there was substantial evidence to support each and every one of the findings made by the Civil Service Commission, and the findings support the Commission's conclusion that Petitioner's discharge was justified." The findings of a "majority of the Commission" constitute the findings of the commission, while the dissent of Commissioner Albert does not. The sole question before the trial court was a determination of whether there was substantial evidence in the record to support the findings of respondent commission, Civ.Code Proc. sec. 1094.5. The court made its findings on that issue. Therefore, the truth or falsity of Paragraph XII of appellant's petition for writ of mandate and the finding thereon is neither material nor prejudicial.

Appellant next contends there is no substantial evidence in the record to support the decision of respondent commission in that the facts do not justify his discharge.

Count 1 charges that appellant was instructed to collect the young leaves from the previous year's growth from four types of vegetation for the purpose of performing fluoride analyses. Instead he substituted a method of his own not acceptable to the district, and although asked several times to follow his supervisor's instructions, he failed to do so. He took numerous samples from trees other than the ones speci-

fied. The commission found these facts to be true. That determination is supported by the testimony of Gordon P. Larson, Director of the Air Pollution Control District, and other testimony adduced at the hearing.

Count 2, charging a violation of office procedure for submitting papers for typing, was found true by the commission. Some of the evidence on this question showed: That petitioner violated instructions and procedures by submitting material for typing without the prior approval of his supervisors, as required by district rule.

Count 5, charging appellant with criticisms of his supervisors and fellow employees, was found true by the commission. Some of the evidence supporting the charge is as follows: That on February 6, 1953, petitioner referred to his supervisor as completely unqualified and a "daisy picker". On December 16, 1953, petitioner referred to the Plant Section of the Air Pollution Control District and its vegetation program as "ridiculous".

Count 12 alleging ridicule of his supervisors after being ordered to standardize certain solutions, was found true by the commission, but the commission found the allegation that appellant attempted to discourage other employees from following the supervisors' instructions not true. Some of the evidence supporting the first part of the charge is as follows: When another employee was told to standardize silver nitrate, one-tenth normal, petitioner said, "Whoever heard of standardizing a silver nitrate solution? It doesn't deteriorate. It is the same thing as labeled on the bottle. It is ridiculous."

Count 13, alleges deliberate and disturbing loud talking, which the commission found to be true. Some of the evidence supporting it is as follows: That petitioner engaged in loud conversations concerning matters of no importance to his assignment, preventing another employee from working.

Count 14, alleges the withholding of certain data sheets from the supervisor and waiting until he had "run around awhile"

looking for them before putting them on his desk. The commission referred to this as a practical joke but found the statement to be true. Some of the evidence supporting it is as follows: That on March 8, 1954, petitioner's immediate supervisor asked for information concerning a report petitioner had turned in. Petitioner told him the report might be in a number of places and after the supervisor had searched for a considerable period of time, petitioner told him it was on his desk, he just wanted the supervisor to "run around a little while".

Count 15 alleges the refusal to do an analysis. The commission found the charge to be true. Some of the evidence in support thereof is as follows: That on June 29, 1953, petitioner was ordered to do a zinc analysis on a soil sample. Petitioner in a loud voice objected to doing so, insulted his supervisor, and said "he could see no reason to do it and would not do it unless he was very strongly ordered to do it."

The commission also found the allegations of the answer to the amended charges filed by appellant before the Civil Service Commission, and particularly the allegations of Paragraphs 15 and 18 thereof, were not true.

Appellant introduced before the commission five employee efficiency reports covering the period from January 1, 1949 to December 31, 1953, inclusive. These reports show that appellant's rating for 1952 and 1953 was only "fairly satisfactory" and the 1953 report shows certain improvement was necessary in connection with: amount of work performed; completion of work promptly on schedule; attentiveness or application to duties; co-operation with others; courtesy toward others; meeting and handling the public, and getting along with fellow employees. This report also states that he was definitely below requirements with respect to courtesy towards others.

[6-10] The Civil Service Commission of Los Angeles County is a local administrative tribunal exercising *quasi judicial* powers and its actions may be reviewed

by mandamus. However, on such a review the chief issues are whether the person affected has been accorded a fair hearing, and if so, whether there is any substantial evidence to support the determination of the administrative board. In the review proceedings the court must confine itself to the showing made before the administrative tribunal with regard to the sufficiency of the evidence. The power to make the determination of whether or not there is a basis for the discharge in the instant case is vested in respondent commission. In the absence of a claim that the commission proceeded without or in excess of jurisdiction, or that the trial was not full or fair, or that there was a prejudicial abuse of discretion in some other respects, the courts are confined to the question of determining whether the decision of the commission is supported by the findings and the findings are supported by substantial evidence in the light of the entire record. *Dierssen v. Civil Service Comm.*, 43 Cal.App.2d 53, 62, 63, 110 P.2d 513; *Greif v. Dullea*, 66 Cal.App.2d 986, 1009, 153 P.2d 581; *La Prade v. Department of Water and Power*, 27 Cal.2d 47, 53, 162 P.2d 13; *Keeley v. City of Modesto*, 36 Cal.App. 2d 254, 258, 97 P.2d 468; *Vaughn v. Board of Police Comm.*, 59 Cal.App.2d 771, 780, 140 P.2d 130; *Pratt v. Los Angeles County Civil Service Comm.*, 108 Cal.App.2d 114, 119-120, 238 P.2d 3. In a proceeding such as the one now engaging our attention, the ruling of the commission comes before the court attended by a strong presumption that official duty has been regularly performed. *Drummey v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 85, 87 P.2d 848; *Sipper v. Urban*, 22 Cal.2d 138, 144, 137 P.2d 425, concurring opinion; *DeLuca v. Board of Supervisors*, 134 Cal. App.2d 606, 286 P.2d 395.

[11] Although some of the charges might be characterized as minor or even trivial, yet when considered in their entirety and viewed in the light of the whole record, we cannot say that respondent commission abused the discretion vested in it by determining that appellant "was guilty of ac-

tions making his continued employment in the District a detriment to the District”.

[12, 13] Cogently applicable to the situation presented in the case at bar is the language used by Mr. Justice Shenk in his dissenting opinion in the case of *La Prade v. Department of Water and Power*, supra, 27 Cal.2d at page 59, 162 P.2d at page 20, as follows:

“The question of fitness for the position does not contemplate merely qualifications of skill in performing the duties of the office. Under civil service, fitness and suitability have a broader significance, and must be deemed to include a disposition to refrain from creating disorder or inciting dissension, and the commendable qualities of self-discipline and cooperation in maintaining standards of public service. A tendency to foment strife and discontent is a proper ground of unsuitability, and only if there is no room for difference of opinion and the charge appears clearly unsupported may it be held that the board acted arbitrarily or capriciously in discharging the employee. *McNatt v. Lawther*, Tex.Civ. App., 223 S.W. 503.”

[14] Finally, appellant urges that the penalty imposed was too severe and quotes from the dissenting opinion of Commissioner Albert wherein it is said, “I believe a thirty day suspension is sufficient punishment for the acts alleged, many of them being trivial * * *”. But, the court having found that the findings of a “majority of the Commission”, which constitute the findings of the commission, were supported by substantial evidence, the determination of the penalty to be imposed by the commission was vested in the commission and not in the court. *King v. Board of Medical Examiners*, 65 Cal.App.2d 644, 652, 151 P.2d 282; *Fuller v. Board of Medical Examiners*, 14 Cal.App.2d 734, 737, 59 P.2d 171. The instant case is not one wherein the court found one or more of the charges unsupported by the evidence and was accordingly authorized to remand the matter to the administrative agency for the purpose of reconsidering the penalty imposed.

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Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 252, 217 P.2d 630, 18 A.L.R.2d 593; *Nelson v. Department of Corrections*, 110 Cal.App.2d 331, 335, 242 P.2d 906.

For the foregoing reasons, the judgment is affirmed.

DORAN, J., concurs.



137 Cal.App.2d 187

Arthur W. FLEHARTY, Plaintiff and Appellant,

v.

Henry Leroy BOLTZEN, Louis Stagl, and Guido Stagl, Defendants and Respondents.

No. 16486.

District Court of Appeal, First District, Division 1, California.

Nov. 22, 1955.

Action by motorist against truck driver for injuries and automobile damage sustained in collision which occurred as truck driver was passing motorist who was attempting left turn. The Superior Court, Contra Costa County, Wakefield Taylor, J., entered judgment for truck driver and motorist appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence whether truck driver had knowledge or should have known that plaintiff was in dangerous position was insufficient to raise any question for jury as to last clear chance doctrine.

Judgment affirmed.

1. Negligence $\S$ 83.4

Doctrine of last clear chance presupposes that plaintiff as result of his negligence is in a dangerous position, that defendant knows or should have known of

plaintiff's dangerous position and that defendant has the last clear chance to avoid the accident and that his failure to do so is proximate cause of plaintiff's injury.

2. Negligence ⇨138(4)

In determining whether there is substantial evidence to meet the essential elements necessary to invoke doctrine of last clear chance, evidence must be viewed in light most favorable to contention that doctrine is applicable, and if the evidence when so viewed establishes these elements, plaintiff is entitled to an instruction thereon.

3. Negligence ⇨138(4)

If it cannot be said, as a matter of law that evidence is insufficient to justify application of last clear chance doctrine, jury should be instructed concerning the doctrine.

4. Automobiles ⇨244(59)

In action for personal injuries and property damages arising out of automobile-truck collision it was necessary in order to determine whether doctrine of last clear chance applied in the case, that plaintiff show by substantial evidence that truck driver had actual knowledge of plaintiff's dangerous position in time to have had a clear chance to avoid the collision.

5. Negligence ⇨83.7

The knowledge which defendant must have of plaintiff's danger in order for last clear chance doctrine to be applicable is actual knowledge, although in a given case the evidence may warrant inference that defendant had such knowledge despite his testimony to contrary.

6. Negligence ⇨83.7

Defendant's knowledge of plaintiff's dangerous position, as a necessary element to invoke doctrine of last clear chance, is imputed where circumstances are such as to convey plaintiff's peril to mind of reasonable man.

1. Defendants are not questioning the accuracy of the text of the proposed instructions (merely that the evidence did not present a case for instructing the jury on that subject.

7. Negligence ⇨83.8

The doctrine of last clear chance should not be applied to ordinary case in which the act creating the peril occurs practically simultaneously with happening of accident, and in which it can be fairly said that neither party had last clear chance thereafter to avoid the consequences.

8. Automobiles ⇨245(91)

In action by motorist against truck driver for injuries and automobile damage sustained in collision which occurred as truck driver was passing motorist who was attempting left turn, evidence whether truck driver knew or should have known that plaintiff was in dangerous position was insufficient to raise any question for jury as to the last clear chance doctrine

Benjamin F. Marlowe, Oakland, for appellant.

Alexander, Bacon & Mundhenk, San Francisco, Herbert Chamberlin, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff sustained personal injuries and property damage when his automobile collided with a truck owned by defendants Louis and Guido Stagi and driven by defendant Boltzen, on Highway 4 at or near Fourth Street in Oakley, California, about 1:30 p. m. on June 23, 1952. Verdict and judgment were for the defendants and plaintiff has appealed.

Plaintiff requested and the court refused instructions on last clear chance. The only questions upon this appeal are whether or not it was error not to give appropriate instructions on that subject¹ and, if error, was it prejudicial?

[1-6] The first question narrows down to the issue whether there is substantial evidence of the existence of the second and third of the three elements necessary to

Accordingly, we are not considering or deciding whether those instructions correctly state the law on the subject of last clear chance.

bring the doctrine into play.² As stated by the defendants, it was necessary for the plaintiff "to show by substantial evidence that the truck driver had actual knowledge that plaintiff was in a position of danger and that the truck driver had such knowledge in time to have had a clear chance to avoid the collision." They claim that under any view of the evidence plaintiff's own act put him in the dangerous position practically simultaneously with the collision, rendering it impossible for the truck driver to become aware of plaintiff's danger in time to act. Plaintiff erroneously claims it is sufficient to show that defendant by the use of reasonable care should have known of plaintiff's dangerous position. The requirement of actual knowledge still obtains although in a given case the evidence may warrant an inference that defendant had such knowledge despite his testimony to the contrary. *Selinsky v. Olsen*,

38 Cal.2d 102, 105, 237 P.2d 645; *Jobe v. Harold Livestock Com. Co.*, 113 Cal.App.2d 269, 273, 274, 247 P.2d 951. Knowledge of danger is "imputed where the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril." *Sills v. Los Angeles Transit Lines*, 40 Cal.2d 630, 637, 255 P.2d 795, 799. Plaintiff further claims there is substantial evidence that defendant had such actual knowledge and acquired it in time to avoid the collision.

Highway 4 runs north and south. Third and Fourth Streets enter it from the west and end in it, do not extend beyond it to the east. Fourth Street lies 318 feet to the south of Third Street. The paved portion of Highway 4, which lies some distance (perhaps 10 to 15 feet) to the east of the west curb, is 26 feet wide and is divided into north and southbound lanes by a broken white center line.

2. "Whether or not the doctrine of last clear chance applies in a particular case depends wholly upon the existence or non-existence of the elements necessary to bring it into play. The doctrine presupposes: "(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.'" *Daniels v. City & County of San Francisco*, supra, 40 Cal.2d 614, 619, 225 P.2d 785, 788. If any one of these elements is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence. *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36." *Doran v. City & County of San Francisco*, 44 Cal.2d 477, 483, 283 P.2d 1, 5.

The "question to be determined here is whether there is substantial evidence to meet the essential requirements for in-

vocation of that doctrine." *Sills v. Los Angeles Transit Lines*, 40 Cal.2d 630, 635, 255 P.2d 795, 798. The evidence must be viewed "in the light 'most favorable to the contention that the (last clear chance) doctrine is applicable * * since plaintiff is entitled to an instruction thereon if the evidence so viewed could establish the elements of the doctrine.' * * *" *Id.*, 40 Cal.2d at page 633, 255 P.2d at page 797.

If "it cannot be said as a matter of law that the evidence was insufficient to justify the application of the last clear chance doctrine", the jury should be instructed concerning that doctrine. *Daniels v. City & County of San Francisco*, 40 Cal.2d 614, 623, 255 P.2d 785, 791.

"The question of whether there is any substantial evidence, conflicting or otherwise, which could justify the application of the last clear chance doctrine in a given case, is a question of law; and in the absence of such evidence, it is error for the trial court to instruct the jury concerning that doctrine. [Citations.] On the other hand, if there is such substantial evidence, conflicting or otherwise, the question of whether the defendant should be held to have had a last clear chance to avoid the accident is a question of fact to be determined by the jury under appropriate instructions. [Citations.]" *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 487, 283 P.2d 7.

Plaintiff testified that he had parked his car along the west curb of Highway 4 about 60 feet south of Third Street. He then had lunch and upon his return, before pulling away from the curb, he looked for traffic and let one car pass. Seeing no other cars approaching from the rear, he put out his hand and proceeded into the southbound traffic lane; when he reached it, he took his hand in and then traveled parallel to the center line for about 200 feet. When 50 feet from Fourth Street, traveling three to five miles an hour, he gave a hand signal for a left turn and held his hand out until he reached Fourth; when in the intersection, again looking in his rear view mirror and seeing no car coming, he gave a left turn hand signal, turned left and when his front wheels were one to one and a half feet over the center line the collision occurred. He did not see the truck until the impact.

Defendant Boltzen testified that he was traveling south on Highway 4 at 18 to 20 miles per hour. When he had just passed Third Street he saw plaintiff's car when the latter was moving away from the curb, about the middle of the block; it was three or four feet from the curb. Thereupon, Boltzen honked his horn. Plaintiff's car continued to travel in a diagonal line to the point of impact. When he saw plaintiff's car move over toward the center of the street Boltzen moved over into the left lane to go around plaintiff. He got his truck all the way around and then felt the impact, when the truck was about one to one and a half feet to the left of and parallel to the center line; about two-thirds down the block or about 50 feet from Fourth Street. Boltzen at no time saw plaintiff make a hand signal.

A traffic officer who investigated the accident testified that the point of impact was about 100 feet north of Fourth Street, basing his opinion upon debris on the highway and tire abrasions on the pavement.

The right hand side of the truck was hit. The left front fender, door and windwing of plaintiff's car were damaged.

It is quite apparent that plaintiff was not in a position of danger until he crossed the center line. When he did cross it he only

had a foot or a foot and a half to go when he hit defendant's truck. There was no time then for defendant to do anything to avoid the accident. The fact that plaintiff approached the center line along a straight course, diagonally from the curb, to the knowledge of defendant, was no notice or warning to defendant that plaintiff was approaching a position of danger from which he would be unable to extricate himself. His leftward diagonal movement toward the center was quite natural, necessary in getting from the curb (an appreciable distance from the pavement) over onto the paved southbound lane. That was no warning or notice to defendant that plaintiff would continue in that direction across the center line and into the northbound lane. Defendant was entitled to assume that plaintiff would observe traffic regulations, straighten out and run parallel to the center line and to the right of it when he reached it.

If we take plaintiff's version that he made a left turn in the Fourth Street intersection the situation is the same. The moment he crossed the center line he collided with defendant's truck. Until he made the turn he was not in a position of danger and until then defendant had no knowledge of approaching danger for he says he saw no signal and there is no evidence which requires an inference that he must have seen a timely left turn signal.

[7] The doctrine of last clear chance "should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences." *Rodabaugh v. Tekus*, 39 Cal.2d 290, 295, 246 P.2d 663, 666. In the *Rodabaugh* case the defendant, traveling 40 miles an hour on a through highway, observed the decedent approaching on a cross road at about the same rate of speed when the latter was 500 feet away and defendant about the same distance from the intersection. When defendant was only 75-100 feet from the intersection he observed that the decedent was not slowing down and thereupon commenced to apply his brakes but there was not sufficient time

left to avoid the collision. The evidence was held "insufficient to support a finding that after defendant discovered decedent's peril, he had a last clear chance to avoid the collision. The fact that defendant saw that decedent was looking straight ahead while decedent was traveling approximately 500 feet in approaching the intersection does not establish that decedent was in a position of danger this entire distance. Decedent was not in a position of danger until he arrived at a point at which he could no longer stop or slow down in time to avoid a collision. *Dalley v. Williams*, supra, 73 Cal. App.2d 427, 435, 166 P.2d 595; also, *Young v. Southern Pacific Co.*, 182 Cal. 369, 380-381, 190 P. 36. Defendant had the right to assume that decedent possessed normal faculties, and that he saw the stop warnings which were directly within the range of his vision. *Folger v. Richfield Oil Corp.*, 80 Cal.App.2d 655, 660-661, 182 P.2d 337." 39 Cal.2d at page 294, 246 P.2d at page 665.

Similarly, of pedestrians who crossed a street in the middle of a block in the path of an oncoming bus, the Supreme Court has said: "Therefore plaintiffs' act of negligence in leaving a place of safety and stepping directly into the path of the oncoming bus necessarily occurred almost simultaneously with the happening of the accident. Under these circumstances, such negligence cannot be deemed 'remote in causation,' and it cannot be said that defendants thereafter had a last clear chance to avoid the accident." *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 490, 283 P.2d 9.

In *Mahnkey v. Bolger*, 98 Cal.App.2d 628, 220 P.2d 824, it appeared that plaintiff was driving north in his inner lane and according to his testimony when a little less than 25 feet from the intersection he signaled a left turn, pulling it in when he reached the intersection. At the center of the intersection he made a sharp left turn athwart defendant's oncoming car. Defendant testified he saw plaintiff's car only a few seconds before the accident when plaintiff was about to cross over in front of him. He said he was 20 feet from the intersection when he first saw plaintiff's car, start to turn, whereupon he applied his brakes. His car started to skid, so he then tried to go

around plaintiff into the intersecting street but could not make it, so he again applied his brakes. Concerning the applicability of the last clear chance doctrine in such a case, this court said: "There is no evidence that defendant saw plaintiff's car sooner, but even if it could be inferred from the evidence that he did see plaintiff's car sooner it is difficult to see how defendant could realize that plaintiff was in a position of danger until plaintiff made the left-hand turn; and it is difficult also to see how defendant could have a last clear chance to avoid the collision after plaintiff made the left-hand turn. In order to make the doctrine of last clear chance applicable, we must assume that plaintiff was, as a result of his negligence, in a position of danger, which would mean that he negligently made a left-hand turn into the path of defendant's oncoming automobile. Defendant's car must have been close to the intersection or there would have been no collision. Defendant could not know that plaintiff was in a position of danger until plaintiff turned into his path, and then it was too late for defendant to have a last clear chance to avoid the collision. We believe that the instant case was one in which the questions of negligence and of contributory negligence should have been left to the jury, but we are convinced that it was prejudicial error to submit the issue of last clear chance to the jury." 98 Cal.App.2d at page 634, 220 P.2d at page 828.

These are not isolated holdings. Similar rulings were made in *Johnson v. Southwestern Eng. Co.*, 41 Cal.App.2d 623, 626-628, 107 P.2d 417; *Jones v. Heinrich*, 49 Cal.App.2d 702, 706-707, 122 P.2d 304; *Dalley v. Williams*, 73 Cal.App.2d 427, 431-437, 166 P.2d 595; *Jobe v. Harold Livestock Com. Co.*, 113 Cal.App.2d 269, 273-276, 247 P.2d 951; *Hazelett v. Miller*, 115 Cal.App.2d 801, 805-807, 252 P.2d 997; *Mehling v. Zigman*, 116 Cal.App.2d 729, 732-734, 254 P.2d 141; *Schouten v. Crawford*, 118 Cal. App.2d 59, 63-65, 257 P.2d 88; and *Story v. Cox*, 130 Cal.App.2d 231, 232-234, 278 P.2d 720.

[8] Accordingly, we find no error in the court's refusal to instruct upon the doctrine

of last clear chance. In view of this conclusion it is unnecessary to consider whether the refusal, if erroneous, would have been prejudicial.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



137 Cal.App.2d 481

Vinton H. DUTCHER and Edna M. Dutcher,
Husband and Wife, Plaintiffs and
Appellants,

v.

CITY OF SANTA ROSA HIGH SCHOOL
DISTRICT, Board of Education of the
City of Santa Rosa, Kenneth Brown, Hel-
en M. Lehman, Hirschel Niles, Harvey Sul-
livan, John H. Moskowitz and Rollo Norris,
Defendants and Respondents.

Dennis REHE, a Minor, by his Guardian ad
Litem, Lee Rehe, and Lee Rehe, Individu-
ally, Plaintiffs and Appellants,

v.

CITY OF SANTA ROSA HIGH SCHOOL
DISTRICT, Board of Education of the
City of Santa Rosa, Kenneth Brown, Hel-
en M. Lehman, Hirschel Niles, Harvey Sul-
livan, John H. Moskowitz and Rollo Norris,
Defendants and Respondents.

Civ. 8681.

District Court of Appeal, Third District,
California.

Dec. 2, 1955.

Hearing Denied Jan. 25, 1956.

Actions were brought against high school district and automobile mechanics teacher for death of first student and injuries of second student as result of explosion which occurred at high school when third student attempted to burn hole in automobile, which had an open gasoline tank, with an acetylene torch. The Superior Court of Sonoma County, Hilliard Comstock, J., entered judgments adverse to the plaintiffs, and they appealed. The District Court of Appeal, Van Dyke, P. J., held that question

of negligence of teacher was for jury, and that Superior Court gave an erroneous instruction on assumption of risk, and that Superior Court erred in submitting to jury question of contributory negligence, and that where District Court of Appeal could not say from record whether jury found teacher not negligent, or found teacher negligent but found that the deceased student and injured student assumed risk of injury, or found teacher negligent and found that deceased student and injured student guilty of contributory negligence, the errors were reversible.

Judgments reversed.

1. Schools and School Districts — 122, 147

In action against high school district and teacher of automobile mechanics for death of first student and for injuries of second student as result of explosion which occurred at school when third student used acetylene torch to burn hole in automobile on which there was an open gasoline tank, issue of negligence of teacher was a question of fact for jury.

2. Schools and School Districts — 122, 147

In action against high school district and teacher of automobile mechanics for death of first student and for injuries of second student as result of explosion which occurred at school when third student used acetylene torch to burn hole in automobile on which there was an open gasoline tank, instruction that one who, for purposes of his own, voluntarily places himself in position of danger, assumes risks ordinarily incident to such a position and must use a quantum of care commensurate with the danger, was erroneous because of failure to inform jury that before defense of assumed risk can succeed the evidence must disclose either actual or implied knowledge of the risk and an appreciation of the magnitude thereof.

3. Schools and School Districts — 122, 147

In action against high school district and teacher of automobile mechanics for death of first student and for injuries of second student as result of explosion which occurred at school when third student used

acetylene torch to burn hole in automobile on which there was an open gasoline tank, evidence was insufficient to justify submission to jury of question of contributory negligence of deceased and injured students.

4. Appeal and Error $\Rightarrow$ 1062(1), 1064(1)

Where, in action against high school district and teacher for death of first student and for injuries of second student as result of explosion, jury returned verdict for teacher and district, and question of teacher's negligence was for jury, but trial court gave an erroneous instruction on assumption of risk, and improperly submitted issue of contributory negligence, and District Court of Appeal on appeal could not say from record whether jury found teacher negligent, or found teacher negligent and that deceased and injured students assumed risk of injury, or found teacher negligent and the deceased and injured students guilty of contributory negligence, errors were reversible.

C. D. Dorn, San Francisco, for appellants Dutcher.

Lewis H. DeCastle, Santa Rosa, for appellants Rehe.

Lounibos & Lounibos, Petaluma, for respondents.

VAN DYKE, Presiding Justice.

Vinton H. Dutcher and his wife, parents of Paul Dutcher, deceased, brought action against the City of Santa Rosa High School District and Rollo Norris, an instructor employed by the school, to recover damages for the death of their son. In another action Dennis Rehe, a minor, by his guardian ad litem brought action the school district and Norris for damages for personal injuries suffered by him in the same accident. His father sued for expenses incurred. Both boys were members of a class in automobile mechanics which the respondent Norris was teaching. Each complaint charges negligence on the part of Norris. The respondents pleaded the general issue and also contributory negligence.

The evidence showed the following: Respondent Norris had been regularly employed as a teacher of automobile mechanics at the high school for eight years. The course was designed so as to give the students practical experience and was, therefore, conducted as supervised shop work. There were 14 or 15 students in the class and under the supervision and instruction of Norris they worked on automobiles, some of which belonged to members of the class. They disassembled and reassembled, and learned the technique necessary to such work. The class members worked in various areas of the shop and freely moved about the area while in class for the purpose of getting and replacing tools and equipment, for consultation with the instructor, and such like related purposes. Norris gave general instructions on various phases of automobile mechanics and repairs and the students were encouraged to bring their own cars upon which to work, with his help and supervision. Two or three weeks prior to the accident, one of the high school students, Donald Saunders, who was a member of another class, brought in a stripped down automobile which he apparently wished to convert into a racing car by welding thereon so-called "roll over" bars made of iron pipe. He removed the top, windows, seat and gasoline tank and stood the tank against the wall at a distance of from six to eight feet from his car. This position of the tank was observed by Norris on the afternoon before the accident and on the following morning he told Donald to place it on the frame of his car so the janitor would be able to sweep the area where it was resting. However, it does not appear that Donald obeyed this order. Donald was a member of another class in automobile mechanics and it appears was more advanced in that study than were the members of the class which included plaintiff Rehe and the deceased Paul Dutcher. These two boys were in a class which was conducted in the fifth class period between 12:40 and 1:40 P.M. of a school day. Donald's class met between 9 and 10 o'clock in the morning. On the day of the accident Norris gave Donald some instructions during

his class period on the technique of burning a hole in the floor of his car so as to be able to weld a plate to the frame to anchor the "roll over" bars. The operation necessitated the use of a lighted arc torch. Donald did not complete the work that morning. Between 12:40 and 1:40 P.M. he had a class in gymnastics. He answered roll call, then left the class without permission and went to the automobile mechanics shop. He obtained an arc torch from the tool room, which was in charge of one of the students, and with it entered the shop. Several boys in the class, including Paul Dutcher and Dennis Rehe, were standing by a bench where Norris was explaining how to remove valves from an engine. He joined the group for a few minutes, then went over and attached the torch to the hose leading from the oxygen and acetylene tanks which were standing on a movable hand truck. He lit the torch, proceeded to his car, entered it, crouched down in it and began burning a hole in the floor. The explosion of the gas tank from his car occurred a few minutes thereafter. Just before the explosion Paul Dutcher and Dennis Rehe, moving about the shop area, had gathered with several other class members around Donald's car to see what Donald was doing. They had stopped while on their way to a grinder with some valves. As they turned away to continue to the grinder the explosion occurred and they were encircled with burning gasoline and flames from the exploded tank. Paul Dutcher died from his injuries and Dennis Rehe was seriously injured. The two actions herein were consolidated for trial and have been consolidated for appeal. The jury returned verdicts in favor of defendants and from the judgments entered thereon these appeals are taken.

[1] It is contended by respondents in answer to claims of error that the record shows as a matter of law that Norris was not negligent. With this we cannot agree and hold that the issue of Norris' negligence was a question of fact for the jury to determine. The trial court committed no error in submitting that issue to the jury. Although Norris testified that he did not know Donald Saunders had come into the shop,

nevertheless he was moving about the area and there was evidence that on at least two occasions Donald was in close proximity to him after he had obtained the torch; also that while the torch was operating and giving off strong and fluctuating light typical with such instruments Norris was quite close by and the jury could have held, notwithstanding his testimony, that he in fact did know Donald was there and did know that he was operating the torch. He knew the tank had been taken off of Donald's car and left in the shop area and the jury could infer that he knew also that there was unconsumed gasoline in the tank since the tank had been used to propel the car into the shop. The jury could have inferred from the fact of the explosion that, in removing the tank, the opening had not been closed and that fumes from the gasoline would be permeating the air near the tank which, in turn, was in proximity to the point where Donald was operating the torch. It does not appear clearly from the record just where the tank was when it exploded, but it is a fair inference that it was in fact close enough to the torch so that the fumes therefrom were ignited. The jury could have inferred that Norris, with his extensive training and practical knowledge of the danger of having an open tank exuding gas vapor in an area where torches were used, was negligent, and particularly so when that use was made by partially trained members of a class such as Norris was in charge of. It at least appears that the explosion was caused by the contents of the tank being fired by the torch and the jury could have inferred that a failure to prevent such dangerous proximity was negligence on the part of the instructor in charge. Without going further, we think the foregoing sufficient to justify a conclusion that the negligence of Norris was a matter for the jury to determine.

[2] The court instructed the jury as follows: "One, who for purposes of his own, voluntarily places himself in a position of danger, assumes the risks ordinarily incident to such a position and must use a quantum of care commensurate with the danger." This instruction failed to inform the jury that before the defense of assumed

risk can succeed the evidence must disclose either actual or implied knowledge of the risk and an appreciation of the magnitude thereof. As applied to the two boys who stopped by Donald's car and for a short interval watched him operating the torch it is questionable whether from the evidence the jury could even have found support for a holding that they knew and appreciated the extent of the risk involved. To be sure, they knew that Donald was operating a torch, but there is no showing that they knew either how close the tank that exploded was to the flames and sparks being emitted by the torch or that they appreciated the danger of explosion if flames or sparks from the torch ignited gases issuing from the tank. Assuming, however, that such an assumption of risk might have been predicated upon the facts in evidence, nevertheless the court failed to inform the jury of the vital element of knowledge which must exist before a risk can be assumed and the assumption constitute a defense to a charge of negligence from the existence of the risk. *Prescott v. Ralphs Grocery Co.*, 42 Cal.2d 158, 161-162, 265 P.2d 904; *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 385, 240 P.2d 580; *Prosser on Torts* (1941), page 386. While it might be argued that the use of the word "voluntary" in defining assumption of risk inferentially includes the element of knowledge, nevertheless we think that if the defense is to be submitted to a jury the jury must be told clearly that the doctrine has no application unless there was knowledge, express or implied, of the existence of the risk, together with an appreciation of the extent of the danger.

[3] The trial court with appropriate instructions and at the request of respondents instructed the jury upon the defense of contributory negligence. Appellants claim that there was no evidence here of any negligence upon the part of the two boys which could qualify as negligence

proximately contributing to their injuries. In the present state of the record this contention must be sustained. Of course, the presence of the boys near the automobile of Donald where he was working with the torch was no part of the cause of the explosion, and in order for it to be negligence for them to have approached the area of danger there would have to be some evidence from which it could be inferred that they violated their duty of care for their own concerns. As has been said, it appears that they were prompted either by a legitimate interest in the work of Donald or mere youthful curiosity and there is nothing to show that they knew anything about the dangerous proximity of the gas tank to the torch. We are unable to find in this situation that these boys could have been negligent. They were properly in the shop in pursuit of their regular studies, they went from the point where they had been instructed in the technique of removing valves from an engine to the place where they could grind those valves, and stopped for a moment to observe Donald's work. We hold it was error to submit the question of their contributory negligence to the jury.

[4] The foregoing leaves the record in condition that as a reviewing court we cannot say whether the jury found Norris not to have been negligent, or found Norris to have been negligent but found further that the two boys had assumed the risk of injury, or found Norris to have been negligent but also found the boys to have been guilty of contributory negligence. Therefore the errors pointed out are reversible. *Plotts v. Albert*, 120 Cal.App.2d 105, 108, 260 P.2d 621; *Hoyt v. Southern Pacific Co.*, 6 Cal. App.2d 49, 53, 44 P.2d 363.

Both the judgments appealed from are reversed.

SCHOTTKY and PEEK, JJ., concur.

137 Cal.App.2d 237

**In the Matter of the Estate and GUARD-
IANSHIP of Rebecca Rae LEVY,
A Minor,**

**Lula P. STOGSDILL, William B. Stogsdill,
Petitioners and Appellants,**

v.

**Marian ARNOLD, Petitioner and
Respondent.
Civ. 21191.**

District Court of Appeal, Second District,
Division 2, California.

Nov. 25, 1955.

Proceeding wherein the Superior Court, Los Angeles County, Otto J. Emme, J., revoked appointment of a child's great aunt as the child's guardian, granted an aunt's petition for appointment as the child's guardian, and denied petitions by the great aunt and the latter's son for appointment as guardian. The great aunt and her son appealed. The District Court of Appeal, Fox, J., held that the vacation of the great aunt's appointment was warranted equally on the ground of misrepresentation and concealment and on the ground of inadvertence and excusable neglect, and that the trial court did not abuse its discretion in appointing a nonresident aunt as guardian.

Affirmed.

1. Guardian and Ward ⇨2

Court appointing guardian retains continuing jurisdiction of the guardianship by virtue of solicitude of the state, as *parens patriae*, for welfare of the ward.

2. Guardian and Ward ⇨13(1,3)

Aunt of minor child was privileged to file petition for her own appointment as guardian though the court had, within four months previously, already appointed a guardian for the child, and the aunt thereby became a party to the proceedings. West's Ann.Code Civ.Proc. § 473.

3. Guardian and Ward ⇨18

Where great aunt of minor child was appointed guardian of the child, and an aunt later filed petition in same court for her own appointment as guardian and then mov-

ed to vacate order appointing great aunt, the motion being based in part on allegations that order was procured by misrepresentation and concealment, aunt was party against whom order was taken within statute authorizing relief from order. West's Ann.Code Civ.Proc. § 473.

4. Guardian and Ward ⇨18

Statute authorizing relief from judgment or order applies to guardianship proceedings. West's Ann.Code Civ.Proc. § 473.

5. Guardian and Ward ⇨18

Where aunt of minor child alleged, in moving seasonably to vacate order appointing great aunt as guardian of the child, that the great aunt in procuring the appointment had misrepresented her relationship to the child and had concealed from the court that the child had an aunt living in the state, court had power to grant the motion and properly did so. West's Ann.Code Civ.Proc. § 473; Probate Code, § 1441.

6. Guardian and Ward ⇨18

Granting of aunt's motion to vacate order appointing great aunt as guardian of child was equivalent of an order making the aunt a party to the guardianship proceeding. West's Ann.Code Civ.Proc. § 473.

7. Judgment ⇨443(1)

Intrinsic fraud perpetrated upon court is well recognized as ground for relief under statute authorizing relief from judgment or order taken by mistake, etc., where motion is made within period of time prescribed. West's Ann.Code Civ.Proc. § 473.

8. Judgment ⇨443(1)

In determining applications for relief under statute authorizing relief from judgment or order taken by mistake, etc., no distinction is to be made between extrinsic or other fraud; and fraud, or its equivalent, whether upon court, or a party, or one so situated as to be held in law an adversary, is sufficient to warrant relief. West's Ann.Code Civ.Proc. § 473.

9. Guardian and Ward ⇨18

Where letters written on behalf of one who had filed petition for her own appointment as guardian gave impression that guardianship was primarily for purpose of

administering estate of child's mother and to minimize expense, and that guardianship could be terminated after mother's estate was closed, and that court could revoke appointment at any time, vacation of order of appointment was warranted on ground of inadvertence and excusable neglect, and court did not abuse its discretion in vacating. West's Ann.Code Civ.Proc. § 473.

10. Guardian and Ward ⇨13(1)

Cardinal consideration governing court in its appointment of a guardian for person and estate of a minor is how to serve most effectively the best interests and temporal, moral and mental welfare of the child. Probate Code, § 1407.

11. Guardian and Ward ⇨13(1)

Wide latitude must be allowed trial judge in exercise of his discretion in appointing guardian, so that he may perform his statutory duty in manner most conducive to permanent well-being of the child. Probate Code, § 1407.

12. Guardian and Ward ⇨10

While place of residence of prospective guardian is not to be ignored, mere fact that he is a nonresident cannot inhibit court from appointing him when circumstances are such as, in court's discretion, make it appear for the best interests of the minor to do so. Probate Code, §§ 420, 1407, 1500, 1580(6), 1606.

13. Guardian and Ward ⇨18

Removal of guardian for any of the reasons specified in applicable statute rests within broad discretion of the court. Probate Code, § 1580.

14. Guardian and Ward ⇨10

Statute providing that guardian of person of a ward may fix residence of ward at any place in state, but not elsewhere without permission of court, inferentially recognizes possibility that nonresident or one proposing to leave state may be appointed guardian, and authorizes probate court to fix residence of minor in place outside the state to which guardian wishes to remove himself. Probate Code, §§ 420, 1500, 1580(6), 1606.

15. Guardian and Ward ⇨13(4)

Under circumstances shown by record on appeal, trial court did not abuse its discretion in appointing nonresident aunt of minor child as the child's guardian. Probate Code, §§ 420, 1407, 1500, 1580(6), 1606.

16. Guardian and Ward ⇨13(8)

Ultimate selection of guardian by trial court, guided by solar star of what is for best interest of the child cannot be disturbed in absence of showing of abuse of discretion. Probate Code, § 1407.

17. Guardian and Ward ⇨13(4)

Such testimony as contents of letters written by child's mother to mother's sister in which mother, later deceased, expressed her wishes concerning placement of her child, was admissible in guardianship proceeding, wherein much latitude was to be allowed in clarifying facts relevant to the child's best interests and welfare.

18. Evidence ⇨183(1), 187

To make admissible oral testimony of contents of a writing, preliminary proof of loss or destruction of the writing is required, and it is committed to trial court's discretion to determine whether evidence so offered is sufficient. West's Ann.Code Civ.Proc. §§ 1855, 1937.

19. Appeal and Error ⇨970(2)

Determination of trial judge that substantial evidence has been introduced to show loss or destruction of a writing as prerequisite to reception of testimony as to its contents will not be disturbed on appeal where no clear abuse of discretion appears.

20. Evidence ⇨183(14)

Where witness testified that, before leaving the Philippine Islands, she had destroyed, because of baggage limitations, all letters she had there received, trial judge in a guardianship proceeding did not abuse his discretion in permitting oral testimony of contents of certain of the letters. West's Ann.Code Civ.Proc. §§ 1855, 1937.

21. Appeal and Error ⇨1058(3)

Where independent evidence from other witnesses to substantially same effect as excluded evidence is placed before trier of

facts, erroneous exclusion of such cumulative or repetitious evidence is ordinarily nonprejudicial.

Hooper, Miller & Astor, Los Angeles, and James B. Ogg, Alhambra, for appellants.

Krag & Sweet, William L. Mock, Donald O. Krag and David T. Sweet, Alhambra, for respondent.

FOX, Justice.

The appellants herein are Mrs. Lula P. Stogsdill and William S. Stogsdill, her son. They appeal from: (1) an order revoking the appointment of Mrs. Stogsdill as guardian of Rebecca Rae Levy, a minor; (2) a judgment granting Marian Arnold's petition for appointment as Rebecca's guardian, and (3) judgments denying their individual petitions for appointment as guardian.

The principal questions for determination are: (1) the propriety of the order vacating Mrs. Stogsdill's appointment as guardian; (2) whether the appointment of Marian Arnold, a nonresident, as guardian was contrary to law and an abuse of discretion, and (3) whether the court erred in rulings on the admissibility of evidence.

Rebecca was born to Raymond and Helen Levy on September 10, 1951. Raymond died on October 6, 1953. Helen Levy died on July 8, 1954, in Alhambra, California. When Helen died, her mother, Mrs. Bertie Miller, and her sister, Mrs. Marian Arnold, were residing in Lafayette, Indiana. Mrs. Arnold, the wife of Lt. Col. Carl Arnold, was in the process of moving to Baltimore, Maryland, where her husband was being transferred on a military assignment. Helen's other sister, Mrs. Edna Gonzales, was living in Los Angeles County. When Helen entered the hospital during her fatal illness, Rebecca was left with Mrs. Stogsdill, Helen's aunt, who also resided in Alhambra. Mrs. Stogsdill's son, William, and his wife, Marlou, helped look after Rebecca in the weeks after Helen's death.

On the day of Helen's death, Mrs. Stogsdill consulted an attorney, James Ogg, with reference to the probate of Helen's estate and the matter of establishing a guardian-

ship for Rebecca. Mr. Ogg thereupon prepared a petition for the appointment of Mrs. Stogsdill as guardian and had it filed the following day, July 9, 1954, the hearing being set for July 27, 1954. Also, on July 9, 1954, Mr. Ogg wrote to Rebecca's grandmother, Mrs. Miller. His letter reads in part:

"Whenever a minor has any estate or property, it is necessary that a guardian be appointed to take care of his person and estate. If Mrs. Stogsdill is appointed Rebecca's guardian, she has prior right to be appointed administratrix of Helen's estate. If she is not appointed Rebecca's guardian, a California public administrator will take over the administration of the estate and two fees will have to be paid, one to the public administrator and one to the county counsel * * *

"It is necessary that your sister [Mrs. Stogsdill] be appointed Rebecca's guardian *in order for her to handle the administration of Helen's estate*, and she will have to post a surety bond equal to the amount of the estate. If you decide that you want to be Rebecca's guardian and adopt her, *the California guardianship proceedings can be terminated after Helen's estate is closed*, and the money on hand forwarded to you upon receipt of a certified copy of Letters of Guardianship from the Clerk of the Court that appoints you guardian. If you should be appointed Rebecca's guardian, you would handle her estate under the jurisdiction and control of the Court that appointed you guardian, and you would have to post a bond for the faithful performance of your duty, as Mrs. Stogsdill will have to post in California." (Emphasis added.)

The letter contained no reference to the fact that Mrs. Stogsdill's guardianship petition had already been drawn and was being filed the same day as the letter was written.

On July 14, 1954, George E. Weigle, an Indiana attorney, replied to Mr. Ogg's letter in behalf of Mrs. Miller. The pertinent part of his letter reads:

"In reply to your questions, Mrs. Miller wishes to advise that it meets with her approval to have Mrs. Lula Stogsdill appointed as administratrix of the estate of Helen Levy, and also *temporary guardian* for Rebecca Rae Levy * * *

"In regard to the possibility of Mrs. Miller adopting Rebecca, *we want to report that Helen Levy requested in writing that her sister, Mrs. Carl Arnold, adopt and raise the child in case of her death*, and she and her husband are willing to do this, if this is to the best interests of the child. * * *

"Lt. Col. Arnold is being relocated in Baltimore, Maryland, and they feel it would be best for them to find housing accommodations in Baltimore before they come to California to get the child which will be approximately September 15 by the time they get moved and settled. * * *" (Emphasis added.)

On July 19, 1954, Mr. Ogg wrote to Mr. Weigle, stating in part:

"We are presenting a petition to the Court to have Mrs. Stogsdill appointed Rebecca's guardian, and as soon as Letters of Guardianship are issued she will apply for Letters of Administration on Rebecca's mother's estate.

"There is no authority in California to appoint a temporary guardian or a guardian for a limited period of time. *However, Letters of Guardianship may be revoked by an order of Court at any time.*"

1. This misstatement enabled Mrs. Stogsdill to procure her appointment without the investigation called for pursuant to section 721 of the Los Angeles County Probate Policy Memoranda, which reads: "A guardian of the person of a minor will not be appointed until a written report has been filed by the probation officer pursuant to Section 1443 of the Probate Code, unless the proposed guardian is a parent, grandparent, brother, sister, aunt, or uncle by blood, of the minor. However, pending the filing of the report, the Court, on a proper showing, will make an order for temporary cus-

Mr. Ogg testified that when he wrote this letter he was aware that a guardian could be removed only for cause.

On July 27, 1954, Mrs. Stogsdill's petition for appointment was granted. Two significant factors should be pointed out in connection with the petition: First, Mrs. Stogsdill described herself therein as Rebecca's aunt, when her true relationship was that of great aunt;¹ second, she declared herself to be Rebecca's only relative residing in California when the fact was that Rebecca's aunt, Mrs. Edna Gonzales, was then resident in Los Angeles County, and, according to Mrs. Gonzales, Mrs. Stogsdill had talked to her just a few days before Helen died.² At the brief ex parte guardianship hearing, Mrs. Stogsdill reaffirmed the truth of the facts erroneously set forth in her petition.

On August 3, 1954, Mr. Weigle wrote Mr. Ogg inquiring when the Arnolds should come and get Rebecca, since they were moving to Baltimore and felt that the sooner they got her the fewer adjustments she would have to experience. Having received no reply, he dispatched another letter on September 8 asking for a response to his letter. Mr. Ogg testified he was absent from his office frequently during the summer of 1954 and fell behind in his correspondence. Mrs. Arnold, disturbed by this silence, wrote Mr. Ogg on September 13 with reference to when she might come for Rebecca and how guardianship might be transferred to her. On September 14, Mr. Ogg's secretary wrote Mr. Weigle, advising him of Mrs. Stogsdill's appointment as guardian. On October 5, 1954, Mr. Ogg

tody of the minor as is authorized by Section 1442 of the Probate Code."

2. This concealment foreclosed any possibility that the court might require notice of the proceedings be given to Mrs. Gonzales under section 1441 of the Probate Code, which reads in part: "Before making the appointment, such notice as the court or a judge thereof deems reasonable must be given to the person having the care of the minor and to such relatives of the minor residing in the state as the court or judge deems proper."

wrote to Mrs. Arnold at her Baltimore residence informing her that Mrs. Stogsdill had been appointed guardian on July 27 and that a court order would be required to have Mrs. Stogsdill removed and Rebecca taken to Maryland. On October 15, 1954, Mr. Ogg wrote to Mrs. Arnold's Maryland counsel that William and Marlou Stogsdill were anxious to adopt Rebecca. Although not disclosed in the letter, William and Marlou had already filed an adoption petition on October 14, 1954.

On November 17, 1954, Mrs. Arnold (hereinafter referred to as respondent) entered the proceedings by filing a petition for appointment of herself as guardian of Rebecca's person and estate. On November 26, 1954, respondent filed a notice of motion to vacate the order appointing Mrs. Stogsdill as guardian upon the grounds, among others, that (1) the appointment was obtained without notice to Edna Gonzales; (2) there were misrepresentations in the petition for appointment; (3) that Mrs. Stogsdill's appointment was contrary to Helen Levy's wishes; (4) that respondent was induced not to seek the guardianship by false representations; (5) that respondent was led to believe no guardianship had been petitioned for by Mrs. Stogsdill, and (6) respondent was led to believe that if a guardianship was sought by and granted to Mrs. Stogsdill it would be of temporary status for the purpose of administering the estate of Helen Levy.

The hearing on respondent's petition for appointment as guardian, and upon the motion to vacate the order appointing Mrs. Stogsdill, was held on January 12, 1955. In the proceedings which followed, the court set aside the appointment of Mrs. Stogsdill on January 14, 1955, "for the purpose of hearing the Petitions for appointment of Guardians [being the petition of Marian and the petition of Lula under which she had previously been appointed]." On January 17, 1955, in the course of the hearings on the respective petitions of respondent and Mrs. Stogsdill, the latter's son, William, filed his own petition for appointment as Rebecca's guardian. On January 19, the petitions of Mrs. Stogsdill and William (hereinafter sometimes denomi-

nated appellants) were denied, while respondent's petition was granted and letters of guardianship were issued to her. On the following day, the court amended its order of January 19, 1955, by ordering appellants to deliver Rebecca forthwith to respondent. On the same day, Mrs. Stogsdill filed a notice of appeal from the order of January 19 revoking her letters of guardianship and appointing respondent and ordering custody of Rebecca to be given to respondent.

On January 24, 1955, upon application by respondent, a writ of habeas corpus was issued commanding appellants and Marlou Stogsdill to bring Rebecca before the court. In view of the pendency of the appeal, the District Court of Appeal issued a writ of prohibition restraining the court from proceeding under the writ of habeas corpus to enforce its order directing the delivery of the child to its new guardian. *Stogsdill v. Superior Court*, 131 Cal.App.2d 78, 280 P.2d 148. On February 4, 1955, the trial judge signed and filed findings of fact, conclusions of law and a judgment in the matters of the three petitions for letters of guardianship and in the matter of the motion to vacate the order of July 27, 1954, appointing Mrs. Stogsdill as guardian. The judgments were in conformity with the minute orders previously described relative to these matters.

On February 28, 1955, appellants filed a supplemental notice of appeal to cover these additional judgments and order.

[1-4] Appellants contend that respondent was not a party against whom any judgment or order was taken within the meaning of section 473 of the Code of Civil Procedure. There is no merit in this contention. As she was privileged to do in a guardianship proceeding, wherein the appointing court retains continuing jurisdiction of the guardianship by virtue of the solicitude of the state, as *parens patriae*, for the welfare of the ward, *In re Guardianship of Reynolds*, 60 Cal.App.2d 669, 673, 141 P.2d 498; 24 Cal.Jur.2d p. 376, sec. 195, respondent filed her own petition for appointment as guardian within four months after Mrs. Stogsdill's appointment and thereby became a party to the proceedings.

A week later, and within the six-months' period prescribed by section 473, she filed her notice of motion to vacate the order appointing Mrs. Stogsdill. Respondent relied not only upon the grounds of her mistake, inadvertence and excusable neglect but also alleged the said order of appointment was procured by affirmative falsification and the concealment of information from the court. Having on file her own petition for appointment as one asserting a superior right to be appointed guardian and one who was consequently injuriously affected by the prior order, respondent was clearly a party against whom the order was taken within the meaning and intent of section 473 as it applies to guardianship proceedings. In re Pozzo's Guardianship, 120 Cal.App. 721, 8 P.2d 217. In the Pozzo case, one Frank Pozzo was appointed guardian of two incompetents on August 17, 1928. On September 18, 1928, Carmen Pozzo (the respondent) filed a petition for appointment as guardian and a notice of motion supported by affidavits to set aside the order appointing Frank. In re Pozzo's Guardianship, 104 Cal.App. 11, 12, 285 P. 330. On January 22, 1929, she filed a new notice of motion under section 473 to set aside the order appointing Frank. Out of this basic situation, which corresponds to the procedure in the case at bar, various proceedings were had in connection with orders made by the trial court setting aside Frank's appointment. At all times, respondent's original petition seeking her appointment remained on file. As in the case at bar, Frank contended that respondent "was not a party to the proceeding in which he was appointed guardian so as to be entitled to move under Code of Civil Procedure, § 473, to have the order appointing him set aside." In answering this contention, the court stated " * * * we do not hesitate to decide that one who opposes the appointment of another as a guardian and seeks the appointment for herself, as respondent did in this case, is an adverse party entitled to seek relief under Code of Civil Procedure § 473." 120 Cal.App. at page 726, 8 P.2d at page 219. That declares the rule here applicable.

[5-8] But exploring the subject somewhat further, it is pertinent to point out that respondent's motion was made on much broader grounds than those stated in section 473. Her notice specified not only inadvertence and excusable neglect, but that the judgment was fraudulent in that Mrs. Stogsdill misrepresented her relationship to the minor and failed to reveal that the minor's aunt, Edna Gonzales, resided in California. Under such circumstances, the court properly entertained respondent's motion, "and the granting thereof was the equivalent of an order making * * * [her] a party to said action." Nuckolls v. Bank of California, 10 Cal.2d 266, 273, 74 P.2d 264, 268, 114 A.L.R. 708. Intrinsic fraud perpetrated upon the court is well recognized as a ground for relief under section 473 where, as here, the motion is made within the period of time prescribed by that section. Rice v. Rice, 93 Cal.App.2d 646, 651, 209 P.2d 662; Security-First Nat. Bank of Los Angeles v. Hauer, 47 Cal.App. 2d 302, 307, 117 P.2d 952; Tomb v. Tomb, 120 Cal.App. 438, 441, 7 P.2d 1104; In re Johnson, 7 Cal.App. 436, 439, 94 P. 592, 594. As remarked in the case last cited: "In applications for relief under section 473 of the Code of Civil Procedure, made within a reasonable time, no distinction is to be made between extrinsic or other fraud. Fraud, or its equivalent, whether upon the court, or a party, or one so situated as to be held in law an adversary, is sufficient to warrant relief." (Emphasis added.) In the case *sub judice*, the court was clearly imposed upon by Mrs. Stogsdill both in her petition and in her testimony at the ex parte application. Good faith on her part required that she inform the court that she was not, as she represented, Rebecca's aunt, but her great aunt. Fairness to the court also required that she set out that Mrs. Gonzales, an aunt of the minor, resided in Los Angeles County so that the court might decide whether notice to her of the proceedings was desirable, Prob.Code, sec. 1441. When respondent's motion suggested to the court that the proceeding resulting in its prior order was tainted with this type of irregularity, and when its investigation into the integrity of its rec-

ords revealed that it had been imposed upon, it had the power under the circumstances to grant respondent's motion and set aside the order appointing Mrs. Stogsdill as guardian. Such control by the court over its proceedings is especially vital in a guardianship proceeding, since the guardian acts as an arm or officer of the court. In re Guardianship of Reynolds, 60 Cal.App.2d 669, 674, 141 P.2d 498; 24 Cal.Jur.2d sec. 11, p. 206, and it would be especially unfortunate if it could not strike down such an appointment procured through misrepresentation and concealment of material facts. From the foregoing, it is clear that the court properly invoked its power under section 473 to set aside the order appointing Mrs. Stogsdill as one procured under circumstances equivalent to a fraud upon the court.

[9] There was equal reason to set it aside upon respondent's motion made on the grounds that it was taken as a result of her inadvertence and excusable neglect. In the correspondence passing between the parties the impression was created that Mrs. Stogsdill's guardianship was primarily for the purpose of administering the estate of Helen Levy and keeping the expense thereof at a minimum, and that it could be "terminated after Helen's estate is closed;" that the appointment could be revoked by the court "at any time." The letters written on behalf of Mrs. Stogsdill were equivocal and failed to reveal the fact that even while permission was being sought by Mrs. Stogsdill to become guardian she had in fact already filed her petition and a hearing date had been set. Her counsel also assured Mr. Weigle that letters of guardianship could be revoked by the court at any time, but he failed to mention that a guardian could only be removed for statutory cause. The trial court could reasonably draw the inference that the whole tenor of the correspondence showed a design to throw the eastern relatives off guard as to Mrs. Stogsdill's underlying purpose in procuring a permanent guardianship over Rebecca and to present them with a *fait accompli* which would defeat respondent's avowed intention either to adopt Rebecca or become her guardian.

There was thus also substantial reason, based on respondent's inadvertence and excusable neglect, for setting aside the *ex parte* order and proceeding with a hearing on the merits. In view of the multifarious authorities stressing the remedial nature of section 473 and that the power under that section should be liberally invoked to dispose of cases on their merits, we cannot say the court abused the dictates of sound discretion in setting aside Mrs. Stogsdill's appointment. Proulx v. De Moti, 106 Cal. App.2d 265, 269, 234 P.2d 1009; Nuckolls v. Bank of California, 10 Cal.2d 266, 273, 74 P.2d 264, 114 A.L.R. 708.

Appellants contend that the appointment of a nonresident as guardian of the person and estate of a minor is contrary to California law. This argument is clearly untenable. Appellants concede that there is no statutory requirement that the guardian be a resident of this state but argue that "there are other pertinent provisions of the Probate Code which appear to show what the law of this state would be were the question presented, as is the case in this instance." They rely on section 420 of the Probate Code which requires that administrators of estates be bona fide residents of this state and section 1606 of the Probate Code which states: "When not otherwise specially prescribed in this division, *practice and procedure* and the *making and entry of orders* under this division shall be governed by the provisions of Division III of this code, so far as they are applicable." (Emphasis added.) An attempt upon the same grounds to defeat the appointment of a nonresident guardian of the estate of an incompetent person by applying the substantive statutory law relating to administrators was made in the case of In re Guardianship of Boutz' Estate, 24 Cal.App.2d 644, 646, at page 648, 76 P.2d 154, at page 157, where the court states: "By virtue of section 1606 of the Probate Code appellant also attempts to read into the provisions of the Probate Code, referring to the guardianship of insane persons, the provisions of the Code relative to the appointment of * * * administrators, but such section cannot be

applied here, as that section applies to matters of procedure only."

[10-12] The Boutz case rests upon wholesome principles. Had the Legislature decided to exclude nonresidents from securing appointments as guardians of a minor, it would have specifically so stated as was done in the case of administrators. But it did not do so for very cogent and compelling reasons, because of the crucial distinction between the duties and functions of an administrator and a guardian. An administrator is interested primarily in winding up the estate of an intestate. The cardinal consideration governing the court in its appointment of a guardian for the person and estate of a minor is how to serve most effectively the best interests and temporal, moral, and mental welfare of the child. In *re* Guardianship of Aviles, Cal.App., 284 P.2d 176; In *re* Guardianship of Walsh's Estate, 100 Cal.App.2d 194, 196, 223 P.2d 322, 22 A.L.R.2d 689. A wide latitude must be allowed the trial judge in the exercise of the discretion vested in him, so that he may perform his statutory duty in a manner most conducive to the permanent well-being of the child. It may sometimes be for the best interests of the child that a nonresident should be appointed, either as one most closely related to it, or as one highly qualified to act and nominated by the deceased parents, or as one best able to educate and support the child, or for any other significant advantage that might accrue to the child. For such reasons the Legislature has seen fit not to interpose any statutory abridgment of the court's power to designate a nonresident as guardian if such appointment would promote the welfare and best interests of the child. In *re* Guardianship of Boutz' Estate, supra, 24 Cal.App.2d at page 647, 76 P.2d at page 157, in summarizing the authorities, the court pointed out that while in many instances a resident guardian might be preferred as a matter of policy, yet "in the absence of a specific statutory bar, the courts of this state have the power to appoint a nonresident guardian * * *." This is a salutary rule. While the place of residence of the pro-

spective guardian is not to be ignored, the mere fact that he is a nonresident cannot inhibit the court from appointing him when the circumstances are such as, in the court's discretion, make it appear for the best interests of the minor to do so.

[13, 14] Appellants also argue that since section 1580(6) of the Probate Code enables the court to remove a guardian "for removal from the state", there is the suggestion of a statutory intent that only a resident should be appointed. The removal of a guardian for any of the reasons specified in Probate Code section 1580 rests within the broad discretion of the court. In *re* Estate of Howard, Cal.App., 284 P.2d 966; In *re* Guardianship of Riley, 72 Cal.App.2d 742, 747, 165 P.2d 555; In *re* Guardianship of Boutz, supra, the court observed that the mere fact that a guardian might be subject to removal if he departed from the state did not militate against the appointment of a nonresident guardian. The reason, of course, is clear since the court itself is authorized to allow the guardian and his ward to take up residence outside the state. Prob.Code, sec. 1500; *Ricci v. Superior Court*, 107 Cal. App. 395, 290 P. 517. The last sentence of section 1500 reads: "The guardian of the person of a ward may fix the residence of the ward at any place in the state, but not elsewhere without the permission of the court." This section not only inferentially recognizes the possibility that a nonresident or one proposing to leave the state may be appointed guardian, but authorizes the probate court to make an order fixing the residence of the minor in the place outside the state to which the guardian wishes to remove himself. *Ricci v. Superior Court*, supra, 107 Cal.App. at page 398, 290 P. 517.

[15, 16] Appellants contend that it was an abuse of discretion to appoint a nonresident in the absence of any clear and strong reason therefor. We do not agree. Respondent was Rebecca's maternal aunt, while Mrs. Stogsdill was a great aunt and William Stogsdill a cousin. While the evidence was conflicting as to whom the deceased mother preferred, Mrs. Gonzales

testified that Helen Levy told her in December, 1953, that "If anything happens to me I want Marian and Carl to have my baby." About a month before her death, Mrs. Gonzales testified her sister again said: "Marian and Carl will take my baby if anything happens to me, Edna." Respondent testified her sister had written to her to the same effect. Probate Code section 1407 provides: "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows: (1) To a parent; (2) To one who was indicated by the wishes of a deceased parent; * * * (4) To a relative * * *." Respondent being more closely related by consanguinity, there being evidence that her deceased sister expressed a desire that she have the child, and other evidence showing that respondent was a fit and responsible person, maintained a good home, and had a daughter about three years older than Rebecca, we cannot say that there were no compelling reasons for the appointment of respondent in preference to appellants or that it was an abuse of discretion to do so. While appellants are unquestionably also estimable people, the ultimate selection of the trial court, guided by the polar star of what is for the best interest of the child, cannot be disturbed in the absence of a showing of abuse of discretion. In re Guardianship of Walsh's Estate, 100 Cal.App.2d 194, 196, 223 P.2d 322, 22 A.L.R.2d 689; In re Guardianship of Sharp, 41 Cal.App.2d 79, 84-85, 106 P.2d 244. To fetter the court's discretion by virtue of geography alone would frequently doom rather than advance the welfare of the child.

[17-20] Appellants complain that over their objections the court permitted the introduction of oral testimony regarding the contents of letters written by Helen Levy to respondent in which the deceased mother expressed her wishes concerning the placement of her child. Such testimony is admissible in a guardianship proceeding wherein much latitude must be allowed in clarifying facts relevant to the child's best interests and welfare. Appellants contend there was no proper founda-

tion to permit oral evidence of the contents of the letters. Sections 1855 and 1937 of the Code of Civil Procedure permit such evidence of the contents of a writing when the original has been lost or destroyed. Preliminary proof of the loss or destruction is required and it is committed to the trial court's discretion to determine whether the evidence so offered is or is not sufficient. *Kenniff v. Caulfield*, 140 Cal. 34, 41, 73 P. 803; *White v. White*, 39 Cal.App.2d 57, 60, 102 P.2d 432. Respondent testified that the letters in question were received by her while she was in the Philippine Islands, where her husband was on military duty. She destroyed all letters she had received, including those from her sister, preparatory to returning to the United States because of baggage limitations. The court stated it was satisfied with her explanation of the destruction of the letters. The rule is well established that the determination of the trial judge that substantial evidence has been introduced to show the loss or destruction of a writing as a prelude to the reception of testimony as to its contents will not be disturbed on appeal where no clear abuse of discretion appears. *Hausen v. Goldman*, 124 Cal.App.2d 25, 30, 267 P.2d 852; *White v. White*, supra; *Kenniff v. Caulfield*, supra; *Cotton v. Hudson*, 42 Cal.App.2d 812, 814, 815, 110 P.2d 70. The record fails to show an abuse of discretion.

[21] Appellants contend it was error to exclude evidence concerning the character of derogatory remarks allegedly made by Bertie Miller concerning Raymond Levy, Rebecca's father, since Mrs. Miller was living in respondent's home. It is asserted Mrs. Miller was biased against Mr. Levy because of his religion. The complaint is also made that certain evidence of friction between Mrs. Miller and Mr. Levy was excluded. However, Mrs. Miller was not a party to this proceeding and her attitude toward the child's deceased father did not bear significantly on the issues in the case. It is not contended that respondent entertained religious prejudice that would adversely affect her capacity to serve as guardian. Fur-

thermore, the court did receive evidence from both Mrs. Stogsdill and her husband bearing on Mrs. Miller's purported bias and also that there was friction between Mrs. Miller and Mr. Levy. Other witnesses, such as Mrs. Phelan, Catherine Ryan and Emma Miller also testified to friction between the Levys and Mrs. Miller and respondent. It is thus clear that the evidence excluded was merely cumulative. Where independent evidence from other witnesses to substantially the same effect as the excluded evidence is placed before the trier of facts, the erroneous exclusion of such cumulative or repetitious evidence is ordinarily nonprejudicial. *Ash v. Soo Sing Lung*, 177 Cal. 356, 360, 170 P. 843; *Battle v. Niece*, 43 Cal.App.2d 655, 659, 111 P.2d 455; *Fuller v. Vista Del Arroyo Hotel*, 42 Cal.App.2d 400, 405, 108 P.2d 920; *Vuilleumier v. Kelley*, 117 Cal. App. 723, 731, 4 P.2d 557. This is such a case.

The judgments and order are affirmed.

McCOMB, Acting P. J., concurs.

ASHBURN, Justice pro tem., concurs in the judgment.



137 Cal.App.2d 486

Harriet JONES, Administratrix of the Estate of Herbert Paul Jones, Deceased,
Plaintiff and Appellant,
v.

Grace Mae GILLAND, and Osnia O. Gilland,
Defendants and Respondents.
Civ. Nos. 5203, 5209.

District Court of Appeal, Fourth District,
California.

Dec. 2, 1955.

Hearing Denied Jan. 25, 1956.

Action by pedestrian's widow, who was appointed administratrix and substituted as plaintiff in personal injury action, for injuries sustained by pedestrian when struck

by defendants' automobile while crossing street and for pedestrian's wrongful death allegedly caused by such injuries. The Superior Court, San Bernardino County, Carl B. Hilliard, J., entered judgment upon verdict for defendants, and widow appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to require giving of instruction on last clear chance doctrine.

Judgment reversed.

1. Negligence ⇨83.1

Applicability of doctrine of last clear chance must usually depend upon facts of each particular case.

2. Appeal and Error ⇨928(1)

In determining whether last clear chance doctrine was applicable, reviewing court must view evidence in light most favorable to its application and indulge in every reasonable inference in support thereof.

3. Negligence ⇨138(4)

Instruction on last clear chance doctrine should be given where there is any evidence which would reasonably support recovery on such theory.

4. Negligence ⇨83.8

Where act creating peril and accident occurred practically simultaneously, neither party can be fairly said to have had a last clear chance to avoid the accident

5. Automobiles ⇨227(3)

Where motorist collides with pedestrian or stalled automobile, question whether motorist had last clear chance to avoid accident does not depend entirely upon whether, in exercise of reasonable care, he should have been able to stop in time but may involve the opportunity to give warning or possibility of turning or swerving his automobile in time.

6. Automobiles ⇨246(58)

In action by pedestrian's widow, who was substituted as plaintiff in personal injury action, for injuries sustained when pedestrian was struck while crossing street in evening and for pedestrian's wrongful death on ground that injuries were proximate cause of pedestrian's death more than

a year later, evidence was sufficient to require giving of instruction on last clear chance doctrine.

7. Automobiles ⇨243(17)

Trial ⇨127

In action by pedestrian's widow, who was substituted as plaintiff in personal injury action, for injuries sustained when pedestrian was struck by defendant's automobile and for pedestrian's wrongful death allegedly due to the accident, ends of justice would best be served by refusing to allow jury to hear or see evidence pertaining to pedestrian's use of alcohol and insurance.

Robert V. Fullerton, Robert S. Morris, San Bernardino, for appellant.

Wilson & Wilson, San Bernardino, for respondent.

BARNARD, Presiding Justice.

On August 1, 1952, while crossing a street in San Bernardino, the deceased was struck by an automobile owned by the defendants and driven by the defendant wife. He filed an action for damages on July 16, 1953, and died on October 22, 1953. His widow was appointed administratrix of his estate and substituted as plaintiff. She filed an amended complaint and also filed a wrongful death action, asserting that the injuries sustained in the accident were a proximate cause of Jones' death. The two actions were consolidated for trial and on this appeal. A jury returned a verdict in favor of the defendants as to each cause of action, and the plaintiff has appealed from the judgment.

The accident happened near the intersection of Mt. Vernon Avenue with Thirteenth Street. Mt. Vernon Avenue runs north and south and has four marked traffic lanes with a double white center line. Thirteenth Street, running east and west, comes into Mt. Vernon Avenue at two points 60 feet apart. One part of Thirteenth Street runs east from Mt. Vernon Avenue, and 60 feet south of there the other part runs west. There was no marked cross-walk at either place. The accident happened about 9:00 p. m. when the deceased was attempt-

ing to cross Mt. Vernon Avenue at a point about midway between where Thirteenth Street comes in from the east and where it goes on to the west. The deceased was struck while he was in the westerly of the north-bound traffic lanes, and about five feet east of the double white line.

A traffic officer testified that the point of impact was 30 feet south of the south curb of Thirteenth Street as it came in from the east; that the defendants' car came to rest with its front end 24 feet south of that curb line; that the car was four feet east of the center line of Mt. Vernon Avenue; that the car had gone six feet beyond the point of impact; that the car left "tire marks" running 51 feet back of its front wheels; that these tire marks ran in a straight line; that the deceased lay nine feet ahead of the car and across the center line; that this was a 25-mile zone; and that the traffic on Mt. Vernon was very heavy.

A witness, who lived on the west side of Mt. Vernon and just south of where Thirteenth Street leads to the west, testified that from her front porch she saw Jones walk south on the east sidewalk of Mt. Vernon Avenue, across the northerly portion of Thirteenth Street, and to a point about 30 feet south of that portion of Thirteenth Street; that he then walked westerly across the easterly half of Mt. Vernon Avenue to a point near the white center line of that street; that he stopped there and waited for the steadily flowing south-bound traffic to clear; that she saw him standing at that position for about 20 to 30 seconds watching the south-bound traffic; and that she then saw him being struck by the defendant's north-bound car.

Mrs. Gilland testified that she was traveling north on Mt. Vernon Avenue in the lane next to the center line, at a speed of about 25 miles per hour; that she had her eyes on the road and could see ahead for a couple hundred feet or so, but the lights on the south-bound cars bothered her; that there were cars on her right going north, but she could not remember just where they were; that as she proceeded she saw a pedestrian in front of her car; that "It seemed like he fell out of the sky"; that

"He was very close because I hit him almost instantaneously"; that as soon as she saw him she took her foot off the accelerator and slammed on the brakes; and that she did not turn her car in either direction or honk her horn. There was also evidence that Jones was struck by defendant's car at a point just inside the left front fender; that he was wearing a white T-shirt; and that there were some artificial lights around this area.

Appellant's main contention is that the court erred in that it refused to give a requested instruction on the last clear chance theory, on the ground that it was "not applicable." It is argued that it could be inferred from the evidence that Jones stood in a position of danger near the white center line for some 30 seconds before he was struck; that he was watching traffic approaching from the north and was oblivious to his peril; that he was standing in an artificially lighted intersection wearing a white T-shirt against a background of dark pavement; that Mrs. Gilland had actual knowledge of his perilous situation while the car traveled 45 feet, plus the time it would take her to act in removing her foot from the gas pedal and applying her brake; that swerving her car a foot or two to the right would have avoided the accident; and that she had a last clear chance to avoid the collision by swerving her car, or by sounding a warning with her horn and thus giving Jones an opportunity to step forward toward the center line. The respondents argue that in order to make the last clear chance doctrine applicable there must be substantial evidence of all of its elements, including actual knowledge of the perilous situation of the other party and his inability to escape, a clear opportunity after acquiring such knowledge to avoid the accident by exercising ordinary care, and a failure to make use of that opportunity; that none of these elements may be established by mere conjecture or speculation; that a mere possibility of avoiding an accident is not enough; that it must affirmatively appear that a defendant not only had a last chance but a clear chance to avoid the accident by the exercise of ordinary care; that one suddenly confronted with a perilous sit-

uation is not required to use the same judgment or skill which is required of him in calmer moments; that there was no substantial evidence here which would have justified the giving of a last clear chance instruction; and that to have given such an instruction would only have had the effect of inviting the jury to use speculation and conjecture.

[1-5] The requisite elements of the last clear chance doctrine are well settled and are not here questioned. The applicability of the doctrine must usually depend upon the facts of each particular case. In determining whether or not the doctrine is applicable, a reviewing court must view the evidence in the light most favorable to its application and indulge every reasonable inference in support thereof. *Daniels v. City and County of San Francisco*, 40 Cal.2d 614, 255 P.2d 785. An instruction on last clear chance should be given where there is any evidence which would reasonably support a recovery on that theory. *Bonebrake v. McCormick*, 35 Cal.2d 16, 215 P.2d 728. Where the act creating the peril and the accident occurred practically simultaneously, neither party can be fairly said to have had a last clear chance to avoid the accident. *Poncino v. Reid-Murdock & Co.*, 136 Cal.App. 223, 28 P.2d 932. It has been held that the doctrine should not be applied in the ordinary case involving a collision between two automobiles, in the absence of exceptional circumstances. *Rodabaugh v. Tekus*, 39 Cal.2d 290, 246 P.2d 663. Even in such a case the existence of facts indicating that the defendant, after seeing the danger, had sufficient time to swerve his vehicle in time to avoid the accident were held sufficient to justify the application of the doctrine. *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.2d 915. A number of cases recognize that a somewhat different situation may well exist where an automobile collides with a pedestrian or a stalled car. In such a case, while the time and space elements are also limited, the exercise of ordinary care may afford the driver a clear chance to avert the collision. Whether a driver had such a chance does not depend entirely on whether, in the exercise of reasonable care, he should have been able to stop in time, but it may

involve the opportunity to give a warning or the possibility of turning or swerving the car in time. Whether the evidence was sufficient to justify an inference that such a driver, by exercising ordinary care, had a clear chance to avoid the accident by turning or swerving his car to one side has in a number of cases been held to be a question for the jury, under facts and circumstances which were somewhat similar in effect to those disclosed by the record here. *Center v. Yellow Cab Co.*, 216 Cal. 205, 13 P.2d 918; *Selinsky v. Olsen*, 38 Cal.2d 102, 237 P.2d 645; *Lebkicher v. Crosby*, 123 Cal.App.2d 631, 267 P.2d 361; *Bailey v. Wilson*, 16 Cal.App.2d 645, 61 P.2d 68.

[6] There was ample evidence that Jones was negligent, and some evidence that he was looking the other way and was unaware of the approach of the respondents' car. There was evidence that after Mrs. Gilland saw him, and before he was struck, her car traveled 45 feet plus the distance it traveled before she changed her foot from one pedal to another and applied the brake; and that she neither sounded her horn nor swerved her car to the right. The evidence indicates that a swerve of only a couple of feet would have been sufficient. It could be inferred from the evidence that after seeing him in this dangerous situation she had a clear chance, in the exercise of ordinary care, to avoid hitting him by swerving her car slightly, or perhaps by sounding her horn to warn him of his danger. Under the evidence and the inferences which could reasonably be drawn therefrom, a factual question was presented on which the jury could have decided either way. It follows that it was prejudicial error to refuse to instruct the jury with respect to that doctrine.

[7] It is unnecessary to consider at length the appellant's further contention that the court erred in denying her motion to strike or "mask" certain hearsay statements, attributed to the decedent's wife, which appeared in a hospital record which was admitted in evidence. The statements in question were to the effect that the deceased's use of alcohol was "moderate to excess", and that at the time of the acci-

dent he "was walking home having had several drinks in tavern." The court denied appellant's motion to prevent these statements being shown to the jury, but granted a similar motion made by the respondents to eliminate another statement in the hospital record relating to the matter of insurance. There was other evidence relating to the deceased's condition, with respect to liquor, at the time of the accident. While it would seem that the statements in question would not have any great bearing on the ultimate result, the ends of justice would be best served by not allowing the jury to hear or see them.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.



137 Cal.App.2d 361

Stamateo KAZANTENO, also known as Sam Kazanteno, Plaintiff and Respondent,

v.

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, a corporation, Defendant and Appellant.

Civ. 20897.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 30, 1955.

Action by insured against insurer to establish insured's right, under accident policy, to \$300 per month disability payments. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered judgment in favor of insured, and insurer appealed. The District Court of Appeal, Ashburn, J. pro tem., held that evidence was sufficient to establish that agent had ostensible authority to assert that signing of form, which provided that changed or added insurance should not be in effect unless new policy or supplemental agreement was re-

ceived by insured during his lifetime and good health, was mere formality.

Judgment affirmed.

1. Appeal and Error ⇨931(1)

Where appellant challenges sufficiency of the evidence, the District Court of Appeal must accept as established all facts and inferences which are favorable to respondent and which find substantial support in the evidence.

2. Appeal and Error ⇨1010(1)

Where appellant urges insufficiency of evidence to sustain findings, such contention requires demonstration that there is no substantial evidence to support the challenged findings.

3. Insurance ⇨131(1)

Oral contracts for insurance are valid.

4. Appeal and Error ⇨1010(1)

Rule that proof of oral agreements for insurance must be clear and convincing is one for governance of the trial court, not appellate tribunals.

5. Insurance ⇨665(2)

In action by insured against insurer to establish insured's right, under accident policy, to \$300 per month disability payments, evidence was sufficient to establish making of oral agreement for insurance.

6. Insurance ⇨175

Where valid parol contract of insurance has been entered into, policy to be issued thereon is simply the memorial of the prior parol contract, and, even though the policy be not delivered until after the loss occurs, the insurance is deemed effective from the time agreed upon in the parol agreement, irrespective of any delivery of the policy.

7. Insurance ⇨131(3), 175

If agent, who is authorized to accept risks, accepts a risk by parol and promises to deliver the policy, insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, and such contract in parol is then superseded by the policy.

8. Insurance ⇨138(1)

Ordinarily, it is presumed that persons are familiar with terms of written contracts to which they are parties, and, in absence of fraud, they are justly bound by provisions therein, but such rule should not be strictly applied to insurance policies.

9. Principal and Agent ⇨101(1)

Rule, which is applicable to waivers attempted at time of making of contract, does not apply to subsequent waivers made by agents who have actual or ostensible authority.

10. Insurance ⇨92

In action by insured against insurer to establish insured's right, under accident policy, to \$300 per month disability payments agreed upon in oral agreement with insurer's agent, evidence was not sufficient to establish that insured was charged with knowledge of policy terms in such manner that he was precluded from relying upon ostensible authority of agent to make the oral contract. Civ.Code, §§ 2300, 2317.

11. Insurance ⇨175

Provision in application for change in policy, that changed or added insurance requested should not be in effect unless and until new policy or supplemental agreement was delivered to and received by insured during his lifetime and good health related to change in an existing policy; not necessary to issuance of a new one.

12. Insurance ⇨92

In action by insured against insurer to establish insured's right, under accident policy, to \$300 per month disability payments in accordance with oral agreement between insured and insurer's agent, evidence was sufficient to establish that agent had ostensible authority to assert that signing of form, which provided that changed or added insurance should not be in effect unless new policy or supplemental agreement was received by insured during his lifetime and good health, was mere formality.

13. Actions ⇨65

Court of Equity will make final disposition which is governed by circumstances

shown to exist at time decree is made, rather than at time of inception of the litigation, and a supplemental pleading is not necessary to such end.

14. Judgment ⇨13

In law action it is proper to render judgment for all installments of debt which have matured at time of judgment if there is not any plea in abatement based on prematurity of the action as to unaccrued installments.

15. Insurance ⇨666

Where, in action by insured against insurer to establish insured's right to certain monthly payments under accident policy, accident occurred on August 25, 1952, action was filed on October 6, 1953, trial ended July 20, 1954, and judgment was filed on October 5, 1954, inclusion in judgment of installments due at time of rendition of judgment was proper, even though insured, who had filed an amended complaint on June 23, 1954, had not filed a supplemental complaint.

Frank M. Benedict, Los Angeles, and J. S. Heston, for appellant.

Sydney Tannen, Beverly Hills, and Wright, Wright, Green & Wright, Loyd Wright, Dudley K. Wright, Edgar R. Carver, Jr., Los Angeles, for respondent.

ASHBURN, Justice pro tem.

[1,2] Plaintiff Stamateo Kazanteno sued herein to establish his right to receive from defendant California-Western States Life Insurance Company, disability payments at the rate of \$300 a month under certain accident insurance. He relied upon an oral agreement which the court found to be established, rendering judgment in his favor. Defendant appeals, urging two major propositions: (1) That the agent, William Economidis, who was found to have made the oral agreement, had no actual or ostensible authority so to do, and (2) that the evidence is insufficient to support the finding that such agreement was made. As each of these contentions is a challenge to the sufficiency of the evidence, this court must accept as established all

facts and all inferences favorable to respondent which find substantial support in the evidence. "And where appellant urges the insufficiency of the evidence to sustain the findings * * * the rule is that, 'Such contention *requires defendants to demonstrate* that there is no substantial evidence to support the challenged findings.' Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. (Emphasis added.) It is said in Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, that: 'It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" Hartzell v. Myall, 115 Cal.App.2d 670, 673, 252 P.2d 676, 677. The following statement of facts is molded accordingly.

On July 18, 1946, defendant insurance company issued to plaintiff a \$10,000 life insurance policy (No. 564765) and two "Good Will Builder" policies, one an accident monthly income policy, and the other a health income policy. Each bore the same number as the life policy, 564765. Counsel refer to them as "rider" policies. The monthly payments were to be \$200 under each income policy. In 1949 the company demanded return of the accident policy for the purpose of reducing the agreed payments to \$100 a month and reclassifying plaintiff as a C risk, rather than A. These things were done. In August, 1951, plaintiff permitted the life policy to lapse and conversations began shortly looking to reinstatement of the policy and increase of the accident benefits from \$100 to \$300 per month. The immediate participants were the plaintiff and William Economidis, who concededly was a company agent. The conversations also included a proposal for plaintiff to take out a policy upon his son's life, with himself as beneficiary. Plaintiff refused to reinstate the

existing policy or to buy one on his son's life unless the benefits on the two "Good Will Builder" policies were increased to \$300 a month. Of course, the agent was interested. He testified: "I always keep after him." The home office of the company (which was in Sacramento) had expressed its approval of the increase in August, 1951. The vice president had written the Hawaiian agent (plaintiff was a resident of Honolulu) on August 21, 1951, that: "Subject to evidence of insurability satisfactory to the Company, we will now be prepared to consider increasing the Accident Income for Life and Health Income Benefits to \$300.00 each. We will need the enclosed Form 10 and Non-Medical properly completed and returned to the Home Office together with the old Good Will Builder Policies * * *." A copy was sent to Economidis, who in turn forwarded a copy to plaintiff, saying, with reference to the proposed increase of payments under the accident and health policies, "I would be more than glad to take care of this matter for you from here when you come back to Los Angeles again. I think I can give you something better." On September 24, 1951, the vice president of the company sent a memorandum to the Hawaiian agency referring to the lapse of the life policy and saying: "We will, however, be prepared to consider reinstatement and increasing the Accident Income for Life and Health Income Policies to \$300.00 a month each provided we receive a completed reinstatement Form 75 and a payment of \$751.54 by October 18, 1951. For your convenience in discussing this case with Mr. Kazanteno, we have prepared the following figures: * * *." Copy of this communication was likewise sent to Mr. Economidis and its text shows that the letter was intended for discussion with plaintiff. The matter finally crystallized on June 25, 1952, after plaintiff had returned to Los Angeles from Hawaii. He told Economidis that he was ready to effect the \$200 increase in the accident and health benefits and the agent said it would be necessary to reinstate the life policy No. 564765 and pass a physical examination. Plaintiff said that unless he got the \$200

a month increase he would not buy a policy on his son's life or reinstate his own life policy No. 564765, but would look elsewhere for his insurance. Economidis assured him that "if you have it in writing you will get it" and also that "I did have it in writing, he did write to me that he was going to get it for me, the company approved." Plaintiff understood this language to refer to the letters of August 21 and September 24, 1951 from the home office, and Economidis himself testified to the same effect; also, that he told Kazanteno that the letter was sufficient to be binding when he paid the premiums (amounting to \$620.70). The letter of August 21, 1951, said that the company would require "the enclosed Form 10 and Non-Medical properly completed." Form 10 is a request for change in policy, but Economidis told plaintiff that Form 10 was no good because he had to pass a medical examination, being over 49 years of age; so on June 25, 1952 he had plaintiff sign an application for reinstatement of life policy No. 564765, using for that purpose company's Form 75. Plaintiff also had in force another life policy, No. 564934, and a policy loan agreement was executed by him in order to effect a loan upon that policy in the sum of \$1,281.33 to provide the funds for the pending deal. At the same time he made an application for a policy upon his son's life, which carried a premium of \$372.50. Economidis, of his own volition, required the medical examination; it was had, probably on June 24th; it must have been successful or the policy on the son would not have been written as it was on July 16, 1952. Economidis said he would have plaintiff sign a Form 10, to keep it in case the company should inquire for it. He told plaintiff he wanted his check for \$120 to cover additional premium for changing his classification, and that plaintiff should have it in before August 18; also, that he had plenty of reserve and his policy would automatically cover the \$200 increase. The signing of Form 10 occurred a day or two after June 25. Kazanteno was leaving hurriedly for Honolulu because of a strike in Hawaii and Economidis sent the form to his hotel

for signature. Plaintiff there signed it in blank and the agent later picked it up at the hotel, dated and signed it and held it until October 6, when he forwarded it to the home office.¹

Before signing the various documents plaintiff said to the agent that if he did not get his increase in accident and health benefits he would not want the insurance, and Economidis said that the minute the 65 (meaning life policy No. 564765) was reinstated, the increase would go with it. Plaintiff was leaving for Honolulu and testified: "He told me as soon as they know the doctor's findings that he would notify me, that is all I had to do." Also, "I said, 'Is there anything else you want with me?' He said, 'No, everything is all right, as soon as we hear from the doctor, he is the main thing, if he passes you everything is all right, and if the doctor don't pass you there is nothing I can do.'" Economidis testified that he told plaintiff the increase would be effective at the time he paid the premium for the basic policy. Plaintiff believed these statements and relied upon them. On July 31, 1952, Economidis sent plaintiff a copy of a letter of July 30 from the manager of the premium collection department to himself, saying: "Our records show that Policy No. 564765 was reinstated July 10, 1952, and premiums and loan interest paid to July 18, 1952." Having made a package deal whereby reinstatement of the life policy was conditioned upon increase in the benefits of the accident and health policies, plaintiff was justified in believing that the increase had likewise been effectuated. At that time he had received no new policy, his old ones were in the hands of the company.

On August 25, 1952, while supervising the harvesting of pineapples, plaintiff suffered an accident which caused hospitalization for 60 days or more, and caused total disability which continued to the time of trial.

Economidis, the agent, had advised the company, through the Los Angeles office, of Kazanteno's desire for the \$200 increase, and on June 25th he forwarded the life policy to the home office for reinstatement, which was actually effected on July 2nd. On July 7th the company sent plaintiff notice of reinstatement with premiums paid to July 18, 1952; also, notice of premium due on July 18, 1952. The premium thus billed on the reinstated life policy, No. 564765, \$620.70, included the two Good Will policies for the period of July, 1951 to July, 1952. The \$120 was to cover increase in benefits on the Good Will policies. Under date of August 14, 1952, plaintiff forwarded four checks in the amounts of \$620.70, \$535.70, \$372.50 and \$120. The two first mentioned were received in the Los Angeles office by August 15th and were cashed by the company on August 25, 1952. They covered the premiums on the two life policies, Nos. 564765 and 564934. The check for \$372.50 represented the premium on the son's policy; it was payable to Economidis and appears to have been cashed by the company on September 22, 1952. The \$120 check, payable also to Economidis, was cashed by the company on September 22, 1952. (These two checks had been sent to one Chumas in Los Angeles, a friend of both plaintiff and the agent, and he had delayed delivery, and for some reason they had to be put through the bank twice, once on September 10th and again on September 22nd.) The policy on the son's life was

1. The instrument bears date August 14, 1952, in typewriting. Also, under the caption "Additions or Amendments (*For Home Office use only*)" the following typewritten matter: "AIL and HI increased from \$100 monthly to \$300 monthly as of 10-18-52. Classification of AIL & HI is 'A'." There was evidence to the effect that the date was placed in the document by plaintiff after his return to Honolulu, but the testimony did not cover the quoted insertion concerning the AIL and HI increases. Kazanteno denied that he dated the

document or returned it from Honolulu. This conflict bears only upon the credibility of plaintiff as a witness and was undoubtedly resolved in his favor by the trial judge, who was perhaps assisted to that end by a letter from the manager of the Los Angeles agency to the superintendent of the policy payment department, dated March 18, 1953, which says that Mr. Kazanteno "is a very high-class business man, not the type that is trying to take advantage of an insurance company or to distort the picture in any way."

issued on July 16, 1952. On September 4, 1952, defendant company sent to plaintiff a notice that "Your request for change has been put into effect" and the notice refers to policies Nos. 564765 and 564934.

Economidis and the Honolulu agent both learned promptly of plaintiff's accident. Though the company denied liability for increased benefits, it retained the moneys, issued the son's policy, and reinstated the life policy, No. 564765, regardless of delay in payment of premium. On October 17, 1952, after knowledge of plaintiff's accident, it issued new "Good Will Builder" accident and health policies, carrying benefits of \$300 a month, dated July 18, 1953 but effective October 18, 1952. On November 11, 1952, Economidis wrote plaintiff that there was no company liability in excess of \$100 a month and explained the reason as it had been stated to him by the company: "As you will recall, when you were here last July we decided to increase the benefits on this portion of your policy from \$100.00 a month to \$300.00 a month. The effective date of the policy was to have been July 18, 1952. Our trouble started when your check was missent to the Choumas Produce Company. We, of course, in turn, were then late in forwarding the money on to the company. Our next problem arose when we failed to get the yellow Form 10 signed, which was sent to you for your signature. The end result was that the company did not have all of the facts before them that they requested until early in October, and final approval was given for the increase, effective October 18, 1952." Economidis had explained on or before June 25th, that if necessary the reserve on the existing policy would take care of an automatic loan in the event the \$120 premium was not paid. Concerning the alleged failure to get Form 10 signed, he testified that he sent two of them to plaintiff in Honolulu for signature but they were never received by plaintiff; that this was done because the one which had been signed in June had expired; that that one was in his own possession until October 6, 1952, when he transmitted it to the home office.

The letter of November 11th also said: "There is one bit of good news: The com-

pany, when approving your request for increased benefits, also reclassified you from Class 'C' to Class 'A', which will materially reduce your premium in the future. I am enclosing the refunded portion of your premium." This seems to refer to company's check of October 21, 1952, for \$63.75, which plaintiff cashed in March, 1953, believing it to be a refund because of change in his classification. Actually, it was a refund due to issuance of the policy as of October 18, 1952, instead of July 18, 1952, as agreed; but the attached voucher meant nothing to plaintiff, especially in the face of Economidis' explanation of a different reason for the check.

So the company retained all of the premiums except the \$63.75—a net amount of \$1,049.45 (exclusive of the premium on No. 564934), issued the policies per application and undertook to make the new "Good Will" policies effective after the date of the accident instead of the date which its agent had represented and agreed upon, July 18, 1952.

The trial judge found, in paragraph IV: "It is true that on or about the first day of July, 1952 plaintiff and defendant entered into an oral agreement whereby defendant agreed to extend the Good Will Builder Accident Monthly Income for Life and the Good Will Builder Health Monthly Income for Life policy * * * for a period of one year commencing July 18, 1952 and ending July 18, 1953, and that the monthly benefits payable to plaintiff pursuant to the terms and conditions of said policies would be the sum of \$300.00 per month, and that defendant, in consideration for plaintiff reinstating the Life Insurance policy * * * agreed to issue its written policies containing the terms and conditions set forth in Exhibits L and M providing for \$300 per month monthly benefits and providing for a term beginning July 18, 1952 and ending July 18, 1953 evidencing the oral agreement entered into by the parties on July 1, 1952." Also, that the new accident and health policies "were issued with an effective date of October 18, 1952 without the knowledge and consent of plaintiff and without the payment of consideration by defendant, and contrary to the agreement of defendant to issue said policies with an

effective date of July 18, 1952 pursuant to the agreement mentioned in Paragraph IV above." Paragraph XVII: "It is true that defendant by its duly authorized agent on or about the first day of July 1952, represented and warranted to plaintiff that plaintiff had done everything necessary in order to extend the terms and provisions of said Good Will Builder Accident Monthly Income for Life policy for a period of one year commencing July 18, 1952 and ending July 18, 1953, and increasing the monthly benefits payable thereunder in the event of accident as therein defined from \$100 per month to \$300 per month and double that amount in the event of hospitalization during said period due to accident." Paragraph XVI: "It is true that defendant accepted the benefits of the contract between the parties set forth in Paragraph IV above with knowledge of the terms and conditions of the oral contract made by its agent, William Economidis." Paragraph XIX: "It is true that plaintiff relied on said representations and warranties by defendant's agent and refrained from procuring other accident monthly income for life insurance and traveled to the Territory of Hawaii in reliance thereon." Paragraph XX: "It is true that defendant's agent failed and neglected to forward the necessary forms to effectuate the increased benefits under the Good Will Builder Accident Monthly Income for Life policy to defendant's home office within a reasonable period of time." The court rendered judgment reforming the accident and health policies to make the effective dates thereof July 18, 1952 instead of October 17, 1952, awarding \$8,100, with interest, as total of amounts due from August 25, 1952 to September 25, 1954, and declaring plaintiff's right to receive \$300 a month "for so long as plaintiff shall be wholly and continuously disabled as a result of the injuries incurred on August 25, 1952."

[3, 4] First, as to the sufficiency of the evidence of the making of the oral agreement. Both sides assert that California recognizes as valid oral agreements for insurance. *Toth v. Metropolitan Life Ins. Co.*, 123 Cal.App. 185, 188, 11 P.2d 94. And it appears that the rule is equally applicable

to all phases of insurance contracts. "Insurance contracts may be made by parol. A parol contract of insurance, or agreement to issue, renew, or make an indorsement upon a policy, or to waive a provision or condition thereof, is valid and enforceable." (14 Cal.Jur., § 14, p. 428.) See also, *Gold v. Sun Insurance Co.*, 73 Cal. 216, 14 P. 786; *Farnum v. Phoenix Insurance Co.*, 83 Cal. 246, 260-261, 23 P. 869; *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 449, 89 P. 102. But the rule stated in the *Toth* case that the proof thereof must be clear and convincing is one for governance of the trial court, not the appellate tribunals. *Edmonds v. H. W. Wilcox*, 178 Cal. 222, 224, 172 P. 1101; *Ward v. Waterman*, 85 Cal. 488, 503, 24 P. 930; *Penney v. Simmons*, 99 Cal. 380, 382, 33 P. 1121; *Couts v. Winston*, 153 Cal. 686, 688-689, 96 P. 357; *Estate of Pepper*, 158 Cal. 619, 622, 112 P. 62, 31 L.R. A., N.S., 1092; *Wilcox v. Salomone*, 118 Cal.App.2d 704, 711, 258 P.2d 845; 19 Cal. Jur.2d § 468, p. 233.

[5-7] The facts above recited clearly constitute substantial support for the court's finding of the making of the oral agreement. "Where a valid parol contract of insurance has been entered into, the policy to be issued thereon is simply the memorial of the prior parol contract, and, even though the policy be not delivered until after the loss occurs, the insurance is deemed effective from the time agreed upon in the parol agreement, irrespective of any delivery of the policy. *Crawford v. [Trans-Atlantic Fire] Ins. Co.*, 125 Cal. 609, 58 P. 177. 'If an agent, authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy.' *Ferrar v. Western Assur. Co.*, 30 Cal.App. [489] 491, 159 P. 609, 611." *Marderosian v. National Casualty Co.*, 96 Cal.App. 295, 303, 273 P. 1093, 1096.

Next arises the question of whether Economidis had actual or ostensible authority to make such an agreement. If ostensible agency be found that is enough to support the judgment. Section 2300 Civil Code provides: "An agency is ostensible when

the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Section 2317: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Economidis had a written agency contract which, standing alone, restricted his activities considerably, but plaintiff never saw it or knew its contents, and so it becomes immaterial to the consideration of the question of the existence of ostensible authority. Economidis had no connection with any other insurance company, for years he had handled Kazanteno's insurance with defendant and conducted the company correspondence with him, using company stationery for that purpose. Letters were actually written by Miss Hubbard, who was secretary and cashier of the Los Angeles agency, but she was told by Economidis the substance of what should be said; he signed the letters; following his signature were the typed words "Los Angeles Agency." He had had a desk in the company office, then moved into his son's office which was on the same floor as the company, but, speaking of June and July, 1952, he said: "I always get any desk there when I go in there." He had the run of the office. When the home office became interested in having Kazanteno reinstate his policy No. 564765 after its lapse in 1951, the information was sent to Economidis with the expectation that he would follow the matter with plaintiff and that he did do. Kazanteno had no contacts with the home office and practically none with other persons in the Los Angeles office. He would leave his policies with Economidis for safekeeping and they would repose in the company safe and were there when he left Los Angeles in June, 1952. In 1951 plaintiff was late in forwarding his premium and Economidis advanced his own funds to cover the same; this was done with the assistance of Miss Hubbard and was known to the company, which later made a refund to him. Economidis undertook to overrule the home office on the need of a Form 10 and insisted on a medical examination in connection with reinstatement. He under-

took to make a package deal with plaintiff, reported it to the Los Angeles office and the home office, and the company took full advantage of it, received and kept the premiums, issued the son's policy promptly on July 16, 1952, reinstated No. 564765 on July 2, 1952, and gave notice of the fact to plaintiff. It accepted the \$120 extra premium for increase of benefits on the Good Will policies and Economidis testified that he did not know of plaintiff's accident when those checks were received. It developed that the company did insist upon a Form 10, that Economidis had it in his possession but did not forward it until after the accident. This doubtless was primarily responsible for delay in formal action on increase of benefits under the accident policy. In letter of March 10, 1953, from the manager of the Los Angeles agency to the superintendent of the policy payment department it is said: "At that time he requested Bill Economidis, the agent in this case, to increase the Health and Accident Income benefits from \$100 a month to \$300 a month. Bill neglected to have a Form 10 signed, but did notify the Company of the intended change. By the time Bill had been informed that a Form 10 was required, Mr. Kazanteno had gone to Hawaii for what was intended to be a short business trip to look after his interests there. By the time Bill Economidis was able to communicate with Mr. Kazanteno and inform him that a Form 10 was required, Mr. Kazanteno had been injured, which was the injury for which the present claim has been made." Never, until after the accident, did the company do or say anything which smacked of rejecting any part of the package deal which Economidis had made for them. Plaintiff had every reason, after years of dealing with Economidis as the representative of the company, to believe and he did believe that that agent had authority to make the agreement which they reached on or about June 25, 1952. Cogent proof of this lies in the fact that plaintiff returned to Honolulu without trying to get the desired insurance elsewhere as he had threatened to do if the transaction was not consummated.

In attacking the finding of ostensible agency appellant quotes standard provision

No. 2 of the outstanding accident policy, viz.: "No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon." Counsel argue that plaintiff was thus charged with notice of limitation upon the authority of *Economidis* which precludes any finding of ostensible authority. In support of this contention counsel cite *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 138 P. 708, 52 L.R.A.,N.S., 670; *Fidelity & Casualty Co. v. Fresno Flume etc. Co.*, 161 Cal. 466, 119 P. 646, 37 L.R.A.,N.S., 322; *Linnastruth v. Mutual Benefit etc. Ass'n*, 22 Cal.2d 216, 137 P.2d 833; *Toth v. Metropolitan Life Ins. Co.*, 123 Cal.App. 185, 11 P.2d 94; and *Lucas v. Metropolitan Life Ins. Co.*, 14 Cal.App.2d 676, 58 P.2d 934. Examination of those cases discloses that, with the exception of the *Lucas* case which is not in point, each case deals with an alleged waiver of a term of the policy or of the application which occurred at the time of entering into the contract, a waiver of one of its specific terms; this, as presently shown, is substantially different in legal concept from a waiver made subsequent to the issuance and acceptance of the policy. Moreover, the absence of an ostensible authority is carefully noted in each case. For instance, the *Sharman* opinion says, 167 Cal. at page 125, 138 P. at page 711: "The contention solely is that, because Wade was agent of the company—the ostensible agent at least—his knowledge bound the defendant. But Wade was merely a soliciting agent of the defendant. He had no authority, actual or ostensible, to waive conditions in the policy." In the *Linnastruth* case the court said, 22 Cal.2d at page 218, 137 P.2d at page 834, that the application itself "gave notice that he [agent] had no such apparent authority" and in 22 Cal.2d at page 220, 137 P.2d at page 835 distinguished two cases upon the ground that they dealt with existing apparent authority. The *Toth* case, 123 Cal.

App. at pages 193 and 194, 11 P.2d 94, commented upon the absence of any ostensible authority and distinguished an Oklahoma case upon that ground. The *Fidelity* case, 161 Cal. at page 471, 119 P. at page 647 says: "It may be conceded that this was sufficient to clothe the agents with ostensible authority coextensive with the business intrusted to them, in the absence of any notice of a limitation thereon. But the policies accepted and retained by defendant contained the provision that "no condition or provision of this policy shall be varied or altered by any one unless by written consent of the president or secretary of the company." This was a limitation upon the authority of agents of which defendant had notice." The language just quoted from the *Fidelity* decision relates to an application which was before the plaintiff and signed by it as part of the issuance of the policy. The situation at bar is somewhat different. The policy had been issued in 1946, it was in the possession of the insurance company at the time of the transaction in question, nothing occurred to point plaintiff's attention to that particular provision, and past dealings had instilled in him a confidence in *Economidis* and a belief that the company would do what he said it would.

[8] But if the matter were to be tested by reference to the terms of said standard provision No. 2, it would not follow that plaintiff was charged with notice of its terms when dealing with the agent in 1952. "It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policy holders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous—the one before us covering thirteen pages of the transcript—and

in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy holder such provisions as the one before us. The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent." *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213, 230, 107 P. 292, 298. This language was quoted in *Golden Gate Motor T. Co. v. Great American Indem. Co.*, 6 Cal.2d 439, 444, 58 P.2d 374 and in *Valdez v. Taylor Automobile Co.*, 129 Cal.App.2d 810, 816, 278 P.2d 91.

[9] That the rule applicable to waivers attempted at the time of making the contract does not apply to subsequent waivers made by agents having actual or ostensible authority is well established.

[10] *Farnum v. Phenix Insurance Co.*, supra, 83 Cal. 246, at page 257, 23 P. 869, at page 872, says: "A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals. * * * A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority." At page 261 of 83 Cal., at page 873 of 23 P., speaking of a policy requirement that waivers of conditions expressed in the policy shall be in writing and endorsed on the policy, the court said: "It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver not forbidden by the statute of frauds." Though the cases naturally fall into recognition of a

general agent as having the necessary authority and a mere soliciting agent as having none, that distinction is not an inflexible one. The *Farnum* case, 83 Cal. at page 261, 23 P. at page 874, says: "Whether or not any particular agent has the general power of the company to make an oral contract, or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact." As shown by the earlier quotation this language refers to ostensible as well as actual authority. To the same effect as the *Farnum* decision are *Mackintosh v. Agricultural Fire Ins. Co.*, supra, 150 Cal. 440, 447-449, 89 P. 102; *Raulet v. Northwestern etc. Ins. Co.*, supra, 157 Cal. 213, 233-234, 107 P. 292; *Guipre v. Kurt Hitke & Co.*, 109 Cal.App.2d 7, 16, 240 P.2d 312. See also, *Chase v. National Indemnity Co.*, 129 Cal.App.2d 853, 859, 278 P.2d 68, and *Golden Gate Motor T. Co. v. Great American Indem. Co.*, supra, 6 Cal.2d 439, 447, 58 P.2d 374, where waivers by general agents were involved. There is no merit in the contention that plaintiff was charged with knowledge of the terms of the existing accident policy in such manner as to preclude his relying upon the ostensible authority of *Economidis* to make the oral contract in question.

[11, 12] Appellant's counsel also argue that plaintiff's signing of Form 10, the application for change in his policy, precludes his relying on *Economidis'* assurances. Reliance is placed on this language: "That the changed or added insurance hereby requested shall not be in effect unless and until the new policy or policies and/or supplemental agreement or supplemental agreements are delivered to and received by the Insured during his lifetime and good health * * *." However, this provision falls within the rationale of the *Farnum* and other cases just cited. It relates to a change in an existing policy, not necessarily the issuance of a new one. In 1949 the change had been made on the face of the existing policy. Moreover, *Economidis* asserted to plaintiff that Form 10 would not enter into the new deal, that a medical examination was necessary and Form 75 re-

quired; also that plaintiff's signing of Form 10 was but a formality, the document to be held for use only in the event that the company persisted in its error as to the applicability of Form 10. Economidis' ostensible authority covered this phase of the transaction as well as the others. We again quote the Farnum opinion, 83 Cal. 246, at page 257, 23 P. 869, at page 872: "A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals." The finding that Economidis had such ostensible authority is supported by substantial evidence and that ends the problem on appeal.

The accident occurred on August 25, 1952, and the action was filed on October 6, 1953. The trial ended July 20, 1954, and the judgment was filed on October 5, 1954. The court awarded plaintiff \$8,100, plus interest, as the aggregate of payments due at the rate of \$300 a month from August 25, 1952 to September 25, 1954. Plaintiff filed an amended complaint on June 23, 1954, but no supplemental complaint. Appellant argues that in the absence of a supplemental pleading plaintiff was entitled to recover only the amounts which had accrued at the date of filing the complaint. The amended complaint at bar has five causes of action, two of which sound at law, and three in equity, the first being an action for declaratory relief. In the prayer addressed to each of the five counts the plaintiff seeks relief for "such period of time as plaintiff is permanently disabled due to said injuries sustained by plaintiff on or about August 25, 1952, and double such amount for such period of hospitalization of plaintiff due to such injuries."

[13-15] Respondent correctly asserts that a court of equity will make a final disposition of the litigation governed by the circumstances as shown to exist at the time the decree is made rather than at the inception of the litigation, and a supplemental pleading is not necessary to that end. In *Del Riccio v. Photochart*, 124 Cal.App.2d 301, 316, 268 P.2d 814, 823, an action which

was partially in equity, the court said: "Under the pleadings herein and without the necessity of filing supplemental pleadings it was the duty of the trial court, under the circumstances here presented, to adjust the rights of the parties up to the time of the entry of judgment and to leave nothing open to further litigation. One of the attributes of equity is its power to do complete justice. [Citing cases.] We find no error in the scope of the accounting." *Union Oil Co. v. Reconstruction Oil Co.*, 20 Cal.App.2d 170, at page 183, 66 P.2d 1215, at page 1221: "With respect to the contention that the award of damages included in the decree is outside any of the issues presented by the pleadings and that therefore the court lacked the power to make the award, it may be observed that a supplemental pleading might have been filed after the evidence produced during the trial of the action had disclosed what amount of damage respondent had suffered. *McCarthy v. Gaston Ridge Mill, etc., Co.*, supra. However, it must be borne in mind that we are here considering an action in equity where the relief administered is such as the nature of the case and the facts as they exist at the termination of the suit demand. In such a situation a supplemental complaint is not required to apprise the court of those facts which have occurred since the filing of the original complaint and which have an evidentiary bearing upon the facts in issue in the action as originally instituted. The allegation of such subsequent facts would be surplusage and not consistent with the familiar equitable maxim which declares that equity will not require the performance of an idle act. *Collins v. Sargent*, 89 Cal.App. 107, 264 P. 776. We conclude therefore that, under the circumstances here presented, the trial court was not without power to make an award of damages that were purely incidental to the equitable relief originally sought and that no reversible error was committed in making such award in the absence of a supplemental complaint alleging the existence of facts which occurred subsequent to the filing of the original complaint." To the same effect see *Kohn v. Kohn*, 95 Cal.App.2d 708, 716, 214 P.2d 71; *Rosicrucian Fellowship v.*

Rosicrucian etc., Church, 39 Cal.2d 121, 135, 245 P.2d 481. Likewise, in a law action it is proper to render judgment for all installments of the debt which have matured at the time of judgment where no plea in abatement based on prematurity of the action as to unaccrued installments has been filed. Kelley v. Upshaw, 39 Cal. 2d 179, 186-189, 246 P.2d 23. There was no such plea here. There was no error in granting judgment for installments due at the time of its rendition.

Having considered all the arguments presented by appellant, we find no error in the judgment.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



137 Cal.App.2d 393

HOWARD PACKING CO., Inc., a corporation, and **Gianni Packing Co., Inc.**, a corporation, Plaintiffs and Respondents,

v.

MEAT CUTTERS AND BUTCHERS WORKMEN OF AMERICA, an unincorporated voluntary association, **Meat Cutters and Butchers Workmen, Local No. 563**, an unincorporated voluntary association, **J. J. Rodriguez, Chubby Cornwell, et al.**, Defendants.

Meat Cutters and Butchers Workmen of America, Local No. 563, J. J. Rodriguez and Chubby Cornwell, and J. J. Rodriguez, Individually and as President of and on behalf of Amalgamated Meat Cutters and Butchers Workmen of America, Local No. 563, an unincorporated voluntary association, Appellants.

Gilbert R. GARCIA, Edward Montez, Roberto Nava, Miguel Sandoval, Cecello Rodriguez and Ramon Garcia, Plaintiffs and Appellants,

v.

HOWARD PACKING CO., Inc., a corporation, **Gianni Packing Co., Inc.**, a corporation, **Association of Food Handlers**, an un-

Cal.Rep. 289-290 P.2d-45

Incorporated association, Walter J. Schmidt, Individually and as secretary of the Association of Food Handlers, Defendants and Respondents.

Civ. Nos. 20887, 20888.

District Court of Appeal, Second District, Division 2, California.

Nov. 30, 1955.

Rehearing Denied Dec. 20, 1955.

Hearing Denied Jan. 25, 1956.

Action to enjoin picketing by labor union and action by former employees to compel their reinstatement and both actions were consolidated for trial. In the first action, the Superior Court of Los Angeles County, A. Curtis Smith, J., entered judgment enjoining union picketing and in second action judgment was entered adversely to former employees and there were consolidated appeals by labor union and former employees. The District Court of Appeal, McComb, J., held that evidence sustained finding that employees were not discharged because of joining another union but merely temporarily laid off because of employer's oversupply of products, and California Jurisdictional Strike Act does not violate the federal or California Constitutions.

Judgments affirmed.

1. Labor Relations ⚡940

In former employees' action to compel their reinstatement, evidence sustained finding that former employees were not discharged because of the fact they had joined a union but were temporarily laid off because of employer's oversupply of products on hand.

2. Labor Relations ⚡946

In action to enjoin picketing under California Jurisdictional Strike Act, evidence sustained finding that labor association to which employees belonged was not a company dominated union. West's Ann. Labor Code, §§ 1115-1120.

3. Labor Relations ⚡217

Where National Labor Relations Board certified association as bargaining representative for employees, and determined that association was not a company

dominated union, such determination was binding in an action in state court between litigants who were parties to hearing before such Board. West's Ann.Labor Code, § 923.

4. Labor Relations Ⓒ946

In employer's action to enjoin union picketing under Jurisdictional Strike Act, evidence sustained finding that employee who had aided two employees in procuring membership in rival union was not a supervisory employee. West's Ann.Labor Code, §§ 1115-1120.

5. Labor Relations Ⓒ394

Under Labor Management Relations Act, a lead man is not a part of management, especially in a small plant having a few employees. Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

6. Labor Relations Ⓒ939

In employer's action under Jurisdictional Strike Act to enjoin union picketing, trial court properly rejected testimony that original formation of rival union was aided by a company not involved in action. West's Ann.Labor Code, §§ 1115-1120.

7. Constitutional Law Ⓒ90, 91, 275(2)

Labor Relations Ⓒ284

Jurisdictional Strike Act is not in violation of the First and Fourteenth Amendments to the United States Constitution or provisions of California Constitution guaranteeing personal rights. West's Ann. Labor Code, §§ 1115-1120; U.S.C.A. Const. Amends. 1, 14; West's Ann.Const. art. 1, §§ 9, 10.

David Sokol, Los Angeles, for appellants.

William C. Stein and McLaughlin & Casey, Los Angeles, for respondents.

McCOMB, Justice.

On December 7, 1953, plaintiffs Howard Packing Co. and Gianni Packing Co., filed a complaint in the superior court, Los Angeles County, No. 622038, for an injunction against defendant Meat Cutters and Butchers Workmen of America, Local No. 563, and defendants J. J. Rodriguez and Chubby

Cornwell, union officers, to restrain picketing activities on the ground that such activities violated the California Jurisdictional Disputes Act. (Lab.Code, secs. 1115-1120).

Thereafter, an action was filed in the same court, No. 622387, against Howard Packing Co. and Gianni Packing Co., and a labor union known as Association of Food Handlers and its executive secretary, Walter J. Schmidt, by six employees who claimed to have been discharged because they had joined the Meat Cutters and Butchers Union of America, Local No. 563. In such action the employees sought to be reinstated to their jobs with back pay, and to have all defendants restrained from interfering with their employment.

Both the above actions were by stipulation consolidated for trial. After trial, before the court without a jury, judgment was rendered in the first action in favor of plaintiffs, enjoining defendants' picketing activities. In the second action the court gave judgment in favor of defendants, denying plaintiffs any relief.

The appeals by defendants in the first action and plaintiffs in the second action have, by stipulation, been consolidated for determination by this court.

Viewing the evidence pursuant to the rules set forth in *Re Estate of Isenberg*, 63 Cal.App.2d 214, 216 [2], et seq., 146 P. 2d 424 (See also cases in 6 West's Calif. Dig. (1951) Appeal and Error, Ⓒ931(1), p. 423 et seq., and Ⓒ1001(1), p. 679, et seq.) the record discloses these facts:

Howard Packing Co., Inc., has been canning dog food at its premises at 3328 East 45th Street in Los Angeles, California, since April 1953, and Gianni Packing Co., Inc., at the same time was operating a slaughter house for the production of horse meat on adjoining premises at 3224 East 45th Street up to October 9, 1953, at which time it terminated all its operations and leased its premises to Mayfair Packing Company.

About the 9th of September, 1953, Arthur Eaton, a business representative of the Meat Cutters and Butchers Workmen of America, called upon Albert Gianni, presi-

dent and general manager of each of the foregoing companies, and requested him to sign a contract with the Meat Cutters and Butchers Workmen of America. At this time Mr. Gianni told Mr. Eaton that it was not his business to go to the employees; that he had no right to sign a contract until the employees decided what they wanted to do. Subsequently, Mr. Eaton brought a contract to Mr. Gianni, and Mr. Gianni told him to leave it on his desk and he would look it over.

After visiting with the employees two or three times, and with the plant foreman, Mr. Huerta, Mr. Eaton arranged to meet with Edward Montez, Roberto Nava, Miguel Sandoval, Cecelio Rodriguez and Ramon Garcia (plaintiffs in the second action, set forth above) on September 28, 1953. At that time Mr. Huerta told Mr. Eaton the employees desired to join the union, whereupon Mr. Eaton obtained their signatures on application cards.

On September 30, 1953, Mr. Gianni instructed his foreman to lay off the employees of the Howard Packing Company because they had a surplus of canned dog food on hand. Accordingly the employees were laid off and told to come back to work in a few days. At a subsequent date these employees were asked to resume their employment but refused to go back to work. After the employees' refusal to return to their work the Howard Packing Company sought and obtained new employees who thereafter joined the Association of Food Handlers.

Contentions

The appealing parties contend:

First: *That there is not any substantial evidence to sustain the trial court's findings:*

(a) *That the appealing plaintiffs in action No. 622387, have not been discharged because they joined the union;* and

(b) *That the Association of Food Handlers was not a company-dominated union. Also, that there was no finding:*

(c) *That Mr. Loza was a supervisory employee, and therefore his aid to Mr. Schmidt in getting the new employees*

signed up in the Association of Food Handlers tainted their membership to the extent that plaintiff Howard, in action No. 622088, was not entitled to invoke the Jurisdictional Disputes Act.

These contentions are devoid of merit for these reasons:

[1] (1) Witnesses gave direct testimony that the plaintiffs in action No. 622387 were not discharged because of the fact they had joined the union, but they were laid off because the company had an oversupply of canned dog food on hand. This evidence, believed by the trier of fact, sustains the first questioned finding.

[2, 3] (2) There is no evidence that the Association of Food Handlers was a company union. In addition, the National Labor Relations Board, by certifying the Association as the bargaining representative for the employees, determined this question adversely to the appealing parties' contention, and since they were parties to the hearing before such board, such determination is binding upon them. There is no evidence that the employer companies financed in whole or in part, or interfered with, dominated or controlled the Association of Food Handlers. The record discloses that the employers fully complied with the requirements of section 923 of the Labor Code, which reads as follows:

"Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Since the foregoing evidence sustains the questioned findings, no useful purpose would be served by setting forth in extenso a plethora of other evidence, all tending to support the trial court's findings.

[4, 5] (3) There was an implied finding that Mr. Loza was not a supervisory employee, which was supported by the evidence. There was direct evidence that Mr. Loza was not a foreman but was merely a lead man; that Mr. Gianni supervised the plant himself, therefore Mr. Loza did not have the right to hire or fire. In addition, the uncontroverted evidence discloses that the defendant union signed all of its members with the aid of Mr. Huerta who was, in fact, the foreman. Under the Labor Management Relations Act, 29 U.S.C.A. § 141 et seq., a lead man is not a part of management, especially in a small plant having a few employees. The applicable rule is well stated in *Wayside Press, Inc., v. N. L. R. B.*, 9 Cir., 206 F.2d 862, 866, as follows:

"Most of the evidence by which the Board seeks to tie Wayside to the formation and administration of the Independent Union is based upon the acts of foremen. It must be borne in mind that acts of such minor supervisory employees must be considered in their setting. *N. L. R. B. v. Link-Belt Co.*, 311 U.S. 584, 599, 61 S.Ct. 358, 85 L. Ed. 368 (7 LRRM 2971). Here the foremen were union members who spent no more than 20 to 25% of their time in a supervisory capacity. Wayside is a small plant, employing some sixty persons. To attempt, as the Board has done, to apply the same standards to such a plant as are applied to plants employing hundreds of persons with full-time supervisory employees is to ignore reality."

Second: *The trial court erred in excluding evidence that the Association of Food Handlers was originally formed under the sponsorship of Lewis Food Company, a company which was wholly independent of the Howard Packing Company and the Gianni Packing Company.*

The trial court's ruling was correct.

The appealing parties sought to elicit testimony from a former plant manager, Wendell Stratton, of Lewis Food Company that such company had paid certain costs in connection with the original formation of the Association of Food Handlers in January, 1951. The trial court rejected this testimony.

[6] The evidence was entirely immaterial to any issue pending before the trial court. Neither of the employers was involved or in any way connected with the Lewis Food Company, and the fact that the Lewis Food Company at some time in the past might have dominated the Association would in no way prove or tend to prove, or give rise to the slightest inference, that the Howard Packing Company or Gianni Packing Company dominated such Association.

Third: *The Jurisdictional Strike Act is in violation of the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9 and 10 of the Constitution of the State of California.*

[7] This contention is devoid of merit, as the appealing parties concede in their brief that the Supreme Court of the State of California has upheld this legislation. (See *Seven Up Bottling Co. of Los Angeles v. Grocery Drivers*, 40 Cal.2d 368, 380 [9], 254 P.2d 544, 33 A.L.R.2d 327; *Voeltz v. Bakery and Confectionery Workers*, 40 Cal.2d 382, 254 P.2d 553; *Sommer v. Metal Trades Council*, 40 Cal.2d 392, 254 P.2d 559; *In re Kelleher*, 40 Cal.2d 424, 254 P.2d 572.)

The judgments are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; McCOMB, J., not participating.

137 Cal.App.2d 337

Woody GIBSON, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

Civ. 16295.

District Court of Appeal, First District,
Division 1, California.

Nov. 30, 1955.

Hearing Denied Jan. 25, 1956.

Action for injuries sustained by plaintiff when struck by defendant's train while he was walking along platform adjacent to tracks. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., granted defendant's motion for judgment notwithstanding verdict and plaintiff appealed. The District Court of Appeal, Bray, J., held that plaintiff as user of platform constructed by railroad close to its tracks was not relieved from necessity of watching for approaching trains, and where he walked close enough to tracks to be struck by overhanging of train without looking, he was contributorily negligent.

Judgment affirmed.

Peters, P. J., dissented.

Opinion, 285 P.2d 277, vacated.

1. Judgment ⇨199(1)

A motion for directed verdict is a prerequisite to a later motion for judgment notwithstanding verdict. West's Ann.Code Civ.Proc. § 629.

2. Appeal and Error ⇨1061(4)

Although ordinarily a motion for directed verdict cannot be heard in chambers, such hearing of motion would be merely a nonprejudicial irregularity and not jurisdictional. West's Ann.Code Civ.Proc. § 166.

3. Appeal and Error ⇨212

Where plaintiff failed to object to defendant's making a motion for a directed verdict in chambers rather than open court, any error was not jurisdictional and plaintiff could not complain of error on appeal. West's Ann.Code Civ.Proc. § 166.

4. Appeal and Error ⇨659(1)

Party to an appeal could augment record by certificate of trial judge and courtroom clerk concerning the circumstances under which a motion for directed verdict was made. West's Ann.Rules on Appeal, rule 12(a, b, c).

5. Trial ⇨173

Although a motion for directed verdict should be made at completion of taking of evidence, it is within discretion of court to permit it to be made at any time before case is submitted to jury. West's Ann.Code Civ.Proc. § 629.

6. Appeal and Error ⇨212

Where defendant made a motion for directed verdict after commencement of oral arguments, and plaintiff did not object, on appeal plaintiff could not complain that the motion was made too late. West's Ann.Code Civ.Proc. § 629.

7. Railroads ⇨385

Where railroad constructs a platform close to its tracks, railroad does not impliedly represent to the users thereof that all portions of the platform are safe, and thereby relieve user from necessity of watching for approaching trains while walking close enough to the tracks to be struck by the overhanging of the train, or to be drawn into the train by suction.

8. Railroads ⇨385

Fact that railroad customarily painted lines on platform constructed near tracks to mark danger points, did not change rule that parties using platform may not assume that all portions thereof are safe.

9. Railroads ⇨355(1)

Construction of platform alongside railroad tracks by railroad, constituted an invitation from railroad for people to use it, but it was an invitation to use it with ordinary care.

10. Evidence ⇨5(2)

It is a matter of common knowledge that it is dangerous to stand close to a fast moving train, both because of overhanging and suction.

11. Negligence ⇨136(9, 26)

Usually, questions of contributory negligence are for the jury and it is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn from the evidence, that court can say, as a matter of law, that contributory negligence is established.

12. Railroads ⇨398(4)

In action for injuries sustained by plaintiff when struck by defendant's train while he was walking along platform adjacent to tracks, evidence sustained no other possible inference other than that plaintiff was guilty of contributory negligence.

13. Railroads ⇨397(1)

In action for injuries sustained by plaintiff when struck by defendant's train while walking along platform adjacent to tracks, evidence of suction power of train when passing plaintiff was properly excluded where such evidence was offered not to prove that plaintiff was pulled into train, but to relate only to what occurred after plaintiff was first struck.

14. New Trial ⇨164

In action for injuries sustained by plaintiff when struck by defendant's train while walking along railroad's platform adjacent to tracks, action of court in denying defendant's motion for new trial but granting its motion for judgment notwithstanding verdict was not inconsistent where effect of action was a finding that if court was wrong in determining that plaintiff was guilty of contributory negligence as a matter of law, then it saw no reason for disturbing jury's verdict and the judgment on that verdict would stand as judgment in the case. West's Ann.Code Civ.Proc. § 629.

Fitz-Gerald Ames, San Francisco, for appellant.

1. The witnesses variously referred to it as walk, pathway and platform. We have accepted the designation preferred by both counsel, "platform," although in so doing we do not consider that the difference in nomenclature makes any differ-

R. Mitchell S. Boyd, Dunne, Dunne & Phelps, San Francisco, for respondent.

BRAY, Justice.

Action for damages for personal injuries sustained by plaintiff when struck by defendant's train. Motions for nonsuit and directed verdict were denied. The jury awarded plaintiff \$75,000. Defendant moved for judgment notwithstanding the verdict and for a new trial. The court granted the former and denied the latter. Plaintiff appeals from the judgment notwithstanding the verdict.

Questions Presented.

1. (Raised for the first time on petition for rehearing.) (a) May a motion for directed verdict be made in chambers? (b) May the record on appeal be augmented by the certificates of the trial judge and courtroom clerk? (c) May a motion for directed verdict be made after argument has begun?

2. Was plaintiff contributorily negligent in assuming that all portions of the railroad platform were safe from overhang of passing trains?

3. Should evidence of suction power of the train have been admitted?

4. Was the court inconsistent in denying defendant's motion for new trial but granting its motion for judgment notwithstanding the verdict?

Facts.

Except as to just when the train's whistle was blown there appears little, if any, conflict in the evidence. Westerly, opposite Bay Meadows race track, defendant's railway tracks run north and south. On the west side of the west rail and distant 1 foot 9 inches therefrom defendant maintains an asphalt pathway or platform¹ 8 feet wide, about at the level of the ties except at the Hillsdale station and Bay Meadows crossing platforms, where the asphalt

ence in the respective duties of the parties. We might add that in our previous decision we referred to it as "pathway" and were taken to task for so doing by plaintiff in his petition for rehearing.

is level with the tracks. This platform connected the much wider platform at the Hillsdale station with that at the Bay Meadows crossing. It was used both for walking between those platforms, and for boarding trains which stopped there on occasion to pick up race track patrons. The engine which struck plaintiff had an overhang which extended 1 foot 2½ inches over the platform. The edge of the platform was 1 foot 9 inches from the nearest rail. The platform extends southerly from the Bay Meadows crossing (an infrequently used commuter stop) some 1,200 feet to the Hillsdale station. The tracks here and for a considerable distance southerly are straight. The platform is used by passengers and other pedestrians. This fact was well known to defendant. (Defendant concedes it owed a duty of due care to persons using the platform.) Near the station for a distance of 380 feet and near the crossing for a distance of 230 feet a white line extends along the platform sufficiently far from the rails to clear the engine's overhang. The railroad's maintenance official testified that such lines are painted on some of the "passenger loading platforms to indicate the extremities of the loading zones * * *". In the intervening distance of approximately 600 feet there is no white line. Near sundown, with the weather clear and light, a slight breeze blowing about 5:50 p. m., plaintiff had walked across the crossing intending to go to Bay Meadows track. As he got to the gate of the track, the crowd started coming out. He noticed a train standing to the north. He assumed it was headed north. Assuming that the races were over, he retraced his steps to the west side of the tracks. While on the crossing he seemed to hear a couple of train whistles. He made no assumption as to their source. He walked south on the platform. He heard a train whistle, probably a little deeper in tone than the whistle or whistles he heard at the crossing. (This was 10 to 15 seconds before he was struck.) He continued walking forward and "took probably a half step to the right" (away from the track). He heard no sound of grinding such as would be caused by the application

of locomotive brakes. The half step to the right placed his left foot about 22 inches away from the track edge of the asphalt. He has a faint recollection of being "spun," feeling heat in his face and seeing a wheel of the engine. The next thing he remembered he was talking to a San Mateo policeman after the accident. He was then lying to the west of the platform at a point about half way between the crossing and the station. This was plaintiff's first time on the platform. He did not know that a locomotive would overhang the platform. Plaintiff suffered serious injuries to his shoulder, arm, elbow and his leg was "mashed."

The engineer died prior to trial so his story is unknown. The fireman, whose view was obstructed by the engine for the last 300 feet before the impact, at that point observed a group of people walking southerly along the platform, their backs towards the train. He could not tell how close they were to the edge. People "too often" walk alongside the track there, fairly close. The usual speed at this point is 50 miles per hour. No stop at either Hillsdale station or Bay Meadows crossing was intended. Immediately north of the crossing there is a whistle post. Admittedly the whistle was blown there. There was evidence that the whistle was not sounded after the engine reached the crossing. One Harland, walking north on the platform, passed plaintiff walking south. He heard a whistle, turned around and started walking south. At that time the train was about 600 yards away. When he was about 10 to 20 feet behind plaintiff he heard the whistle again. The train was then possibly 300 yards away. He did not have too much of an idea on that. Harland turned over to the right and stopped. When the train passed him he saw some part of the front part of the engine strike plaintiff. Plaintiff was then about 2½ feet from the edge of the platform nearest the rail. It looked to Harland as though plaintiff, who was walking straight, was in the clear. Harland had the impression that plaintiff was sucked into the train. Harland then stated that the whistle was going continuously until the time of the accident.

A railway "red cap" walking on the platform saw plaintiff about 350 feet ahead of him. Plaintiff was walking close to the track edge of the asphalt. The whistle was blowing continuously when it passed the witness. The train hit plaintiff and spun him to the right.

Defendant's maintenance official testified that prior to May, 1946, there had been a gravel path which was 3 feet 6 inches in from the point where the track edge of the asphalt now is. The old path was completely clear of the engine overhang.

1. Motion for Directed Verdict.

[1] We granted a rehearing in this case because the record failed to show that a motion for directed verdict had been made, such motion being a prerequisite to a later motion for judgment notwithstanding the verdict. Code Civil Procedure § 629; *In re Estate of Caldwell*, 216 Cal. 694, 697, 16 P.2d 139. Defendant moved, and we granted permission, to augment the record to show that such motion was made. Certificates of the trial judge and courtroom clerk were filed. These show that after both sides had rested their case, and at the opening of court at the end of a recess during defendant's argument, defendant's counsel approached the bench and stated that he desired to make a motion outside the presence of the jury. The judge, because "there were no available facilities for the jurors except for the courtroom," directed counsel for both parties, the clerk and the reporter, to proceed to the judge's chambers adjoining the courtroom so that the motion could be heard and argued outside the hearing of the jurors. In the presence of the persons above mentioned and without any objection by plaintiff, defendant moved for a directed verdict. The motion was argued by counsel for both parties. The motion was submitted. The court outside of the hearing of the jury made its order denying the motion and the clerk entered such order in the minutes. The court and the other participants then proceeded to the courtroom where the jury was seated and defense counsel then continued with his argument to the jury. On the motion for judgment

notwithstanding the verdict no contention was made by plaintiff of any irregularity in the making of the motion for directed verdict nor was it contended that the court had no power to grant such motion.

(a) Motion Made in Chambers.

[2] Plaintiff contends that a judge has no jurisdiction to hear or determine motions in chambers other than those expressly included in section 166, Code of Civil Procedure. Assuming that ordinarily a motion for directed verdict cannot be heard in chambers, the hearing of such a motion there would be merely a nonprejudicial irregularity and not jurisdictional. See *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 43 A.L.R. 1509, where the court tried a default action for divorce in Long Beach, pursuant to a statute held to be unconstitutional. The court held that "proof which the law requires to be 'taken before the court' was in fact taken before the judge", 195 Cal. at page 371, 233 P. at page 340, that the "result is that the evidence so heard by it was in effect heard by the judge 'in chambers'", 195 Cal. at page 373, 233 P. at page 341, and that this was a mere irregularity, was not jurisdictional and did not render the judgment entered thereon void. See also *Holland v. Superior Court*, 121 Cal.App. 523, 9 P.2d 531, where the trial judge wrote out in the county clerk's office an order denying a motion for new trial and modified the findings and judgment. This order was lost after entry into the minutes. One of the grounds upon which the petitioner sought to prohibit any further proceedings under the order was that the judge had no jurisdiction to sign the order at the clerk's office as that would not be a session of the court. In denying prohibition the court stated, 121 Cal.App. at page 528, 9 P.2d at page 533: "The weight of authority in California which receives support in other jurisdictions seems to support the conclusion that, if it be assumed that it is error for a court to hold its session at a place other than in its courtroom, the error, if any, is one of law to be reached only on direct attack and not one resulting from a lack of jurisdiction or an act in excess of jurisdiction * * *."

[3] As the proceeding here, if error, could not be jurisdictional, plaintiff may not complain of error because of his failure to object in the proceedings in the court below. In *Hersom v. Hersom*, 60 Cal.App. 383, 385, 212 P. 717, it was held that the appellant could not complain of the receiving of evidence in chambers in the presence of counsel for both parties, because of her failure to object to the holding of court there.

However, the record here discloses that although taking place in chambers it was a full court session. To save inconveniencing the jurors, the court transferred its session to its chambers, all of the attachés of the court and all counsel were present. It was a situation similar to that in *People v. Pompa*, 192 Cal. 412, 221 P. 198, where considerable testimony was taken and evidence received by the jury at the scene of the alleged crime. Concerning the claim that this was a jurisdictional error the court said, 192 Cal. at page 422, 221 P. at page 203: "But the record expressly discloses that during the entire proceedings attending and embracing the view of the premises the court in its completeness, including the judge, the clerk, the bailiff, the reporter, the interpreter, the jury, the defendant, and the respective counsel was at all times present; the only element absent being the walls and fittings of the courtroom wherein the court is usually convened. There is no special sacredness in the atmosphere of a courthouse or the walls or furnishings of a courtroom which requires that sessions of the court shall be held there and not elsewhere, if otherwise the forms of law governing the trial of causes are observed, which appears to have been done, though with some absence of formality, in the instant case (*Block v. Kearney*, 6 Cal.Unrep. 660, 64 P. 267); but aside from this we think that the defendant is precluded from objecting to any of the alleged informalities in the procedure of the trial court during its view of the premises in question by the fact of the entire acquiescence of himself and the acquiescence and even active participation of his counsel in the taking of testimony and receiv-

ing of evidence by the jury during the inspection of the scene of the homicide."

Thus, the proceedings in chambers, including the making of the order denying the motion, are properly a part of the record on appeal. The contention that because defendant opened his motion by stating "I want to move now for a directed verdict," he actually made no motion, is quite amusing in view of the length of time plaintiff then spent in arguing against the granting of the motion. There is no merit to the contention. The same is true of the contention that the motion did not contain the grounds of the motion. There is no similarity in the facts of our case and those in *Hallinan v. Prindle*, 220 Cal. 46, at page 52, 29 P.2d 202, at page 204, where the plaintiff stated, "I had a motion. I think that would be in order" for a directed verdict and the court said "I would rather that comes up later * * * not now." The motion was not made later. Here it was made, grounds given, argued and passed upon.

(b) Augmentation.

[4] Plaintiff contends that Rule 12(a), Rules on Appeal, does not permit augmentation by a certificate of the trial judge or courtroom clerk. He contends that the language "or that portions of the oral proceedings be transcribed, certified and transmitted" applies only to oral proceedings reported below but not transcribed. This would be a most peculiar rule if it were interpreted to mean that this court in passing on the action of a trial court could not have before it the proceedings upon which that court based its action, merely because, for any reason, the whole of the proceeding was not reported. Here, the court reporter did report portions of the hearing and they are included in the judge's certificate to which the reporter attached his certificate. Rule 12(b) provides "If any material part of the record is incorrect in any respect * * * the reviewing court * * * may direct that it be corrected or certified." Here the record was incorrect in not showing the proceedings on motion for directed verdict. Rule 12 (c) provides that this court may submit to

the superior court for settlement any differences of the parties with respect to alleged errors or omissions in the record, and then states, what unquestionably is the reason behind all the rules on augmentation, to "make the record conform to the truth." Plaintiff has cited no case which holds that certificates of the type here may not be used to augment. *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892, is not in point. There the trial judge denied a motion for new trial without giving insufficiency of the evidence as a ground. After appeal, he tried by certificate filed in the reviewing court, to get the transcript returned so as to permit a nunc pro tunc order to be made to change the order denying new trial to include that ground, claiming that the clerk failed to include it in the original order, although the judge had instructed him to do so. The reviewing court refused to consider the certificate. In our case the certificates are not for the purpose of changing any part of the record, but merely to add to it the matters which occurred but which were not placed in the original transcript.

(c) Timeliness.

[5,6] While a motion for directed verdict should be made at the completion of the taking of evidence, as the main purpose of requiring such a motion to be made as a condition precedent to the court power to consider a motion for judgment notwithstanding the verdict, is to give the other party an opportunity to introduce evidence he may have to overcome the grounds of the motion, *In re Estate of Caldwell*, supra, 216 Cal. 694, 697, 16 P.2d 139, it is within the discretion of the court to permit it to be made at any time before the case is submitted to the jury. That in effect is the holding in *Red Boiling Water Co. v. McEwen*, 3 Tenn.Civ.App. 687, cited by plaintiff, although, under the circumstances there, it was held that the action

of the trial court in refusing to entertain the motion as being too late, coming after argument had started, could not be upset by the appellate court. Here, again, plaintiff in the trial court made no objection to the timeliness of the motion, nor to the court's hearing the same. It is too late to do so now.

2. Contributory Negligence.

The judgment notwithstanding the verdict was granted on the theory that plaintiff was guilty of contributory negligence as a matter of law. The evidence shows without conflict that plaintiff walked some 600 feet down the platform close to the railside edge of the platform. Although he admittedly heard a train whistle when he was at the crossing before starting down the platform he made no effort to locate it or to learn if there was any train approaching from his rear. At no time during his movement down the platform did he glance behind to observe if there were any trains approaching. About 10 to 15 seconds prior to the accident he heard another whistle which "probably sounded a little deeper in tone" than the previous one. He then continued walking forward and took a half step away from the rails "to be safe." This placed his foot nearest the track approximately 22 inches from the edge of the asphalt and approximately 3 feet 7 inches from the nearest rail. He continued on in this location until hit. Although he heard a whistle and felt it necessary to do something "to be safe," he did not look around to determine where the whistle came from or to see if he were in a safe position.

If defendant owed plaintiff the duty of maintaining the entire platform free from danger from overhang of trains and suction, then plaintiff could not have been guilty of contributory negligence² for if plaintiff had the right to assume that all

2. Defendant, although not conceding its correctness, is not attacking (except as it relates to the maintenance of the platform) the jury's implied finding of negligence. Defendant's negligence was not in building the platform in the manner it did, nor in operating an engine with the overhang of the one here, but in op-

erating its train at 50 miles per hour in an area where many persons were congregating, and in failing to operate cautiously when the engine crew must have seen persons walking close to the tracks, as the testimony shows, in ample time to have slowed down.

portions of the platform were safe, then under the facts of this case he was under no duty to look for approaching trains.

[7] The question here is, by the constructing of a platform close to its tracks, does a railroad impliedly represent to users thereof that all portions of the platform are safe, thereby relieving the user from the necessity of watching for approaching trains when walking close enough to the tracks to be struck by the overhang of the train, or to be drawn into the train by suction? In *McKeown v. Northwestern Pac. R. Co.*, 20 Cal.App.2d 324, at pages 326-327, 66 P.2d 1250, at page 1251, the court said: “* * * it is the uniform rule that where a passenger places himself so near the edge of a railroad platform as to be within the line of the ordinary overhang of a train, he contributes to the injury, and other things being equal, cannot recover. [Citations.]”

While the facts in our case are distinguishable from those in the *McKeown* case, that difference would not change the apparent universalness of the rule, see cases cited in the *McKeown* case, 20 Cal. App.2d at page 327, 66 P.2d 1250, and the cases hereafter discussed), nor the application of the principle to the facts of our case. In the *McKeown* case, the plaintiff was familiar with the station platform and with the normal overhang of engines, while here plaintiff was using the platform for the first time and knew nothing of engine overhang. In the *McKeown* case, although denied by the plaintiff, there was testimony that as the train approached she deviated from her course to approach nearer the edge of the platform. In our case, after hearing a whistle, plaintiff took a half step away from the track. In the *McKeown* case the engine overhang was either flush with the edge of the concrete platform, or overhung it an inch; thus the plaintiff's arm must have extended either beyond the platform or within an inch of its edge. In our case the engine overhung the platform 14½ inches. Plaintiff's feet were probably 2½ feet from the platform's edge. Only his elbow could have extended into the space occupied by the engine's

overhang. The other differences between the two cases bear on defendant's negligence rather than on plaintiff's duty.

In *Holmes v. South Pac. Coast Ry. Co.*, 97 Cal. 161, 31 P. 834, the railroad tracks were in the street. There was a space of 3 feet between the sidewalk at the station and the nearest rail. The plaintiff was walking in this space. When the whistle sounded the plaintiff stepped partly upon the track and was hit. Again, here, the facts are not similar to ours but the court pointed out that there are many cases supporting the principle, 97 Cal. at page 167, 31 P. at page 835: “A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence *per se*.”

In *Norfolk & W. R. Co. v. Hawkes*, 102 Va. 452, 46 S.E. 471, because of a curve in the track, the projection from the train overhung the platform varying from 1¼ to 10 inches and at the point where the train was struck it was 6½ inches. The plaintiff knew that the train was approaching. Of a person's duty at a railroad platform the court said, 46 S.E. at page 472: “It is manifest that this duty requires the railroad company to construct its platform sufficiently near to the rails that it will afford to passengers, including the aged and infirm, a safe exit to and from the trains. And it is a matter of common knowledge that in performing this duty the platforms along the best-regulated railroads are built so near the rails that the projections from the engines and cars will overlap, to some extent, the edge of the platform. While the extreme edge of the platform is perfectly safe for passengers

when occupying it for the purpose to which it is manifestly adapted, it is a matter of common knowledge that it is a place of danger when occupied while trains are passing or are likely to pass."

In *Higgins v. Erie R. Co.*, 1916, 89 N.J.L. 629, 99 A. 98, the plaintiff was familiar with the platform and the coming and going of trains there. He was drawing a hand truck on the platform and either drew it so near the platform's edge that it was struck by the engine tender's overhang or in turning he brought the truck against the tender. "The law is well settled in this state that where a person places himself so near the edge of a railroad platform as to be within the line of the ordinary overhang of a properly constructed platform and engine he contributes to the injury, and the company is not liable for the injuries he may suffer from such negligent exposure to danger." 99 A. at page 99.

In *Long v. Delaware, L. & W. R. Co.*, 1941, 127 N.J.L. 207, 21 A.2d 824, the court quoted the above statement in holding negligent a plaintiff who was struck by a handrail of a passing car, while standing on a platform 19 feet 2 inches wide between two sets of tracks.

In *Ratliff v. Chesapeake & O. R. Co.*, 6 Cir., 1940, 116 F.2d 155, the plaintiff standing on the station platform was trying to flag the approaching train so that she could board it. She was struck by a cross-beam on the front of the engine which overhung the platform $1\frac{1}{2}$ or 2 feet. It was claimed, as here, that the platform as constructed was an implied assurance that any portion of it was safe from passing trains. The court said, at pages 156-157: "None of the cases cited by appellant holds that such a facility as is here involved,—entirely adequate and safe when used as ordinary persons would use it,—is unsafe merely because it does not prevent careless persons from putting themselves in positions of danger."

In *Ferran v. Southern Pac. Co.*, 3 Cal. 2d 350, 44 P.2d 533, the court referred to the general rule quoted above in *Holmes v. Southern Pac. Coast Ry. Co.*, 97 Cal. 161, 31 P. 834, but held it did not apply to persons

required to cross intervening tracks to board cars who are injured while doing so.

As *contra* to the principle enunciated in the foregoing cases, plaintiff cites the following: *Chunn v. City & Suburban Ry.*, 207 U.S. 302, 303, 28 S.Ct. 63, 52 L.Ed. 219. There the platform which was customarily used by passengers intending to use the Washington car was one between two sets of tracks and was 7 feet 10 inches wide. The steps of defendant's cars projected 2 feet 2 inches over the platform, so that when two cars passed each other at this point (which was the situation when the plaintiff was hurt) the clear space left for the passenger to stand in was only 3 feet 6 inches. The court held that "the margin of safety was narrow and left little allowance for the infirmities of mankind. In the confusion of two cars approaching from opposite directions it is too much to expect nice calculations of distances. It is not to be wondered at that in the attempt to escape the one the plaintiff fell foul of the other." 207 U.S. at page 308, 28 S.Ct. at page 65. "Nor was the plaintiff necessarily wanting in due care by taking her place between the tracks. It was the usual place from which entrance to the Washington car was made. It was safe enough under ordinary circumstances. It was made unsafe only by reason of the defendant's negligent act in running another car rapidly by. The plaintiff had the right to assume * * * that, when it [the defendant] stopped one car and thereby invited her to enter it, it would not run another rapidly by the place of her entrance and put her in peril." 207 U.S. at pages 308, 309, 28 S.Ct. at page 65. The court did not discuss the general rule of passengers on station platforms, nor even the exception stated in *Ferran v. Southern Pac. Co.*, *supra*, 3 Cal.2d 350, 44 P.2d 533 (passengers crossing tracks) but rested its decision primarily on the narrowness of the platform provided for its patrons. In many details the facts in *Lagomarsino v. Market Street R. Co.*, 69 Cal.App.2d 388, 158 P.2d 982, were similar to those in the *Chunn* case, and the ruling was the same. A somewhat similar case to the *Chunn* case

is *Edwards v. Union Pac. R. Co.*, 1913, 90 Kan. 183, 133 P. 728, Ann.Cas.1916A, 137. There the court's decision was based principally upon the fact that the station platform where the plaintiff was required to go because of the crowded condition of the rest of the platform, and where she was struck by a locomotive overhang of about 27 inches, was less than 5 feet wide between the rails and a depot bow window. The trial court had given an instruction on contributory negligence embodying the general rule. In holding that the instruction was improper under the circumstances of the case, the court said, 133 P. at page 729: "Had the evidence shown that the platform space about the window had been comparatively free and unobstructed, and that plaintiff, with ample opportunity to choose a safe place to walk, had put herself or remained in a position of obvious danger from incoming trains, the instruction would have stated the law correctly. Her testimony, however, is that she was endeavoring to get past the narrow space in front of the window, and because of the crowd of persons about her she was prevented from realizing her danger * * *." Thus, the decision cannot be construed as applying to the facts of our case.

Nor is *Jaques v. Southern Pac. Co.*, 8 Cal.App.2d 738, 48 P.2d 63, in point here. There two sets of railroad tracks were maintained in the street, each set operated by a different company. Between the tracks there was a safety zone 3 feet 10 inches wide. However, the defendant's cars overhung this zone so that there was less than 22 inches left for a person to stand in. While the plaintiff was standing in the safety zone awaiting an approaching car of the other company, defendant's train passed by. Its great speed drew the coat which she was wearing into contact with the train so that she lost her balance and was thrown or fell under the wheels. The court in upholding a judgment in the plaintiff's favor did not discuss the law of contributory negligence involved other than to say, 8 Cal.App.2d at page 740, 48 P.2d at page 64: "It is then argued that the respondent should have anticipated the danger from suction to a person standing near a

railway track and that she was therefore guilty of contributory negligence. Manifestly, if the engineer, who had operated trains for more than thirty years, was not chargeable with knowledge of this particular danger, it cannot be said as a matter of law that an eighteen year old school girl should be deemed to have anticipated the same danger." It then stated that the question of contributory negligence was one of fact properly left to the jury—an entirely different situation from the one in our case, where on a sufficiently wide platform plaintiff by walking dangerously near to the track, and without any effort to determine whether he was safe from train overhang or suction, chose to violate the rule which the cases hold is well settled, namely, that a person on a station platform must look out for a train's overhang.

In *Becker v. City and County of San Francisco*, 121 Cal.App.2d 723, 264 P.2d 133, while standing on a street curb at a regular bus stop the plaintiff leaned forward and his head came in contact with the side of a moving bus. Judgment for the defendant was affirmed. Apparently the case is cited by plaintiff here because the court approved an instruction to the effect that it would be negligence for the bus to be operated in such manner that any portion of it extended over the curb. Such a ruling, however, in no way minimizes the railroad platform rule heretofore mentioned.

In *Campbell v. Yazoo & M. V. R. Co.*, 1909, 95 Miss. 309, 48 So. 618, 21 Ann.Cas. 1179, the plaintiff stood on the concrete platform between the waiting room and tracks, his back to the tracks. He was struck by the engine bumper which overhung the platform 2 inches. It was held that " * * * being in a place where he is invited to be by the company, he has a right to suppose that he will be safe from collision with a train running on the track so long as he occupies a place on the platform, and the mere fact that plaintiff, while on the platform, did not look behind him for an approaching train, cannot be held evidence of contributory negligence * * *. Negligence is not imputable to a person for failing to look out for danger, when, under the surrounding circumstances,

the person sought to be charged with it had no reason to suspect that danger was to be apprehended.” 48 So. at page 619. This case does not refer to the before-mentioned “uniform rule.” *McKeown v. Northwestern Pac. R. Co.*, supra, 20 Cal.App.2d 324, 66 P.2d 1250.

In *Archer v. New York, N. H. & H. R. Co.*, 1887, 106 N.Y. 589, 13 N.E. 318, the plaintiff while on the station platform was struck by a car which overhung the platform 2 or 3 inches. It was held that the plaintiff could not be chargeable with negligence as a matter of law in “assuming there was nothing to make his position dangerous.” 13 N.E. at page 321. No reference is made to the uniform rule. Moreover, it appears that the platform in the *Archer* case was one between railroad tracks and there was evidence that the plaintiff did not know and because of the peculiar situation was justified in not knowing that there existed the track upon which the train which injured him came.

Except as to situations of platforms between tracks where the rule is different than the one applicable here, plaintiff has cited and we have found no case holding that a person has the right to assume that a platform or pathway is safe from overhang of passing trains, except *Edwards v. Union Pac. R. Co.*, supra, 133 P. 728, where it was held that the plaintiff forced by the crowd upon the platform to place herself in a position of danger would have been negligent had she not been forced to do so; and *Campbell v. Yazoo & M. V. R. Co.*, supra, 48 So. 618, which does not refer to the platform rule. Moreover, these cases were decided many years before the court in the *McKeown* case, supra, stated that the rule was “uniform.”

[8] Defendant’s engineer of maintenance of way and structures testified that it is a general policy of defendant to paint lines on a platform to mark danger points. This fact, however, does not change the rule regarding the fact that parties using such platform may not assume that all portions are safe. While in this case there were white lines on the Hillsdale station and Bay Meadows crossing platforms, plaintiff at no time testified that he was

misled by the absence of white lines between. Prior to the construction of the present platform there had been a gravel pathway, all portions of which were clear of the engine overhang. There is no evidence that plaintiff knew of the white lines where they existed nor of the previous pathway. We can see no practical difference between a station platform and a platform between station platforms, so far as the duty of a railroad company to its users is concerned. Actually, it would appear that its duty at a station platform would be at least as high, if not higher, than on a platform of the type here. On occasion it was used as a loading platform for race track trains. Station platforms are places where many people gather, where there can be confusion and milling around. A platform between station platforms ordinarily has no such congestion.

[9, 10] Of course, the platform constituted an invitation from defendant for people to use it, just as any railroad platform does, but it is an invitation to use it with ordinary care. It is a matter of common knowledge that it is dangerous to stand close to a fast moving train, both because of overhang and suction. To hold that it is a question of fact whether a person is using ordinary care in walking in any portion of the danger zone which every one knows exists, without making any effort to determine whether he is without the overhang and suction area, means that the liability of a railroad to a person on its platforms or pathways is absolute. The case of *Cameron v. City of Gilroy*, 104 Cal.App.2d 76, 230 P.2d 838, is not applicable. A city ramp does not carry with it the warning of danger that railroad tracks, platforms and pathways do. With this warning of danger, no person may assume without looking (particularly when warned by the whistle of an approaching train) that he knows the overhang and suction distance of a train. The distance which a person reasonably must walk from train tracks is that distance which will clear him of overhang and suction. That distance is not determined by a blind guess, but by observation, particularly when he knows a train is approaching.

[11, 12] Usually, of course, the question of contributory negligence is one for the jury and it is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 240, 116 P. 513. In view of the well settled rule as to station platforms, plaintiff's conduct under the circumstances leaves no possible inference other than that he was guilty of contributory negligence.

3. Train Suction.

Plaintiff offered a qualified expert who would have testified to the "suction pounds pressure" developed by a train traveling at 50 miles per hour (the speed maintained by the train which struck plaintiff) and which would have been exerted upon plaintiff, "taking into consideration the fact that * * * [plaintiff] was first hit and then spun facing back with his back to the train and then the amount of pressure that was exerted upon him to throw him into the train, together with his off-balance condition and together with his spinning motion would have been sufficient to pull him into the train." The court refused to admit the testimony. It is not clear to what issue this testimony would have related. Were it to the effect that suction initially might have pulled him into the train, it would be relevant on the question of defendant's negligence in driving a train at great speed alongside a platform on which there were a number of people. But the evidence was offered not to prove this, for it was proposed to relate only to what occurred *after* plaintiff was first struck. There could be no error in excluding it for this purpose, as there was no contention that plaintiff's injuries were not caused by the accident, so that just what occurred after he was first struck is not too important on the question of the negligence of either party.

[13] While plaintiff could have offered it to tie into Harland's testimony that it appeared to him that plaintiff was sucked into the train, plaintiff expressly stated it was for the other purpose. If offered for the purpose of corroborating Harland, it

should have been admitted. However, its exclusion was not prejudicial, because the negligence of defendant was equally true whether the accident was caused by plaintiff's arm being extended into the path of the overhang of the engine or by his being caught by the suction of the train. Likewise, plaintiff was equally negligent whether he allowed his arm to extend into the path of the engine's overhang or walked so close as to be sucked in by an approaching train.

4. Inconsistency of Rulings.

[14] Plaintiff contends that in denying defendant's motion for new trial but granting its motion for judgment notwithstanding the verdict, the court acted inconsistently, in effect, holding on the motion for new trial that the evidence was sufficient to support the jury's verdict, and on the motion for judgment notwithstanding the verdict that it was not, because as a matter of law the jury's finding that plaintiff was not contributorily negligent was not supported.

Section 629, Code of Civil Procedure, dealing with both of these motions, does not appear to meet the situation here. It provides what happens if the court (a) grants a new trial and denies judgment notwithstanding the verdict, (b) where both motions are denied. It appears to us that the effect of the trial court's action is a finding that if it was wrong in determining that plaintiff was guilty of contributory negligence as a matter of law, then it sees no reason for disturbing the jury's verdict and the judgment on that verdict would stand as the judgment in the case. We see no inconsistency in the court's action.

The judgment is affirmed.

FRED B. WOOD, J., concurs.

PETERS, Presiding Justice.

I dissent from that portion of the majority opinion that holds that the trial court properly entered a judgment notwithstanding the verdict on the theory that plaintiff was guilty of contributory negligence as a matter of law. That issue, in my opinion, was clearly one of fact and not of law. I

agree with all other portions of the majority opinion.

The basic fallacy in the majority opinion is that it discusses the facts and law relating to the issue of contributory negligence of the plaintiff as if they were unrelated to the facts and law relating to the duty owed by defendant to plaintiff. The two are, of course, integral parts of the same problem.

The jury here found that defendant was negligent. While the majority do not discuss at any length the nature of the duty violated by defendant, they do assume the sufficiency of the evidence to sustain the finding, and defendant does not challenge this assumption. The jury also found that plaintiff was not contributively negligent. The majority hold that this finding is unsupported, and that the jury, as a matter of law, should have found to the contrary.

It does not require citation of authority to establish the proposition that the issue of contributory negligence is normally one of fact. On this issue, the trial court has no legal right to grant motions for a nonsuit or directed verdict or to enter a judgment notwithstanding the verdict (nor has the appellate court the legal right to affirm orders granting such motions or to reverse a verdict) except in those rare cases where there is no evidence, or no reasonable inference from the evidence, that would support a verdict for the plaintiff. In reviewing the propriety of orders granting such motions, only the evidence most favorable to the plaintiff need be considered, and all conflicts in the evidence must be resolved in favor of the plaintiff. The appellate power begins and ends with the determination as to whether there is any evidence, or any reasonable inference from the evidence, that would support a verdict for the plaintiff. These rules are elementary. The majority give lip service to them, but, in my opinion, simply disregard them.

1. There is considerable discussion in the briefs as to whether this construction was a "pathway," a "walkway," or a "platform." The witnesses used all three terms. If any different legal results follow from the use of one term or another, then that term most favorable to

The majority assume that whatever duty was owed by the defendant to plaintiff was violated. There is little discussion as to the precise nature of that duty. It is self-evident that, before it can be determined if plaintiff, as a matter of law, was contributively negligent, we must know and discuss the duty owed by defendant to plaintiff. The jury could have found, and on this appeal we must presume it did find, that defendant was negligent not only in operating its train at 50 miles per hour under the circumstances, not only in failing to apply the brakes before they were applied, and not only in failing to give adequate warning, but could and we must presume did find, that defendant was negligent in building the pathway¹ between the crossing and station platforms in the manner it did when it knew that its trains would overhang the rails 3 feet, and the pathway 14½ inches. If it was negligence for defendant to run a train as it did that had a 3-foot overhang beyond the rails and a 14½ inch overhang over the pathway, then the plaintiff was not guilty of contributory negligence simply because he walked on the pathway with his feet over 3 feet from the rails.

Negligence and contributory negligence are not abstract concepts, but must be determined by the facts of the particular case. What are the pertinent facts? Here the railroad knew that the pathway involved was to be used by a large number of people. The pathway was designed and constructed by the defendant for the use of these people. The railroad invited the public to use it. At the Bay Meadows crossing, and at the Hillsdale station, at the two ends of the pathway, there were large paved platforms constructed flush with the rails with a white line carefully painted on them that indicated the danger zone near the rails. This raises the reasonable inference that the railroad was actually aware of the danger of

plaintiff must be adopted, this being an appeal from a judgment notwithstanding. I have decided to use the term "pathway" because I believe that term most accurately describes the actual condition.

the overhang and conceived its duty to be to warn the public of the danger on these portions of the area involved. Then between these two extremities, for a distance of about 600 feet, the railroad designed and constructed a connecting asphalt pathway. This was constructed below the level of the rails at the level of the ties. It was 8 feet wide. The closest edge of the pathway was 1 foot 9 inches from the rails. There was no physical reason why the pathway had to be constructed close to the rails, the right-of-way in the area being quite wide and level. These facts raise the natural inquiry as to why, if the defendant believed the two terminals were places of danger requiring a white line to show the areas of danger, a white line was not also necessary on the 600-foot pathway? The engine involved overlapped the rails for 35½ inches, and overlapped the pathway 14½ inches. The plaintiff's feet, when he was hit, were not only over 3 feet from the rails, but were on, and well within, the very pathway designed and constructed by the railroad for the use of persons having the status of plaintiff. Under these circumstances, could the jury not find that the railroad by constructing the pathway as it did, impliedly represented to persons rightfully using it that it was a safe place on which to walk? Could the jury not find that plaintiff in using the pathway as it was intended to be used was not contributively negligent? The answer to these questions seems so clear that further discussion should be unnecessary. Plaintiff saw the pathway constructed as described. He used it for the very purpose that defendant intended that it be used. Certainly, the mere presence of the pathway constituted an invitation to walk on it. Constructed as it was, the jury could have found, and we must presume it did so find, that included within the invitation was the representation that the entire paved area was safe. Thus, so far as the duty of the defendant is concerned, the jury could have found, and we must presume it did find, that defendant invited plaintiff to use the pathway, owed a duty to him and others to maintain all of it in a safe condition, and represented that all of it was a safe place on which to walk.

If these conclusions are sound, they necessarily dispose of the question as to whether plaintiff was guilty of contributory negligence as a matter of law. Of course he was not. The defendant is forced into the position of asserting, and the majority opinion impliedly approves the assertion, that every pedestrian who accepts defendant's invitation to use the pathway, which it designed and constructed, by that very use, as a matter of law, is guilty of contributory negligence by using the pathway, in that he cannot assume that the pathway is safe but must assume that it is unsafe. That this is not the law seems clear. Mr. Justice Dooling in discussing the law applicable to a factual situation not different in principle to the one here involved, stated the applicable law as follows in *Cameron v. City of Gilroy*, 104 Cal.App.2d 76, 80, 230 P.2d 838, 841: "The ramp [constructed by the city for the use of pedestrians] was patently designed for pedestrian traffic and for that purpose alone, and the casual pedestrian would be readily persuaded, without giving the matter further thought, that he might safely use a facility obviously supplied by public authorities for his convenience as a member of the public. The appellant city is in the position of asserting [as does defendant in our case] that every pedestrian who accepted its invitation to use this ramp which it designed and constructed for that very use must be held as a matter of law to have assumed the risk of injury. The conduct of a person of ordinary prudence is the legal standard in such cases and the court was well within the bounds of its fact finding power in determining that a person of ordinary prudence would have used this facility under the circumstances."

The majority say that plaintiff was contributively negligent because, although well within the limits of the path, he walked so close to the rails that the court must say that, as a matter of law he was guilty of contributory negligence. A reasonable man, say the majority, should have known that the area where he was walking was dangerous. This is an unwarranted conclusion. Of course, the mere existence of railroad tracks is a warning of danger

and a person walking on the tracks must anticipate, at his peril, the presence of trains. It is equally true that a reasonable man knows or should know that a train or engine overhangs the rails to some extent. Within that distance from the rails a reasonable man knows or should know that he is in a position of danger. He is required to exercise the same care of self-protection that is required of a person on the tracks. But what is the distance from the rails that a reasonable man should know is a position of danger? Certainly, there is some distance so close to the rails that any reasonable man would say is a position of danger. Within that undefined distance we can safely say that a pedestrian has voluntarily placed himself in a position of danger, and, if hurt, is guilty of contributory negligence as a matter of law. This conclusion was properly reached in those cases cited by the majority holding that a person walking within 6 inches or a foot of the rails is guilty of contributory negligence as a matter of law. But the other extreme also exists. There is some undefined distance from the rails that to any reasonable man is a position of safety. In that area we can say that a person just by walking there, is not, as a matter of law, guilty of contributory negligence. We do not know whether that distance is 4, 5, 6, or more, feet from the rails, but whatever it is, once determined, persons in that area are free from contributory negligence as a matter of law. But in between those two extremes there exists an area where the question as to whether plaintiff was or was not negligent becomes a question of fact for the jury. That is this case. The test is whether a reasonable man, under the circumstances here present, should know that an engine overhangs the rails for a distance of 3 feet. Certainly, until I read this record, and I have ridden trains as much as most, I did not know that fact. Until I read this record I would have assumed that I was in a safe position if I stood or walked 3 feet from the rails. This would be true whether there was or was not a pathway constructed by the railroad for me to walk upon. The pathway,

constructed as it was, constituted an invitation. Its existence aggravates the situation. But the majority broadly imply that the pathway, instead of being an invitation to pedestrians to use it, and instead of constituting an implied representation that it was a safe place on which to walk, constituted, by its very presence, a warning that it was a place of danger, and that any one walking on it was, as a matter of law, contributively negligent. The majority come to this startling conclusion on the theory that they are bound to do so because of the holding in *McKeown v. Northwestern Pac. R. Co.*, 20 Cal.App.2d 324, 66 P.2d 1250. That case dealt with an accident on a loading platform. Here we are dealing not with a loading platform, in the literal sense, but with a pathway built and designed by the railroad for pedestrians to walk upon. This means walking in either direction, some pedestrians facing oncoming trains and some with their backs to them. It may be that a reasonable man knows or should know that a loading platform has to be constructed close to the rails and within the danger zone of overhanging equipment, for the convenience of passengers in getting on or off trains and in loading or unloading baggage. In that sense a loading platform may, *per se*, be a warning of danger. Perhaps users of such a platform should be required to face the rails and anticipate injury. On this issue I express no opinion, because it is not here involved. There are other facts that serve to distinguish our case from the *McKeown* case. These distinctions are fully and fairly set forth in the majority opinion, and need not be repeated here.

For these reasons, I believe that, under the facts here existing, the issue of whether plaintiff was guilty of contributory negligence was a factual one, that the finding of the jury that he was not is supported, and that the trial court erred in entering a judgment notwithstanding the verdict. Therefore, that judgment should be reversed.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.

137 Cal.App.2d 308

**Norman B. GRIFFIN, Plaintiff and
Appellant,**

v.

**Victor L. WILLIAMSON, et al.,
Defendants,**

**Victor L. Williamson and Gratia Williamson,
his wife, Respondents.**

No. 15960.

District Court of Appeal, First District,
Division 1, California.

Nov. 29, 1955.

Rehearing Denied Dec. 29, 1955.

Hearing Denied Jan. 25, 1956.

Action for deficiency judgment against chattel mortgagors and their partners. In Superior Court, City and County of San Francisco, Arthur Coats, J., a jury returned a verdict in favor of the nonmortgagor partners and against the chattel mortgagor, and the latter appealed. The District Court of Appeal, Fred B. Wood, J., held that where no relationship of principal and agent existed between the chattel mortgagors and the other defendants who formed a partnership with them to use the mortgaged property in a business, there could be no ratification of the mortgage which would give rise to liability on the part of the nonmortgagors.

Affirmed.

1. Partnership ⇨173

True test whether defendants were liable upon a note given by makers as part payment for purchase of business was whether formation of partnership between defendants and the makers for operation of the business antedated, not the time of delivery of signed note placed in escrow, but time when obligation to buy business and to pay agreed purchase price was incurred.

2. Appeal and Error ⇨928(4)

Where record on appeal failed to indicate whether certain instructions given had been requested by plaintiff or by defendant or had been given on court's own motion, such instructions would be presumed to have been requested by the appealing party

and would not be subject to challenge by such party upon appeal.

3. Husband and Wife ⇨42

In action against members of partnership, on promissory note signed by certain of the members, evidence sustained finding that no partnership by oral agreement existed between two husband-and-wife teams prior to signing of first written articles of partnership.

4. Evidence ⇨424

In action against partners, plaintiff could not complain of admission of parol evidence concerning occasion, purpose and intent of parties in preparing and executing partnership agreement to which plaintiff was a stranger. West's Ann.Code Civ. Proc. §§ 1856, 1962, sub. 2.

5. Evidence ⇨265(7)

In an action wherein plaintiff sought to obtain deficiency judgment against two defendants as partners of chattel mortgagors and the two defendants testified that there was no partnership created by oral agreement and no partnership agreement prior to written agreement dated May 3, the two defendants were not conclusively bound by declarations in another action or actions wherein one such defendant had claimed certain moneys by partnership agreement and had asserted that property covered by chattel mortgage in question had been sold to such defendant on April 24, and such prior declarations were merely evidence in case.

6. Trial ⇨194(9)

In action wherein plaintiff sought deficiency judgment against partners of chattel mortgagors, wherein court curtailed plaintiff's examination of such a partner as to prior inconsistent statement allegedly made by such partner in another action, and plaintiff offered to show that witness was "estopped" to deny partnership from beginning by reason of his claim of title to assets acquired at beginning of partnership, court's telling jury that witness was not estopped was not error.

7. Partnership ⇨157(3)

Where two defendants formed a partnership with two chattel mortgagors, the

former did not, merely on theory of ratification and acceptance of benefits, or by statute, become liable on chattel mortgage covering business property in which they accepted an undivided interest by virtue of its transfer to the newly formed partnership from the mortgagors. West's Ann. Civ.Code, §§ 1589, 3521.

8. Appeal and Error ⇨172(1)

Where, in action for deficiency judgment against chattel mortgagors and other defendants as partners of the mortgagors, plaintiff requested instruction, as to liability under partnership statute, as to two of the other defendants only, his theory at trial was thus limited and could not be extended on appeal to establish liability of the other two under the statute. West's Ann.Corp.Code, § 15017.

9. Partnership ⇨218(2)

In action for deficiency judgment against chattel mortgagors and other defendants as partners of the mortgagors, instruction under statute, that person admitted as partner into existing partnership is liable for all obligations of partnership arising before his admission as though he had been a partner when the obligations were incurred was defective for omission of limitation "except that this liability shall be satisfied only out of partnership property". West's Ann.Corp.Code, § 15017.

10. Appeal and Error ⇨1052(5), 1062(2)

Where jury found in appellant's favor concerning effective agreement, any error in admission of evidence of conversation between parties before preparation of agreement, or in alleged failure to submit to jury the interpretation of the agreement, was harmless.

11. Partnership ⇨157(3)

Where no relationship of principal and agent existed between chattel mortgagors and persons who formed partnership with them to use the mortgaged property in a business, there could be no ratification of the mortgage which would give rise to liability on part of the nonmortgagors.

12. Contracts ⇨187(2)

Where persons forming partnership with chattel mortgagors agreed to assume

share of indebtedness, mortgagee was third party beneficiary and as such could enforce contract of assumption at any time before parties thereto rescinded it. West's Ann. Civ.Code, § 1559.

13. Contracts ⇨249

Until creditor-beneficiary has accepted benefit of contract for assumption of indebtedness or has detrimentally acted in reliance thereon, the assuming party may rescind, but as long as assuming promisor continues to retain consideration from original promisee, contract for benefit of the third party cannot be rescinded or revoked. West's Ann.Civ.Code, § 1559.

14. Contracts ⇨266(1)

To rescind contract for assumption of indebtedness, promisors must return to promisees the consideration which promisees gave promisors for promise to assume obligation. West's Ann.Civ.Code, § 1559.

15. Contracts ⇨266(1)

Where partners who had agreed to assume share of indebtedness secured by chattel mortgage in consideration of an interest in the property, returned the property to the mortgagors, they met requirement, as prerequisite of rescission, of returning consideration received for promise of assumption. West's Ann.Civ.Code, § 1559.

16. Appeal and Error ⇨1050(1)

In action for deficiency judgment against chattel mortgagors and their partners, admission of oral evidence of conversation prior to drafting of contract was harmless, if error, where conversation concerned occasion for the contract and where the contract was clearly one for rescission. West's Ann.Civ.Code, § 1559.

17. Appeal and Error ⇨1062(1)

Any error in submitting to jury, in action for deficiency judgment against chattel mortgagors and their partners, interpretation of written agreement, was harmless where jury correctly interpreted the agreement as one of rescission. West's Ann.Civ.Code, § 1559.

18. Contracts ⇨272

Express rescission of agreement as a whole was adequate and effective without

specifically listing and separately rescinding each and every clause it contained. West's Ann.Civ.Code, § 1559.

19. Contracts ⇨249

Where chattel mortgagee at time he sued mortgagors and their partners for deficiency judgment had no knowledge of agreement between mortgagors and their partners for assumption of part of indebtedness by the partners, mortgagee was not thereby accepting or enforcing the assumption agreement and parties to the agreement were not thereby barred from rescinding it. West's Ann.Civ.Code, § 1559.

20. Appeal and Error ⇨216(1)

Even if appellant had been entitled to certain instructions in trial court, he could not complain upon appeal where he had failed to present such instructions in appropriate form to the trial court.

21. Trial ⇨256(6)

In action for deficiency judgment against chattel mortgagors and their partners, if mortgagee desired that jury be particularly instructed in respect to theories of the partners' assumption of debt by way of, inter alia, estoppel, ratification, and acceptance of benefits, he should have requested that instructions which court gave be more specific or he should have asked for qualifying instructions.

A. Don Duncan, San Francisco, for appellant.

George W. Hippeli, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff Norman B. Griffin brought this action against Edwina W. and William Compere and Victor L. and Gratia Williamson for the remainder due upon a promissory note of the Comperes after foreclosure of the chattel mortgage which the Comperes had given to secure the note.

The note, made in the principal sum of \$27,500, evidenced the balance due to plaintiff for the purchase of his cleaning business. There is no question as to the liability of the Comperes. They raised no

issue of fact at the trial. Plaintiff sought to hold the Williamsons liable as partners of the Comperes; i. e., as persons who were partners at the time of the transaction in suit or who, subsequently becoming partners, became obligated to pay.

The jury's verdict was in favor of the Williamsons and against the plaintiff. In response to special interrogatories, the jury also found: (1) the first written articles of partnership between the Williamsons and the Comperes were signed and executed "July 31st, retroactive to May 3, 1947"; (2) before these first written articles of partnership were signed and executed no partnership by oral agreement existed between the Williamsons and the Comperes; (3) after the partnership was entered into the Williamsons assumed the obligation evidenced by the note sued upon, "qualified to the extent the obligation was rescinded"; (4) the Williamsons are not now liable to the plaintiff for the indebtedness so assumed.

Plaintiff has appealed from that portion of the judgment which was in favor of the Williamsons; also, from an order which denied his motion for an order vacating the judgment as to the Williamsons and directing judgment in his favor against the Williamsons. In support of his appeal, plaintiff presents some 40 specific points under not less than 20 independent headings. We have considered each of these points and find they do not present a basis for reversal of the judgment. To discuss them one by one in detail would draw this opinion out beyond all bounds and fail to serve the most useful purpose. Instead, we will narrate what of significance happened at the trial, indicate our approval or disapproval, and state our reasons why. An outline of the sequence of events will aid the discussion.

Plaintiff was the owner of the "Norman Cleaners," a business having as its assets two leases, fixtures, equipment and good will.

Not later than April 24, 1947, Mrs. Compere became obligated by contract to purchase this business upon certain terms including the making of a down payment of

\$10,000 and the execution by herself and husband of a \$27,500 note in plaintiff's favor. On that day the Comperes executed the note and put it in escrow. In ordinary course the escrow probably would have been consummated by May 5th (Mrs. Compere took possession May 5th) but was not in fact consummated until May 21, 1947.¹

On July 31, 1947, the Comperes and the Williamsons signed an agreement in writing to become and be partners in the conduct of this cleaning business, for a term "commencing with the date hereof and continuing until dissolved by mutual consent * * * or by operation of law," each of the Williamsons to have a 12½% interest and each of the Comperes 37½%, and designating Mrs. Compere as manager of the business. At the same time, Mrs. Compere executed and delivered to the partnership all of her right, title and interest in and to the business. Each of these two instruments was dated "this 3rd day of May, 1947."

Later, by an agreement in writing dated October 13, 1947, the Comperes and the Williamsons effected certain changes in their partnership contract. Among other things, this agreement increased from 25% to 50% the interest of the Williamsons in

the partnership and decreased that of the Comperes from 75% to 50%, provided for additional cash contributions by the Comperes and the Williamsons, respectively, recited that the Comperes had borrowed \$27,500 from Norman B. Griffin evidenced by a promissory note of April 24, 1947, in the principal sum of \$27,500 bearing interest at 5½% per annum and declared that "for the purpose of equalizing the contributions to the capital of said partnership by all of the partners hereto, the said Victor L. Williamson and Gratia Williamson hereby agree with the said William Compere and Edwina W. Compere that the said promissory note and the indebtedness thereby evidenced shall be considered as a partnership indebtedness and that the payment of all amounts due thereunder shall be a business expense, and the said Victor L. Williamson and Gratia Williamson hereby agree to pay to the said William Compere and Edwina W. Compere 50% of the amount of any judgment which may be recovered against them in any suit brought upon said promissory note."

By a writing dated March 3, 1948, executed by the Comperes and the Williamsons, they in terms expressly rescinded their agreement of October 13, 1947. After de-

1. A few days before April 24, 1947, through E. W. Taylor, plaintiff, orally agreed to sell the business to Mrs. Compere. The transaction, because Taylor had no broker's license, was handled as a sale from plaintiff to Taylor and from Taylor to Mrs. Compere.

Not later than April 24, 1947, Taylor as seller and Mrs. Compere as purchaser signed an agreement in writing (dated April 21, 1947) whereby he promised to sell the business and she promised to buy it upon certain terms and conditions which included a promise by the purchaser to make a \$10,000 down payment and to give a promissory note in the sum of \$27,500 payable at the rate of \$500 per month with interest at 5½%. This agreement also recited the payment of \$500 by William George Compere and Edwina Compere and designated them as the purchaser.

On April 24, 1947, Taylor, Mrs. Compere and Griffin met at the office of the Bay Cities Escrow Company and opened two escrows, one relating to the sale from Griffin to Taylor, the other relat-

ing to the sale from Taylor to Compere. The Taylor-Compere escrow agreement, signed by Taylor and both Comperes, designated Taylor as vendor and Edwina Compere as vendee, incorporated the provisions of the April 21 agreement by declaring that "the herein escrow instructions are subject to the terms and conditions of a Uniform Agreement of Sale and Deposit Receipt *executed by the parties hereto*" (emphasis added) and stated that the note and a chattel mortgage securing its payment would be executed by William George Compere and Edwina Compere, his wife, in favor of Norman B. Griffin.

On the same day the Comperes signed the note and the chattel mortgage and placed them in escrow. Taylor put in escrow a bill of sale conveying the business to "Edwina Compere," a notice of intended sale, under the Bulk Sales Act, designating "Edwina Compere" as the vendee, and an assignment of lease to "Edwina Compere" which assignment was in writing accepted by her and approved by the lessors.

claring the mutual desire of the parties that the October agreement be rescinded and the parties be restored to the position in the partnership which they held prior to the October agreement, the agreement of March 3, 1948, expressly declared the October agreement "is hereby cancelled and nullified"; that the Williamsons "hereby assign and transfer" to the Comperes "one-half of their 50% interest in said business, and that in consideration thereof" the Comperes "release" the Williamsons "from the obligation to pay one-half or any part of any judgment which may be obtained against them in connection with that certain note and chattel mortgage executed by said Comperes to Norman B. Griffin."

[1,2] In connection with instructions to the effect that a partner is liable for all the obligations of the partnership arising after he becomes a member, the court told the jury that the Williamsons did not become liable on that basis if a partnership between them and the Comperes did not exist at the time of the execution of the note, which the court declared was April 24, 1947, the day the note was signed. (Instructions 11, 13, 14 and 19.)² Plaintiff complains of the date the court gave the jury, claiming that the consummation of the escrow (not earlier than May 5th) instead of its commencement (April 24th) was the critical date because delivery of the note, not its mere signing, marked the commencement of the obligation on the note and, assertedly, this is not a case for relation back to the commencement of the escrow. The trial court apparently viewed this as a case for relation back. Whether this is such a case, we need not decide. The true test here is the date when the obligation to buy the business and to pay

the agreed purchase price was incurred, which, as we have seen, was April 24, 1947, the very date which the court gave the jury. The fact that the court described it as the time of the signing of the note instead of the effective date of the contract of purchase, is immaterial. Furthermore, the plaintiff requested and the court gave, with modifications, an instruction quite in harmony with the instructions which he now criticizes; "If you find that Victor L. Williamson and Gratia Williamson were copartners with William Compere and Edwina Compere when the *promissory note obligation to plaintiff Norman B. Griffin for the purchase of the business and its assets was incurred was executed*, you will render a verdict in favor of plaintiff against them for the balance due plaintiff." (No. 19 as given by the court, a modification of plaintiff's No. 29. Words deleted by the court are in *strikeout*; words added, in *italics*. Plaintiff says that by other instructions the court gave the jury clearly to understand that by "execution" of the note he meant its "signing," not its signing and delivery; hence, April 24th, not May 5th or May 21st.) This instruction as prepared and submitted by plaintiff, pointed to the very date which the court gave, April 24th, the date when the "obligation * * * for the purchase price of the business * * * was incurred."

[3-6] The finding that no partnership by oral agreement existed between the Williamsons and the Comperes prior to the signing (July 31, 1947) of their first written articles of partnership, is amply supported by the evidence. That fact and the fact that the partners made their first articles effective retroactively only to May 3, 1947,³ means there was no partnership

in preparing and executing the partnership agreement dated May 3, 1947.

We find no error in that, plaintiff being a stranger to that agreement. The parol evidence rule applies as "between the parties and their representatives, or successors in interest", § 1856, Code of Civil Procedure or "between the parties thereto, or their successors in interest by a subsequent title", § 1962, subd. 2, Code Civ.Proc. Moreover, plaintiff can

2. We observe that the record fails to indicate the source of instructions 11 and 13 (whether requested by plaintiff or defendant or given on the court's own motion); hence, presumably requested by plaintiff-appellant and not subject to challenge by him upon appeal.

3. Plaintiff complains of parol evidence that was admitted concerning the occasion, purpose and intent of the parties

in existence when (April 24th) Mrs. Compere incurred the obligation to pay the purchase price, the remaining \$27,500 portion of which was evidenced by the note in suit.

[7] Plaintiff contends that by participating in the formation of this partnership and in the acceptance of Mrs. Compere's transfer to the partnership of her "right, title and interest in and to the business * * * and * * * assets of said business," the Williamsons assumed the obligation evidenced by the \$27,500 note. He argues that this is like the case of a principal who, if he accepts the benefits of a contract his agent has made, must accept it with its burdens. There is no analogy. All that the Williamsons did was to form a partnership with the Compere. In so doing and receiving and accepting certain properties the partners did not assume the personal obligations of the assignor.

Plaintiff invokes also the provisions of sections 1589 and 3521 of the Civil Code. Here, too, the asserted analogy is lacking. There was no assignment or assumption of obligations. "The general rule is that the mere assignment of rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor.

show no prejudice to his case, because the jury found in his favor when it found the agreement was effective retroactively as of May 3, 1947.

Plaintiff contends that because in a certain other action Williamson assertedly made a claim to certain moneys "by reason of the partnership agreement * * * dated May 3, 1947" and because in another action he asserted through his attorneys that the property covered by the chattel mortgage was sold to Williamson "on April 24, 1947," he was *conclusively* bound by such declarations and they tended to prove the commencement of the partnership as of April 24th, or at least by May 3, 1947. It would appear that such statements were, at most, evidence in the case and merely conflicted with Williamson's testimony that there was no partnership created by oral agreement and no partnership agreement prior to the written agreement which was dated May 3, 1947.

Plaintiff complains that the court erro-

3 Cal.Jur. 281, § 33: *Lisenby v. Newton*, 120 Cal. 571, 52 P. 813, 65 Am.St.Rep. 203; *Wilson v. Beazley*, 186 Cal. 437, 199 P. 772. But the rule is, of course, otherwise in a case where the assignee obligates himself to perform the covenants binding upon his assignor." *Barberich v. Pooshichian*, 59 Cal.App. 507, 510, 211 P. 236, 237. See also *Armstrong Co. v. Shell Co. of Cal.*, 98 Cal.App. 769, 775-776, 277 P. 887. "A person becoming a member of an existing firm, or forming a partnership with another in the latter's existing business, does not thereby become liable for the debts already incurred, nor does the new firm become liable for them. An agreement, express or implied, is necessary to create such liability, not only between the creditors and the new firm but also as between the partners; that is to say, the presumption is against the assumption of such liability, and the burden to prove it is upon the one who asserts it * * *". *Wine Packing Corp. of California v. Voss*, 37 Cal.App.2d 528, 533-534, 100 P.2d 325, 328. In our case, at most, the partnership acquired the property subject to the lien of the chattel mortgage, there being nothing in the partnership agreement or in the assignment from Mrs. Compere indicative of an intent to assume an obligation of any kind.

neously curtailed his examination of Williamson concerning a statement made by the latter upon deposition in another action wherein Williamson assertedly claimed that his title to and in to the property of the business dated back as early as sometime in April. Asked what he wished to prove, plaintiff's counsel said he wished to show that the witness was "estopped" to deny his partnership from the beginning, "by reason of the fact that he claims title to these assets of the partnership which were acquired at the beginning of partnership in this suit." The court ruled that Williamson would not thereby be estopped to deny that he became a partner before he in fact did become a partner, and so informed the jury at the time. We see no error in that. Plaintiff's offer of proof set forth no element of estoppel, at most an out of court statement by Williamson inconsistent with his testimony in court. If plaintiff had the latter in mind he should have so informed the court.

[8,9] Plaintiff advances still another theory for assumption of liability by the Williamsons, this time limited to partnership property. He directs attention to section 2411 of the Civil Code (section 17 of the Uniform Partnership Act; now section 15017 of our Corporations Code) which in 1947 provided that a person admitted as a partner "into an existing partnership" is liable for all the "obligations of the partnership arising before his admission" as though he had been a partner when such obligations were incurred "except that this liability shall be satisfied only out of partnership property." There are authorities which indicate that these provisions are actually as well as literally limited to the case of a person who becomes a member of an existing partnership. See *Wine Packing Corp. of California v. Voss*, supra, 37 Cal.App.2d 528, 100 P.2d 325, and *Hargis v. Hargis*, 221 Ark. 654, 255 S.W.2d 663. If that be the law, then section 2411 does not here apply for lack of evidence that the Comperes operated as partners prior to the time they and the Williamsons became partners. In any case, the urge to apply section 2411 comes too late because the possible application of section 2411 to the Williamsons was no part of plaintiff's theory during the trial. The lack of such a theory is clearly indicated by the fact that plaintiff presented and requested one instruction based upon section 2411 in relation solely to other parties, not to the Williamsons. These other parties were defendants Carl Semonian and Harry Tarpinian, who entered this partnership in March, 1948, taking over the Compere's 75% with the consent of the Williamsons.⁴ This instruction concerning Semonian and Tarpinian concluded with the statement that "a person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before

his admission as though he had been a partner when such obligations were incurred," section 2411 being cited in its support. We note that even as a section 2411 instruction it was defective in omitting the very important limitation "except that this liability shall be satisfied only out of partnership property." In view of these circumstances, plaintiff is not now in a position to urge section 2411 as a basis for imposing liability upon the Williamsons.

[10] Plaintiff correctly states that it was the October 13, 1947, agreement which the jurors had in mind when they found that after the partnership was entered into the Williamsons assumed the obligation evidenced by the note sued upon.⁵ He advances certain theories as to the legal effect of that agreement, theories that are of significance chiefly in connection with the question whether the parties could and did rescind the October agreement.

[11] One of these theories is that this agreement functioned as a ratification by the principal (the partnership and its members) of the act of its agent (Mrs. Compere) in acquiring the property and incurring the purchase price obligation. There inheres in this the same fallacy that we have mentioned in relation to the same theory in connection with the original articles of copartnership, the absence of the essential elements of principal and agent.

[12-15] Another theory advanced by plaintiff is that the October, 1947, agreement had the effect of making the Williamsons the principal obligors and the Comperes mere sureties, to the extent at least of 50% of the obligation, upon the asserted analogy of the situation which obtains when a new partnership succeeds an old one and assumes the obligations of the old, citing *Eastin v. Roberts, Carpenter & Co.*, 19 Cal. App.2d 567, 571, 66 P.2d 224. Whether

4. The trial court directed a verdict in favor of Semonian and Tarpinian and plaintiff did not appeal from the portion of the judgment which was in their favor.

5. Plaintiff claims it was error for the court to admit evidence of a conversation the parties had just before they pre-

pared and executed the October 13th agreement and also error to submit to the jury the interpretation of the agreement. We are not convinced it was error, but even if it were the plaintiff has not been prejudiced because the jury found in his favor concerning the effect of the agreement, and the Williamsons have not appealed.

that doctrine applies here or not, we need not decide. Plaintiff's connection with the October agreement is that of third party beneficiary. In that capacity, he may enforce the contract of assumption "at any time before the parties thereto rescind it." Civ.Code, § 1559. Until the "creditor-beneficiary has accepted the benefit or has detrimentally acted in reliance thereon, the assuming party may rescind. But as long as the assuming promisor continues to retain the consideration from the original promisee, the contract for the benefit of the third party cannot be rescinded or revoked. *Pitzer v. Wedel*, 73 Cal.App.2d 86, 165 P.2d 971; *Pearsall v. Townsend*, 7 Cal.App.2d 162, 45 P.2d 824." *Dick v. Woolson*, 106 Cal.App.2d 415, 419-420, 235 P.2d 119, 122. "Rescission," of course, denotes the return by the promissors (here, the Williamsons) to the promisees (the Comperes) of the consideration which the latter had given the former for the promise to assume the obligation. Here, that requirement was met. The Williamsons relinquished the additional 25% interest in the partnership which they acquired by their assumption contract and transferred it back to the Comperes from whom they had received it.

[16-18] Concerning the rescission contract⁶ of March 3, 1948, plaintiff contends that its failure expressly to mention that clause of the October agreement which declared that payment of the note would be a partnership expense, operated as a failure to rescind that clause. We do not so view it. The express rescission of the October agreement as a whole was adequate and effective without specifically list-

ing and separately rescinding each and every clause it contained.

[19] Plaintiff claims that the rescission came too late, that it came after plaintiff had accepted as a third party beneficiary. He predicates this claim upon the fact that on March 1, 1948, he filed an action against the Comperes and the Williamsons individually to collect the deficiency on the note. In so doing he was not accepting or enforcing the agreement of October 13th because he had not yet learned of its existence.

[20, 21] Plaintiff's principal remaining complaint is that the instructions which the court gave the jury concerning assumption by the Williamsons of obligations that had been created prior to the effective date of the partnership did not place before the jury plaintiff's various theories of liability. Irrespective of the question whether the evidence entitled him to instructions upon any of those theories, he is not in a position now to complain, for he failed to present them in appropriate form to the court. For example, plaintiff criticizes instructions 11 and 13 (which were to the effect that a partner is liable for all obligations incurred by a partnership after he becomes a partner and for such previously incurred obligations of the business as he assumes and agrees to pay) not on the ground that they were erroneous (they were correct as far as they went) but because they did not expound plaintiff's theories of assumption of the debt by way of estoppel, ratification of an agent's act by his principal, acceptance of the benefits of Mrs. Compere's assignment to the partnership, and Williamson's out of court claims to ownership

6. Plaintiff assigns as error, in violation of the parol evidence rule, Williamson's testimony concerning a conversation he and Mrs. Compere had prior to the drafting and execution of this contract. That testimony merely showed the occasion for changing the partnership arrangement, including the fact that Mrs. Compere felt she should not continue to carry on with the management of the business and the fact that she and her husband were leaving California. That testimony did not purport to interpret the contract or vary its terms. The writ-

ing was so clearly a contract of rescission, the admission of the testimony could have done no possible harm.

Upon the ground that a written instrument presents questions of law for determination by the court only, plaintiff claims it was reversible error to submit to the jury the question whether or not the October agreement was rescinded. If there were only legal questions involved, no harm was done because the jury correctly viewed the 1948 agreement as one of rescission.

of the assets of the business. Those theories obviously had to do with the means, manner and method of assuming or incurring indebtedness. If plaintiff desired that the jury be particularly instructed in respect thereto he should have requested that the instructions which the court gave be made more specific or he should have asked for qualifying instructions. See *Ornales v. Wigger*, 35 Cal.2d 474, 478-479, 218 P.2d 531; *Kuehn v. Lowthian*, 124 Cal.App.2d 867, 871-873, 269 P.2d 666. Plaintiff says his instruction No. 10,⁷ which the court denied, was on these subjects but he is mistaken. His No. 10 would have informed the jury concerning the power of a partner to act for his partnership but said nothing about estoppel, ratification, or any of the other theories mentioned. Plaintiff's requested instructions Nos. 8, 28, and 31 did touch upon those theories but each went too far and in effect would have, if given, directed a verdict in favor of the plaintiff. No. 8 declared that the Williamsons received as partners all the assets of the business and cannot be heard to deny that they must assume the balance of the purchase price. No. 28 stated "as a matter of law" that the Williamsons were partners when the obligation to pay the purchase price was incurred. No. 31 declared that the Williamsons could not rescind their agreement or assumption of liability because they had retained the consideration for their promise to pay the obligation to plaintiff, which consideration consisted of "the assets of plaintiff's business, which he had sold to the partnership." Plaintiff's No. 9 dealt with the character of proof required when a stranger asserts the existence of a partnership, but we are unable to consider and determine the propriety of this requested instruction because it appears from the record that "this instruction also contained other material" than that which is set forth in the record upon this appeal. Moreover, as noted earlier in this opinion, plaintiff is not in a position to challenge instructions numbered 11 and 13. They are chargeable to him as appellant because the record is

silent as to their source, whether requested by the plaintiff or the defendants or given by the court upon its own motion.

The court gave two instructions (Nos. 15 and 16) which dealt with rescission of contract. Plaintiff takes exception to them not upon the ground that they incorrectly expressed the law but that the court in effect committed to the jury the interpretation of the written contracts of October, 1947, and March, 1948. Whether or not that was error seems immaterial in view of the fact that the jury arrived at correct interpretations.

It was not error to deny plaintiff's instructions 19-22, inclusive. They would, erroneously, have given the jury May 5th instead of April 24, 1947, as the date when the obligation for the payment of the purchase price was incurred.

Plaintiff's instructions Nos. 7 and 24-27, inclusive, were offered by him in support of his claim that the first written articles of partnership were effective as of May 3, 1947. The court's refusal to give them, whether proper or improper, could not have been prejudicial in view of the fact that the jury found with plaintiff on that point.

We find no abuse of discretion in the denial of plaintiff's motion to amend his complaint. The amendments, designed to conform to proof, did not present any issues concerning which the proof, as we view it, furnished a predicate for a different judgment than was rendered.

We find no merit in plaintiff's claim that it was error to deny his motion for judgment notwithstanding the verdict and his motion to vacate the judgment as to the Williamsons and enter judgment in his favor against them.

The portion of the judgment appealed from and the order denying the motion to vacate a portion of the judgment and render judgment in plaintiff's favor are affirmed.

PETERS, P. J., and BRAY, J., concur.

7. Plaintiff's requested instructions bear one series of numbers; those actually

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given by the court, another series of numbers.

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**C. F. WATERS et al., Plaintiffs and
Respondents,**

v.

**Thomas LANIGAN et al., Defendants and
Appellants.**

Civ. 16437.

District Court of Appeal, First District,
Division 2, California,
Nov. 28, 1955.

Action for damages for trespassing cattle. The Superior Court, San Benito County, Thomas P. O'Donnell, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Kaufman, J., held that evidence warranted finding that defendants wrongfully assumed use and occupancy of pasture land by grazing their cattle thereon.

Judgment affirmed.

1. Animals ⇨100(4)

In action for damages for trespassing cattle, evidence disclosing that there was no binding contract for grazing privileges warranted finding that defendants wrongfully assumed use and occupancy of pasture land by grazing their cattle thereon.

2. Animals ⇨100(9)

In action for damages for trespassing cattle, evidence raised question for trier of fact as to whether plaintiffs, by their silence for 12 days, accepted defendants' offer of joint use of pasture.

3. Landlord and Tenant ⇨118(1)

Where no grazing contract was entered into, and plaintiffs and defendants did not believe that they had entered into contract which for some reason was invalid, the entry of defendants' cattle on pasture land in possession of plaintiffs was without consent and there was no tenancy at will.

4. Appeal and Error ⇨971(2)

Evidence ⇨498½

Whether or not a witness is qualified to express his opinion rests within the discretion of the trial court, and such ruling

will be disturbed only where there has been an abuse of discretion.

5. Evidence ⇨546

In action for damages for trespassing cattle, record disclosed that there was no abuse of discretion in ruling that insufficient foundation had been laid to permit one of the defendants to qualify as a real estate expert and express his opinion as to rental value of pasture land.

6. Evidence ⇨545

To qualify a witness to testify as an expert to value of land, it is necessary to show that he has peculiar means of forming an intelligent and correct judgment as to value of the property in question because of his familiarity with property in the neighborhood, his business experience, and his familiarity with the market and sale of similar property in the vicinity.

7. Appeal and Error ⇨1048(2)

Any error in ruling that one of defendants was not such an expert as could express his opinion on rental value was not prejudicial where defendants had an independent expert testify as to rental value and such defendant would not have testified to a lower rental value.

James A. Walker, Salinas, R. B. McMillan, San Francisco, for appellants.

Wyckoff, Parker, Boyle & Pope, Hollister, for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment for damages in the sum of \$1,078 in favor of respondents C. F. Waters, et al., and against defendants and appellants Thomas Lanigan, et al., and the granting of an injunction prohibiting appellants from allowing livestock owned or controlled by them to trespass upon respondents' real property described therein.

Respondents C. F. Waters and Edna M. Waters, filed a complaint alleging that Thomas and Margarita Lanigan wilfully and maliciously allowed their cattle to trespass upon the real property in possession

of respondents during the years 1952 and 1953. The case was tried by the court without a jury. The trial court found that (1) respondents at all times pertinent herein, were in possession of certain real property containing about 1,053 acres; (2) appellants wrongfully assumed the exclusive use and occupancy of said property for 1952 in allowing their livestock to trespass upon said property, to respondents' damage in the sum of \$1,053, said property having a pasturage value of \$1 per acre during that year; (3) appellants permitted occasional trespasses during 1953, and the grass consumed being of an indeterminate amount, nominal damage in the sum of \$25 was suffered in that year; (4) respondents repeatedly returned said livestock to appellants during the years 1952 and 1953, and gave them notice to keep said livestock off the aforesaid property, but appellants continued to permit the trespasses.

Appellants contend that they did not wrongfully assume the use and occupancy of this property, known as the Stewart Ranch, for the year 1952, since they had entered into a binding contract with respondents for grazing privileges on the Stewart Ranch that year in exchange for respondents having similar rights on the Lanigan Ranch. If the alleged contract is found to be invalid, they say, still appellants' cattle were allowed to enter upon that property with the consent of respondents, hence a tenancy at will was created which was never properly terminated. Error is charged further in the refusal of the court to allow opinion testimony on rental value by appellant Thomas Lanigan, as he clearly possessed the necessary qualifications.

[1] Respondents leased approximately 1,053 acres of pasture land in San Benito County from third parties, and used it for grazing cattle. This land, known as the Stewart Ranch, was contiguous to other pasture land owned by appellants. Consisting of parcels irregular in shape, they were joined together in several places. Between 1,150 and 1,160 acres of appellants' land were situated in the same field

as the Stewart Ranch, and together they formed one big pasture. Not until August 1953, was the boundary fenced. This was done by appellants at their own expense. Prior to that cattle could roam freely from one property to the other.

For approximately five years prior to 1952 respondents had used the entire field for grazing purposes. For the first two years no payment was made, while for the next three years respondents paid rent to appellants under a verbal lease. Appellants then kept their cattle on other land.

Appellants in November 1951, notified respondents that when the lease expired on January 1, 1952, it would not be renewed, and respondents would have to remove their cattle to their own property. Respondents continued to seek a renewal of the lease, and on January 17, 1952, asked Richard Stevens, District Attorney of San Benito County, to arbitrate the difficulties between the parties. Respondents' cattle in the interim remained in the unfenced field. A meeting was held in Mr. Stevens' office on January 24, 1952. It is out of the conversations that occurred on that day in Mr. Stevens' office that appellants contend a contract was negotiated which, even if not valid, gave rise to a tenancy at will on the part of the appellants.

The conversations disclose that the parties at the time were anything but congenial. Appellant Mrs. Lanigan demanded that Waters remove his cattle from her land, but he refused, requesting a renewal of the lease which she refused because of the low rental he had been paying. Mr. Stevens suggested that they use the unfenced pasture land together, but Waters said he did not care to do anything like that. Mrs. Lanigan said she ought to be able to put 100 head of cattle upon the property to compensate for the feed which respondents' cattle had eaten since the lease expired on January 1, 1952, and that if respondents did not remove their livestock, appellants would turn theirs into the area. Appellants cite portions of the record to prove that an agreement was reached that appellants could run 40 head of cattle in the pasture. This testimony was given by

Mrs. Lanigan, and it is claimed that it is uncontradicted and must be accepted as true.

However, Mr. Waters testified that Mrs. Lanigan said she would turn 100 head of cattle into the pasture, but he objected. Mrs. Lanigan stated at one point that Waters had said that appellants could put 15 cattle in the pasture, but she had said she would put in 100 until she found out how many he had and until they were even. She said "That was about all the conversation, and he would just sit there. He didn't say anything."

Mr. Stevens testified that Waters offered to allow appellants to run 15 head of cattle, but Mrs. Lanigan felt she was entitled to more, and threatened to put her cattle in unless Waters took his out. When asked if he recalled an agreement on that he said: "A meeting of the minds, no. It is my recollection that Mr. Waters finally upped the amount of livestock that he would be willing to have Lanigans put into the area but I don't believe he ever arrived at the same number of head that Mrs. Lanigan felt she was entitled to put in, but she did tell him that in the event he didn't get his stock off she would put so many head of stock in there." There is no dispute as to the fact that respondents removed their cattle not long after the January 24th meeting, respondents stating the date as February 5, 1952, and appellants agreeing that it was in the month of February. Shortly after the meeting, appellants put their cattle into the unfenced field where they admit that they remained until November 1, 1952. Appellant Thomas Lanigan stated that 70 head were on the property in February and that the number decreased to around 50 in June, and to 35 in September and October. Waters testified that the number was in the 70's at all times, and sometimes higher. Appellants admit that respondents in February 1952, and at other times during that year demanded that appellants remove their cattle, but they refused.

The statement of the testimony of the parties as reviewed above, is sufficient to answer appellants' first contention, that the trial court was in error in finding that ap-

pellants wrongfully assumed the use and occupancy of the Stewart Ranch during 1952. Appellants cite numerous authorities to the effect that uncontradicted evidence of a witness which is not inherently improbable may not be disregarded by the trier of fact, *Dickenson v. Samples*, 104 Cal.App.2d 311, 314, 231 P.2d 530; *Mantonya v. Bratlie*, 33 Cal.2d 120, 127, 199 P.2d 677; *Wirz v. Wirz*, 96 Cal.App.2d 171, 176, 214 P.2d 839, 15 A.L.R.2d 1129; *Dobson v. Dobson*, 86 Cal.App.2d 13, 14, 193 P.2d 794, but these cases are clearly distinguishable. It is difficult to understand how appellants can claim that the testimony of Mr. Lanigan and Mr. Stevens is uncontradicted to the effect that an agreement was reached whereby appellants could put their cattle into the unfenced field in consideration for appellants allowing respondents already present cattle to remain there, when Stevens definitely testified that there was no meeting of the minds, that the parties never arrived at the same number of cattle, that on the day of the meeting or a subsequent date he advised Waters to take his stock out of the pasture, since it was apparent that he could not keep them off the Lanigan place because of the condition of the fence. They point to testimony that Stevens said Waters agreed to 40 head being allowed into the pasture, but appellants' own testimony is that they ran 70 head in the pasture in February 1952. If they contend that an agreement had been reached as to 40, it is clear that they were not attempting to act under such contract when they immediately ran 70 head of cattle into the pasture. There is, of course, support in the evidence for the conclusion that no agreement was reached as to 40, since, although Stevens used the word "agreed" when referring to Stevens' offer to allow 40, he had stated that the parties never arrived at the same number. Since there was no meeting of the minds, there was no contract.

[2] It is argued that respondents by their conduct in not at once removing their cattle from the pasture, by their conduct accepted appellants' offer to use the pasture jointly. Twelve days after the meeting respondents removed their cattle. Lanigan admitted that Waters asked him to

take his cattle out of there in February 1952. Appellants' so-called offer was in the nature of a threat to put 100 cattle in the pasture. They show that there was a counter-offer on the part of Waters to permit 40, and that this is as high as he went, having started with 15. Because it took him 12 days in which to take action when appellants placed 70 head of cattle in the pasture, it cannot be said that the trial court was bound as a matter of law to conclude that this conduct was subject only to the inference that silence for that length of time was acceptance of an offer of joint use of the pasture. The trial court may well have concluded that that was a reasonable length of time for the making of a determination by respondents that the offer of 40 head had not been accepted, and that a counter-offer of 70 head would be rejected.

Appellant says that California cases have established that silence or inaction on the part of an offeree will be regarded as acceptance of an offer where the offeree is under a duty to speak, citing *Wood v. Gunther*, 89 Cal.App.2d 718, 731, 201 P.2d 874, but that case was concerned with relations between partners. The case pointed out that it was not a case of strangers, and to such persons she would have owed no duty to speak, but the offeree was one of three fiduciary partners who had a contract with one another under which they owed duties, one to the other; consequently, silence constituted acceptance. *Meherin v. Meherin*, 93 Cal.App.2d 459, 209 P.2d 36, is also a partnership case. The remaining cases cited are clearly distinguishable from the case now before the court.

[3] Since no contract was entered into, and since we do not have a situation where the parties believed they had entered into a contract which for some reason was invalid, the entry of appellants' cattle was without consent, and therefore no tenancy at will arose. *Blum v. Robertson*, 24 Cal. 127; *Norton v. Overholtzer*, 63 Cal.App. 388, 218 P. 637.

[4,5] It is contended that the trial court committed prejudicial error in ruling that Thomas Lanigan could not give his

opinion as to the rental value of the Stewart Ranch in 1952. Respondents' objection that insufficient foundation had been laid was sustained. Appellants admit that whether or not a witness is qualified to express his opinion rests within the discretion of the trial court, and such ruling will be disturbed only where there has been an abuse of discretion. *People v. Willis*, 30 Cal.App. 2d 419, 423, 86 P.2d 670; *Eubanks v. Milton G. Cooper & Son, Inc.*, 68 Cal.App.2d 366, 375, 156 P.2d 775. They maintain that such an abuse of discretion was committed in this instance, for Thomas Lanigan had owned the ranch immediately adjacent to the Stewart Ranch since 1945, and 1150 acres of the Lanigan Ranch were located in the same big field as the Stewart Ranch; he had been engaged in the cattle business since World War I; he had more than once rented land for grazing purposes; that although he had not rented property "in the vicinity" of the Stewart Ranch, he had rented property by the Jungle Inn which was "out in the valley more", and one of respondents' witnesses had previously testified that the Stewart Ranch was within hiking distance of the Jungle Inn. Thomas Lanigan also testified that in the spring of 1951 he had paid rent for pasturage on the Stewart Ranch itself.

The record shows that after stating that he had owned the ranch adjoining the Stewart Ranch since 1945, he testified he had had occasion to rent property for grazing purposes, but he was not asked when he had done so. He was then asked if he had ever rented property in the vicinity of the Stewart Ranch. He said "No I haven't. I have rented a small place by the Jungle Inn, but that's out in the valley more." Although appellant cites testimony given by another witness much earlier in the record that the Jungle Inn was in hiking distance of the Stewart Ranch, this was not called to the court's attention. A reading of the record clearly indicates that there was no abuse of discretion in holding that appellant was not sufficiently qualified as a rental expert.

[6] In *People v. La Macchia*, 41 Cal.2d 738, 746, 264 P.2d 15, 21, it is said that to

qualify a witness to testify as to value of land it is only necessary to show "“that he has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question * * * beyond what is presumed to be possessed by men generally.”' * * * The usual expert is qualified by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and of sales of similar property in the vicinity." Since Lanigan was not an owner, he had to qualify as an expert on rental values, according to the standards set forth in the above quotation. Counsel for appellants should have brought out that Lanigan was generally familiar with fair rental values in the vicinity for pasture land of similar quality during the period of time in question.

Appellants say that the ruling was clearly unreasonable when the witness's qualifications are compared with those of Gerald Garner who testified as to rental value for respondents. However, the transcript reveals that the witness Garner was questioned in detail as to his fairly extensive operations on leased land in San Benito County for the past several years. The judge stated that he thought the witness had had enough practical experience in renting property but asked that he be questioned further as to the extent of his experience in renting "in this particular county and this area." After further questions by counsel, the court interrogated the witness at some length as to his experience in the general vicinity of the Stewart Ranch before allowing him to express an opinion on rental value. He then stated the value to be \$1 per acre.

Appellants had an expert witness, a real estate broker, testify that the rental value of the Stewart Ranch was 50 cents per acre. In rebuttal, respondent Waters testified that the rental value was 1.50 per acre. The trial court found the value to be \$1 per acre.

[7] Even if it be assumed that appellant should have been permitted to express his opinion on rental value, in view of the fact that appellants had an independent expert

testify on their behalf that the rental value was 50 cents per acre, and since they do not contend that appellant, an interested party, would have testified to a lower rental value, there appears to be no showing of prejudice. Therefore, as was said in *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 576, 147 P. 238, 252, in a situation where other experts had testified on the subject on which one witness had been excluded, and where it did not appear that qualified witnesses were difficult to obtain, "even if the ruling had been clearly erroneous, we cannot say that it was sufficiently prejudicial to warrant a reversal."

We conclude that no prejudicial error appears in the record before us and that the judgment finds ample support in the record.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.



137 Cal.App.2d 508

Martine G. ETCHEPARE, Plaintiff and Respondent,

v.

Edwin C. EHMKE and Janet Ehmke, Defendants and Appellants.

Civ. 21217.

**District Court of Appeal, Second District,
Division 1, California.**

Dec. 5, 1955.

The Superior Court of Los Angeles County, A. Curtis Smith, J., entered an order denying motion to set aside default judgment, and defendants appealed. The District Court of Appeal held that where defendants' attorney signed stipulation for trial on September 22nd, and sent it to plaintiffs' attorney for filing, and on September 17th, defendants' attorney telephoned Calendar Clerk and was erroneously informed that earliest date for trial would be December 22nd, and then, without check-

ing file or docket in clerk's office, and without telephoning plaintiff's attorney regarding the filing of the stipulation, or the chances of going to trial, and without any arrangement for trial on September 22nd, or for a continuance, defendants' attorney left town for two weeks, and default judgment was entered on September 28th, Superior Court did not abuse its discretion in holding that defendants were not entitled to have judgment set aside on ground that it was entered through "excusable neglect".

Order affirmed.

1. Trial Ⓒ9(2)

Where defendants' attorney signed stipulation for trial on certain date and had it sent to plaintiff's attorney for filing, he thereby waived his right to notice of trial under statute. West's Ann.Code Civ. Proc. § 594.

2. Judgment Ⓒ392

Burden of proving excusable neglect under statute providing that court may, on such terms as may be just, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, is on defendant, who must establish his thesis by the preponderance of the evidence. West's Ann.Code Civ. Proc. § 473.

3. Appeal and Error Ⓒ982(1, 2)

Determination whether burden of defendant to prove excusable neglect within meaning of statute providing that court may, on such terms as may be just, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, is the duty of the trial court, and an order granting or denying motion to vacate judgment will not be reversed on appeal unless abuse of discretion is clearly shown. West's Ann. Code Civ.Proc. § 473.

4. Action Ⓒ66

Defendants and their attorneys must be guided by rules of legal procedure in the conduct of a law suit.

Cal.Rep. 289-290 P.2d—47

5. Judgment Ⓒ143(5)

Where defendants' attorney signed stipulation for trial on September 22nd, and sent it to plaintiffs' attorney for filing, and on September 17th, defendants' attorney telephoned Calendar Clerk and was erroneously informed that earliest date for trial would be December 22nd, and then, without checking and without any arrangement for trial on September 22nd, or for continuance, defendants' attorney left town for two weeks, and default judgment was entered on September 28th, trial court did not abuse its discretion in refusing to set aside judgment on ground that it was entered through "excusable neglect". West's Ann.Code Civ. Proc. § 473.

J. Howard Sullivan, Matthew L. Hatfield, Los Angeles, for appellants.

A. F. Weltner, Hollywood, for respondent.

PER CURIAM.

On June 7, 1954, pursuant to a telephone conversation with defendants' counsel, plaintiff's attorney phoned the Clerk for a trial date, prepared a stipulation "that the above entitled matter now off calendar subject to being reset 30 days from March 31, 1954, be set for trial September 22, 1954, at 9:15 a. m. in Department 1 of the above entitled court, without prejudice to either party", and forwarded it to defendants' attorney for his signature. On June 11th, the signed stipulation was received by plaintiff's attorney with a covering letter from defendants' counsel. The stipulation was filed June 18, 1954, and on the same day, pursuant thereto, the cause was so set for trial.

September 22, 1954, there being no appearance on behalf of defendants, plaintiff's attorney phoned the office of defendants' attorney and "spoke to one who represented herself to be a secretary and also to another person who stated he was an associate of" defendants' attorney; and said persons told him that defendants' attorney "was out of town and that his secretary was away on vacation". He informed the presiding judge

of said conversations and the action was then transferred to Department 15 for trial. Plaintiff was sworn and testified and judgment was rendered in favor of Martine G. Etchepare as plaintiff and cross-defendant. September 28, 1954, judgment was filed providing "that plaintiff do have and recover from defendants the sum of \$5,250".

September 27th, the day before it was signed and filed, plaintiff's attorney mailed to defendants' attorney a copy of the judgment prepared by him. The judgment was entered on October 5, 1954, and notice of entry of judgment was mailed to defendants' attorney on October 6, 1954.

March 31, 1955, Notice of Motion to Set Aside Judgment Under § 473 Code of Civil Procedure was served and filed. The motion specifies that the judgment was entered through the mistake, inadvertence, surprise, and excusable neglect of defendants and cross-complainants' counsel, and is based upon the answer and cross-complaint and "the affidavit of J. Howard Sullivan" filed therewith, and upon all the records and files in the above entitled action.

The affidavit of defendants' said attorney filed with said notice of motion is the only basis in the record on the instant appeal upon which relief under Section 473 could have been granted. The relevant portions thereof are as follows: "* * * that on the 17th day of September, 1954, your affiant called the Calendar Clerk of Department 1 for the purpose of determining whether the trial of the above entitled matter was on the Master Calendar of Department 1 on September 22, 1954 at which time he was informed that there was no Stipulation there and that the earliest date for trial would be December 22, 1954, which date had been reserved for this matter * * * that because of the information given to him by the Calendar Clerk, which evidently was erroneous, your affiant did leave town for a period of two weeks.

* * * * *

"That plaintiff and cross-defendant did not serve a Notice of Trial pursuant to

C.C.P. § 594 on defendants and cross-complainants."

"The court may, upon such terms as may be just, relieve a party * * * from a judgment * * * taken against him through his mistake, inadvertence, surprise or excusable neglect." Code Civ.Proc. sec. 473.

[1] In the instant action, defendants' attorney had signed a stipulation for trial on September 22nd, and had sent it to plaintiff's attorney for filing. He had thereby waived his right to notice of trial under C.C.P. § 594. He knew the date of the trial.

According to his affidavit, on the 17th of September, five days before the stipulated trial date, he telephoned the Calendar Clerk and was misinformed. Then, without checking the file or docket in the Clerk's office, without telephoning plaintiff's attorney regarding the filing of the stipulation or the chances of going to trial, and without any arrangement for trial on the 22nd or for a continuance, he "left town for two weeks".

[2, 3] The burden of proving excusable neglect is upon the defendant who must establish his thesis by a preponderance of the evidence. *Bruskey v. Bruskey*, 4 Cal. App.2d 472, 479, 41 P.2d 203; *Caton v. Caton*, 131 Cal.App.2d 451, 458, 280 P.2d 876. To decide whether the burden has been met in this respect is the duty of the trial court and an order granting or denying a motion to vacate a judgment will not be reversed on appeal unless an abuse of discretion is clearly shown.

[4] In *Shearman v. Jorgensen*, 106 Cal. 483, at page 485, 39 P. 863, at page 864, where defendant's attorney prepared an answer and then, through inadvertence, filed it in his own office instead of filing it in court, the order vacating the default judgment was reversed and it was said: "Inadvertence in the abstract is no plea upon which to set aside a default * * * if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it." *Benjamin v. Dalmo*

Mfg. Co., 31 Cal.2d 523, 528, 190 P.2d 593. Defendants and their attorneys must be guided by the rules of legal procedure in the conduct of a lawsuit. *Caton v. Caton*, 131 Cal.App.2d 451, 458, 280 P.2d 876.

[5] The record on the instant appeal fails to show any abuse of discretion in denying appellants' motion to vacate the judgment.

The portion of the affidavit of defendants' attorney not quoted above expresses his excuses for his delay of five and a half months before seeking relief under Section 473. Since his failure to appear at the trial was held not to have been the result of "mistake, inadvertence, surprise or excusable neglect", the reason for the subsequent delay is immaterial.

The order is affirmed.



137 Cal.App.2d 516

Artle DE LA TOVA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Oscar Mayer & Company, Inc., a corporation, and American Motorists Insurance Company, a corporation, Respondents.

Civ. 21197.

District Court of Appeal, Second District,
Division 3, California.

Dec. 5, 1955.

Hearing Denied Feb. 1, 1956.

Workmen's compensation case. The Industrial Accident Commission made an award, and petitioner sought review. The District Court of Appeal, Parker Wood, J., held, inter alia, that finding that claimant's disability was attributable in part to head and neck injury and in part to normal progress of a pre-existing posture condition for which claimant was not entitled to compensation was supported by substantial evidence.

Award affirmed.

290 P.2d—24½

1. Workmen's Compensation ⇨1939

In reviewing findings of Industrial Accident Commission, courts are without power to disturb them unless there is a lack of substantial evidence.

2. Workmen's Compensation ⇨1652

In workmen's compensation case, findings that claimant's head and neck injuries had resulted in a temporary partial disability for certain periods, and a permanent partial disability thereafter, were supported by substantial evidence.

3. Workmen's Compensation ⇨998

Finding in workmen's compensation case that claimant was in need of no further medical treatment as result of injury was supported by substantial evidence.

4. Workmen's Compensation ⇨556

Compensation is recoverable for disability which results from aggravation or lighting up of a pre-existing disease if aggravation or lighting up is reasonably attributable to accident, but compensation is not recoverable for disability which results, irrespective of accident, from normal progress or development of pre-existing disease. West's Ann.Labor Code, § 4663.

5. Workmen's Compensation ⇨1630

Finding in workmen's compensation case that claimant's disability was attributable in part to head and neck injury and in part to normal progress of a pre-existing posture condition for which claimant was not entitled to compensation was supported by substantial evidence. West's Ann.Labor Code, § 4663.

6. Workmen's Compensation ⇨1630

Finding in workmen's compensation case that only 15 per cent of claimant's disability was attributable to industrial injury was supported by substantial evidence. West's Ann.Labor Code, § 4663.

Louis R. Stein, Los Angeles, for appellant.

Everett A. Corten and Edward A. Sarkisian, San Francisco, for respondents.

PARKER WOOD, Justice.

Review of proceedings of the Industrial Accident Commission.

On January 25, 1952, the petitioner, while employed as a meat packer, sustained injuries to her head and neck when she fell and struck her head on a cement floor. The referee found, among other things, that said injuries caused temporary total disability from January 26, to February 24, 1952, entitling applicant (petitioner herein) to \$35 a week during that time; that said injuries caused temporary partial disability beginning February 25, 1952, entitling applicant to \$17.50 a week based upon 50 per cent loss of earning power; and that applicant was in need of further medical treatment. An award was made in accordance with said findings. On March 25, 1953, the insurance carrier filed a request to terminate liability. Applicant did not object thereto. On May 15, 1953, an order was made terminating liability as of March 25, 1953. On September 25, 1953, applicant filed a petition to reopen, alleging therein that she had been unable to work, except sporadically, since said order was entered; and that she was in need of further medical treatment. At a hearing on March 12, 1954, the referee ordered that petitioner be re-examined by an independent medical examiner (Dr. Dueker, who had previously examined petitioner), and that his report of the examination be received in evidence; and the referee stated that thereafter the "file" might be referred to the rating bureau. Dr. Dueker made the examination and filed a report thereof in May, 1954. He stated therein that about 85 per cent of petitioner's complaints were due to a habitual static postural deviation; and that 15 per cent of her disability was a sufficient allocation to ascribe to the injury. In January, 1955, petitioner cross-examined Dr. Dueker relative to said report. Thereafter the referee instructed the rating bureau to make a permanent disability rating, and to base it on Dr. Dueker's report of May, 1954, "apportioning in accordance with the doctor's opinion." The rating bureau apportioned 15 per cent of the petitioner's disability to the injury and recommended

a permanent disability rating of $7\frac{1}{4}$ per cent.

On April 4, 1955, an order was made granting the petition to reopen, and the referee made findings in part as follows: that further temporary partial disability began on August 10, 1953 and continued to March 12, 1954, entitling applicant to \$17.50 a week during that time, based upon a 50 per cent loss of earning power; and that the injuries resulted in permanent disability which was rated at $7\frac{1}{4}$ per cent, entitling applicant to \$30 a week for 29 weeks. An award was made in accordance with the findings. Applicant's petition for reconsideration was denied.

Petitioner contends that there was no substantial evidence that: (1) her condition became permanent on March 12, 1954; (2) temporary disability terminated as of that date; (3) she was not in need of further medical treatment; (4) her permanent disability required apportionment because of a pre-existing physical condition; (5) apportionment of the disability should be 15 per cent to the injury and 85 per cent to the pre-existing condition.

In September, 1952 (about 8 months after the injury, and prior to the first award), Dr. Dueker, the independent medical examiner who was appointed by the referee, examined petitioner and made a written report which was received in evidence. He stated therein, in part, that: petitioner complained of dull aching sensations in the right temple, and of a dull, heavy sensation in the posterior cervical area; she stated that she had not returned to work "for fear that her neck and head pain will recur"; she stated that medication prescribed by her doctor more or less controlled the headache; she denied previous injury or similar complaints; she seemed to be logical in her conversation and did not seem to exaggerate complaints. Dr. Dueker stated further in his report that strong cervical compression elicited mild complaint of local pain in upper posterior cervical area; he reviewed X-rays of her skull and cervical spine; he believed that her principal trouble is the residual of cervical muscle and fascial strain; peti-

tioner had a posture marked by increased lumbar lordosis and forward carrying of the head which in itself tends to put a more or less continuous postural strain on the supporting structures of the spine; treatment consisting of heat, massage and traction, "with an honest effort" by her to rehabilitate the postural deviation, should be effective within a few weeks; her complaint "is perhaps 85% due to the static postural deviation underlying and prolonging the effects of the cervical strain due to the injury."

In the second report of Dr. Dueker, made in May, 1954, he stated that petitioner complained of heavy feeling and dull ache in the posterior neck, a feeling of tiredness in her arms, and "blackouts" which she said occurred every two or three months and sometimes caused her to fall. He stated further therein that there was moderate tenderness over the upper cervical muscles, that pressure there caused subjective complaint of pain; there is chronic cervical strain, pre-existent with habitual postural alteration contributing; gentle traction or the mere correction of the cervical posture will relieve her complaint; after a careful reconsideration of her case he could not materially alter his diagnosis and comment as stated in his first report; he would reiterate that perhaps 85 per cent of her present complaints are on the basis of the habitual static postural deviation, allowing no more than a small portion of the total picture to the effect of the injury at this time; the effects of the injury, to be termed temporary aggravation, should have cleared up in a few weeks under proper treatment; he believed that the patient had settled down to a degree of comfort acceptable to her, and the avoidance of responsibility for support of herself and son; he would allow her two months of the suggested physical therapy regime, with co-operation on her part, as a generous allowance of time for her recovery from the residual effect attributable to the accident; he believed that the 15 per cent of disability which he ascribed to the injury at the time of his first examination was a sufficient allocation.

At the hearing on January 20, 1955, for the purpose of permitting petitioner to cross-examine Dr. Dueker, he testified that petitioner had a pre-existing habitual postural deviation to which he attributed 85 per cent of her present condition, and that he attributed 15 per cent of her condition to the injury; that the cervical strain should not "of itself" have created symptoms for more than two months after the injury, and that the remainder of her trouble and the prolongation if it were due to the fact that she did not correct her posture; he had no explanation for the blackouts which she referred to during his second examination in May, 1954; he was "so strongly of the opinion that all she needs to do is to cooperate with very simple treatment to get over this," that he believed a very large part of her complaints were due to the fact that she would not co-operate; he thought it probable that, without any injury, the petitioner might have had similar trouble later in life following a longer period of poor posture.

Dr. Meade, who gave petitioner medical treatment on behalf of the insurance carrier, made a report on January 28, 1952 in which he stated that the "period of disability will probably continue for another one to three weeks, depending on whether she develops post-traumatic headaches." In another report, on February 22, 1952, he stated that X-rays taken of petitioner's neck on that date were negative for fracture dislocation; her symptoms were subjective, and he informed her that she should be able to assume her occupation on February 25, 1952; she stated that she did not want to go back to the same place because another employee said things that had embarrassed her.

Dr. Dickerson, who examined petitioner on behalf of the insurance carrier, stated in a report of February 6, 1952 that petitioner's complaints were consistent with a mild cerebral concussion syndrome; she should not return to her employment for four to six weeks; and he could not see any indication of permanent disability from the injury. In a supplemental report, on May 13, 1952, Dr. Dickerson stated that at

that time petitioner was fully able to do some gainful work, and he saw no reason for further treatment; she had made a good clinical recovery from the effects of the injury, and there would be no permanent disability. In a further report, on June 14, 1952, he stated that X-rays of the cervical spine were negative; in his opinion there were no objective findings in the examinations which would support the claim of continued headaches; and it was apparent that she had recovered from any ill effects of the accident.

Dr. Morgan, who examined petitioner on February 18, 1954, on behalf of the insurance carrier, made a report that petitioner had subjective complaints, and he did not believe there was any disability as a result of the injury.

A report of Dr. Shear, which was made on September 14, 1953, was attached to the petition to reopen; he stated therein that in his opinion she has a chronic cervical muscle spring; he believed that she should be reevaluated—such reevaluation to consist of electromyogram studies, rechecking X-rays and subsequent treatment by a psychiatrist if necessary.

[1,2] As above stated, petitioner contends that there was no substantial evidence that her condition became permanent on March 12, 1954, or that temporary disability terminated as of that date. This contention is not sustainable. "In reviewing the findings of the commission, the courts are without power to disturb them unless there is a lack of substantial evidence. The courts are not concerned with conflicts. * * * Where there is substantial evidence to support the findings and order of the commission, the reviewing court may not substitute its views for those of the commission and annul the award. * * * If the findings of the Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award. * * *"

Pacific Lumber Co v. Industrial Acc. Comm., 22 Cal.2d 410, 422-423, 139 P.2d

892, 899; Pacific Elec. Ry. Co. v. Industrial Acc. Comm., 96 Cal.App.2d 651, 660, 216 P.2d 135. Dr. Dueker stated that treatment, with an honest effort by petitioner to rehabilitate the postural deviation, should be effective within a few weeks; about 85 per cent of her complaints were "on the basis of the habitual static postural deviation"; he believed that she had settled down to a degree of comfort acceptable to her; the cervical strain should not of itself have created symptoms for more than two months after the injury; the remainder of her trouble was due to her poor posture and her failure to co-operate in treatments to correct posture. Dr. Dickerson stated that in his opinion there were no objective findings which would support her claim of continued headaches, and that she had recovered from any ill effects of the accident. Dr. Morgan stated that he did not believe there was any disability as a result of the injury. The referee found that the injury caused temporary partial disability from February 25, 1952 to March 25, 1953, and from August 10, 1953 to March 12, 1954; and that it resulted in a permanent disability of petitioner. Those findings are supported by substantial evidence.

[3] As above shown, petitioner contends further that there was no substantial evidence that she was not in need of further medical treatment. She refers to Dr. Dueker's report of May, 1954, wherein he suggested a physical therapy regime for two months, including the co-operation of petitioner. At the hearing in January, 1955 (about eight months later), he testified that the cervical strain should not "of itself" have created symptoms for more than two months after the injury; and that the remainder of petitioner's trouble was due to the fact that she did not correct her posture. Also, Dr. Dickerson stated in his report of May, 1952, that he saw no reason for further treatment; and in his report of June, 1952, that it was apparent that petitioner had recovered from any ill effects of the accident. The finding that petitioner was not in need of further medical treatment (as a result of the injury) was supported by substantial evidence.

[4, 5] Petitioner contends further, as above shown, that there was no substantial evidence that her permanent disability required apportionment by reason of a pre-existing postural defect. She argues that there was no evidence that her postural defect, which had existed prior to the accident, had caused her any discomfort prior to the injury, or that it was progressing to a point which could with reasonable certainty produce disability without an injury. She argues further that an employer takes an employee in the physical condition in which he finds the employee and that the fact that petitioner's posture contributed to prolonging the effects of the injury does not justify an apportionment. Section 4663 of the Labor Code provides: "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury." Compensation is recoverable for "disability which results from the aggravation or 'lighting up' of a pre-existing disease if the aggravation or 'lighting up' is reasonably attributable to the accident; but compensation is not recoverable for disability which results, irrespective of the accident, from the normal progress or development of a pre-existing disease. [Citations.] It was a question of fact for the determination of the Commission as to whether applicant's permanent disability resulted from the effects of the accident, including the aggravating effect of the accident upon a pre-existing disease, or whether the disability or a part thereof resulted from the normal progress of a pre-existing disease. If a part of the disability resulted from the normal progress of a pre-existing disease then a portion of the permanent disability rating herein should have been attributed to the pre-existing disease." *Industrial Indem. Co. v. Industrial Acc. Comm.*, 95 Cal.App.2d 443, 449-450, 213 P.2d 11, 15. The opinion of Dr. Dueker, specifically referred to above, was a sufficient basis for a determination that a part of petitioner's disability resulted from the normal progress of her pre-existing condi-

tion. There was substantial evidence in support of apportionment of the disability.

[6] Petitioner contends further that there is no substantial evidence to justify the apportionment of 15 per cent of her disability to the injury. She argues that Dr. Dueker was unable to give any basis for his opinion that 15 per cent of her disability was due to the injury. At the hearing in January, 1955, counsel for petitioner asked Dr. Dueker to explain how he arrived at the percentage of apportionment, and Dr. Dueker replied that he believed "by far the greater proportion" of her disability was due to her poor posture and failure to correct it "as against a minor portion due to the injury and that comes up with a figure for 85 and 15 respectively"; and that there was no objective rule whereby his opinion could be tested—that it was "a matter of trying to evaluate the whole picture and striking a fair arbitrary apportionment." Prior to said hearing, as above shown, Dr. Dueker made two physical examinations of petitioner—one about eight months after the injury and the other about two years and four months after the injury. He reviewed her history, and examined X-rays of her skull and cervical spine. In his opinion, as above stated, the cervical strain should not have created symptoms for more than two months; she had settled down to a degree of comfort acceptable to her; and a large part of her complaints were due to the fact that she did not co-operate. In *Liberty Mut. Ins. Co. v. Industrial Acc. Comm.*, 33 Cal.2d 89, at pages 93, 94, 199 P.2d 302, at page 306, it was said: "Arriving at a decision on the exact degree of disability is a difficult task under the most favorable circumstances. It necessarily involves some measure of conjecture and compromise by the finder of fact as certainly would occur in the mental processes of a so-called expert witness. When the commission is confronted with widely divergent views as to the extent of the loss of function of the body, further complicated by the possibility of lack of cooperation or faking in various degrees by the injured person, it may make a determination within the range of the evidence

as to the degree of disability. * * *

The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence." In *Tanenbaum v. Industrial Acc. Comm.*, 4 Cal.2d 615 at page 618, 52 P.2d 215, 216, it was said: "[T]he determination of the percentage of disability is a matter left to the sound discretion of the commission." In the present case, it cannot be said that the commission abused its discretion in apportioning 15 per cent of the disability to the injury.

The award is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



137 Cal.App.2d 289

C. SLOAN, Plaintiff and Respondent,
v.

Frederick W. STEARNS, Fairway Construction Co., Inc., Defendants and Appellants.

Civ. 20642, 20935.

District Court of Appeal, Second District,
Division 2, California.

Nov. 28, 1955.

Rehearing Denied Dec. 21, 1955.

Hearing Denied Jan. 25, 1956.

Action by attorney's assignee to recover attorney fees. The Superior Court, Los Angeles County, LeRoy Dawson, J., rendered judgment for plaintiff and denied defendants' motion for judgment n. o. v. and defendants appealed. The District Court of Appeal, Ashburn, J. pro tem., held, inter alia, that evidence was sufficient to support verdict for assignee in quantum meruit irrespective of whether contingency contract between attorney and client were deemed breached by client or unenforceable.

Judgment and order affirmed.

Fox, J., dissented.

See also 128 Cal.App.2d 717, 275 P.2d 913.

1. Appeal and Error ⇨903

Reviewing court was bound to assume that enough appeared in record to enable it to decide whether reversible error was committed, and was bound to make ruling upon basis of what affirmatively appeared. West's Ann.Rules on Appeal, rule 52

2. Appeal and Error ⇨930(1)

On appeal from judgment on verdict, evidence was viewed favorably to respondent.

3. Novation ⇨4

Where attorney had contract to render services in obtaining a loan, and also was engaged to render legal services, and attorney and client subsequently entered into purported contract for compensation for all services, the purported contract constituted a novation. West's Ann.Civ.Code §§ 1530-1532.

4. Work and Labor ⇨14(2)

Where a contract calls for one party to render services, and other party prevents occurrence of condition which would perfect right to compensation, aggrieved party may treat contract as repudiated and proceed in quantum meruit.

5. Contracts ⇨303(4)

A party to a contract cannot take advantage of his own act or omission to escape liability thereon.

6. Contracts ⇨303(4)

Where a party to a contract prevents fulfillment of a condition precedent or its performance by adverse party, he cannot rely on such condition to defeat his liability

7. Contracts ⇨57

Where parties assume to make a contract in which one's promise is consideration for promises by other, promises must be mutual, and one who promises to do a thing only if it pleases him is not bound to perform.

8. Contracts ⇨10(1)

Where a contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation, and no enforceable obligation exists.

9. Contracts ⚭10(2)

Where contract between attorney and client required attorney to obtain a loan for client and to render legal services, provided the payment was contingent upon client's acceptance of loan, contract was unenforcible for lack of mutuality.

10. Attorney and Client ⚭158

Where contract between attorney and client was unenforcible for lack of mutuality in that client was not obliged to perform, and attorney had explained this fact at time contract was executed, attorney, upon client's refusal to perform, was not estopped to rely upon lack of mutuality and seek recovery in quantum meruit.

11. Attorney and Client ⚭166(1)

In action by attorney's assignee to recover attorney fees, evidence was sufficient to support verdict for assignee in quantum meruit irrespective of whether contingency contract between attorney and client were deemed breached by client or unenforcible.

12. Judgment ⚭199(1)

Motion for judgment n. o. v. did not lie where there was no previous motion for a directed verdict.

13. Pleading ⚭177

Where defendant in action to recover attorney fees pleaded written agreement, plaintiff's failure to deny agreements admitted nothing except genuineness and due execution, and did not preclude plaintiff from asserting matters in confession and avoidance. West's Ann.Code Civ.Proc. § 448.

14. Attorney and Client ⚭167(3)

In action for attorney fees, wherein it appeared that contingency contract under which attorney was to be paid only upon client's acceptance of a loan to be obtained by attorney was unenforcible for lack of mutuality, defendants were not entitled to instruction that such a contract is not rendered invalid by a provision that no fee is to be paid unless first person accepts loan.

15. Appeal and Error ⚭1078(4)

Error in rejecting proffered instructions which were not discussed in appellant's brief was waived.

16. Attorney and Client ⚭135

An attorney under a general employment which does not specifically call for his entire time is not precluded from assuming relation which would prevent him from devoting his entire energy to his client's interests.

17. Trial ⚭241

Taking excerpts from opinions of courts of last resort and indiscriminately changing them into instructions to juries is not an approved practice.

18. Trial ⚭261

Trial judge had no duty to modify requested instructions and give them as modified, and performed his full duty in denying them where improper.

19. Attorney and Client ⚭167(3)

In action for attorney's fees, instruction on attorney's duty not to buy an interest in thing in controversy adverse to client was faulty for lack of qualification that this is true only if client does not have full knowledge and give free consent.

20. Trial ⚭228(4)

Requested instruction which consisted of a series of generalities, which unexplained were inappropriate to a jury instruction, was properly refused.

21. Trial ⚭228(4)

In action for attorney's fee, defendant's requested instruction quoting a rule of professional conduct was a generality which was not appropriate to jury instruction.

22. Attorney and Client ⚭167(3)

In action for attorney fees, wherein defendant pleaded an unambiguous contract between attorney and client, defendant's requested instruction concerning attorney's duty to state agreement in unambiguous terms was properly refused.

23. Trial ⚭184

Where an ambiguity exists in a document upon which action is brought, trial

judge should instruct as to specific point to be decided by jurors, the respect in which instrument was ambiguous, and exact question which they should determine.

24. Trial ⇨228(4)

In action for attorney's fees, defendant's requested instruction defining phrase "practice of law" was too general in its terms.

25. Attorney and Client ⇨167(3)

In action for attorney fees, wherein defendant pleaded an agreement which, if enforceable, was a novation of previous agreements between parties, trial court properly refused defendant's requested instruction that an attorney's contract for additional compensation cannot be upheld unless additional compensation is based upon services not contemplated in original contract.

26. Trial ⇨242, 250

Requested instruction which was inapplicable and in its terms calculated to be confusing to jury was properly refused.

27. Attorney and Client ⇨167(3)

In action for attorney's fees, wherein defendant pleaded an agreement whereunder attorney was to be paid only if defendant accepted a loan to be procured by attorney, and wherein it appeared that defendant had refused to accept loan, defendant's requested instruction that an attorney may not arbitrarily repudiate a contingency agreement and claim a reasonable fee instead was properly refused.

28. Trial ⇨237(3)

In action for attorney's fees, defendant's requested instruction which left to jurors question of whether proof was clearest and most satisfactory evidence was properly refused.

29. Attorney and Client ⇨167(3)

In action for attorney fees, wherein circumstances were such that plaintiff was entitled to recover irrespective of whether agreement between attorney and defendant had been breached by defendant or whether agreement was unenforceable, instruction relating to presumption against an attorney

who makes a new contract with client during relationship of attorney and client was properly refused.

30. Trial ⇨191(3)

In action for attorney's fees, wherein defendant pleaded a contingency contract which superseded previous agreements between parties, and wherein it did not appear that there had been a dispute prior to execution of the later agreement, instruction presupposing a compromise of an existing controversy was properly refused.

31. Trial ⇨352(12)

In action for attorney fees, special interrogatory asking whether a certain document was sole instrument under which plaintiff would be entitled to recover propounded a question of law for jurors and was improper.

32. Trial ⇨349(2)

The giving of special interrogatories lies in discretion of trial court.

33. Trial ⇨260(1)

Where subject was adequately covered by instructions given, refusal of requested instruction was not error.

34. Attorney and Client ⇨133

In absence of a special agreement as to compensation, an attorney is entitled to recover reasonable value of his services rendered.

35. Appeal and Error ⇨1064(1)
Attorney and Client ⇨167(3)

In assignee's action for attorney's fees, instruction which left to jury question whether plaintiff could recover under certain written agreements between attorney and client was improper, but was not prejudicial where plaintiff was not required to stand upon the agreements and verdict could not be said to have been computed upon basis stated in the agreements.

36. Appeal and Error ⇨1062(4)

Trial ⇨352(12)

In action for attorney's fees, interrogatory asking whether attorney had rendered legal services to defendant was erroneous in that it left to jurors determination of question of what constituted legal services, but was not prejudicial where verdict

showed that question was answered in affirmative and evidence warranted no other inference.

37. Appeal and Error ⇨1066

Trial ⇨250

In action for attorney's fees, instruction enumerating factors to be taken into consideration in determining what constitutes reasonable compensation was erroneous for inclusion of reference to nature of litigation, where no litigation was involved, but was not misleading or prejudicial under the circumstances.

38. Evidence ⇨208(1)

A defendant may rely upon inconsistent defenses, and they may not be used against him by way of admission.

39. Evidence ⇨155(1)

Where defendants did not object to plaintiff's introduction of allegedly inadmissible evidence, the way was not open for defendants to introduce additional incompetent matter on same line.

40. Witnesses ⇨270(1)

Failure to object to improper questions on direct may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony.

Gene L. Rubin and Irwin Gostin, Los Angeles, for appellants.

Lawrence L. Light and Joseph Friedman, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Defendants appeal from a judgment in favor of plaintiff and an order denying their motion for judgment notwithstanding the verdict. The appeals were initially separate but they have been consolidated and the transcripts, which supplement each other, are to be treated as one. Plaintiff C. Sloan, as assignee of attorney Lawrence L. Light, sued defendants Frederick W. Stearns and Fairway Construction Co., Inc., for recovery of attorney fees for services rendered them by Light. The complaint was in three counts but nonsuit was granted as to the

first and third causes of action, and the judgment rests upon the second which is a common count for the reasonable value of legal services rendered. Mr. Light testified that the value of the same was \$5,000 and the jury appraised them at \$3,500.

[1] The appeals are presented upon settled statements which are so brief as to make it difficult to determine the theories upon which the respective parties tried the case. But we are bound to assume that enough appears to enable us to decide whether reversible error was committed and we must make our ruling upon the basis of what affirmatively appears in the record. Rule 52 of Rules on Appeal; *In re Estate of Pierce*, 32 Cal.2d 265, 274, 196 P.2d 1; *Utz v. Aureguy*, 109 Cal.App.2d 803, 806-807, 241 P.2d 639.

In response to plaintiff's claim for the reasonable value of legal services rendered, the defendants seem to have relied upon (1) a denial that plaintiff rendered any such services, (2) a claim that services of any nature rendered by him are governed by two written contracts providing for payment upon a contingent basis and that the event giving rise to the right to compensation never occurred, and (3) that, assuming that plaintiff was their attorney, he forfeited any right to compensation by acquiring a secret adverse interest in the subject matter of his employment and also secretly represented the other parties in negotiations conducted on behalf of defendants.

[2] Viewing the merits upon the basis of evidence favorable to plaintiff-respondent,¹ it appears that initially Mr. Light was employed to assist in raising finances for defendants to enable them to carry out a Federal Housing Administration building project in San Diego. The original employment is covered by agreement of April 8, 1952. It is signed by defendant Stearns, addressed to Mr. Light and reads as follows: "This will serve to confirm our oral understanding that you are to receive from me for services rendered the sum of \$5,000.00, provided that you are successful

1. *In re Estate of Isenberg*, 63 Cal.App.2d 214, 216, 146 P.2d 424.

in obtaining for me a sum of approximately \$50,000.00 to be used in connection with a certain F.H.A. Building Project in San Diego, California.

"A contract for the aforesaid building project has been awarded to me and consists of approximately 300—1, 2 and 3 bedroom units to be built on a 25 acre site in San Diego.

"If you are successful in obtaining the aforesaid sum of money for me, and it is accepted by me, the sum of \$5,000.00, which will be due and payable to you by me, shall be paid to you out of profits realized by me on this said building contract, and shall be paid at such time as the buildings are completed."

Later, defendants employed Light to represent them generally as their attorney, and it was then specifically agreed that this was to be a separate employment and the compensation not to be contingent or conditional in any respect. Considerable services were performed under this employment and, as above stated, were valued by Mr. Light as a witness in the sum of \$5,000. The relationship of attorney and client was terminated on or about August 1, 1952, when defendant Stearns sought a modified agreement providing a new formula for computing Light's compensation for services in the matter of financing. At Stearns request Mr. Light, who was then attorney for both Stearns and his codefendant Fairway Construction Co., Inc.,² drew an agreement which bears date, August 8, 1952, and contains the following: "We Fairway Construction Company, Inc., a corporation, do hereby acknowledge that Lawrence L. Light, Attorney-at-Law, has heretofore rendered certain legal services for us, and has further devoted time and energy to obtain certain parties who have evidenced their interest in advancing certain monies by way of loan and/or joint venture to the extent of approximately Fifty Thousand (\$50,000.00) Dollars. The said monies, it is contemplated, will be made available to us by way of loan as to part, and investment in a joint venture with us as to part. All of

said monies to be used by us in connection with the performance of a contemplated contract with Ocean Heights Development Company, a corporation, (now in the process of being formed and organized) for the construction by us of a building project consisting of approximately Three Hundred (300) Units in the Linda Vista District, in San Diego, California.

"In the event that the aforesaid financing is made available to us, and accepted we shall pay the said Lawrence L. Light for services he has rendered as aforesaid, remuneration on the following basis." Here follows a formula for computation of compensation which concludes with this language: "It being the intention of the parties hereto that the said Lawrence L. Light is in no event to receive a sum in excess of the sum of Ten Thousand (\$10,000.00) Dollars for his said services rendered." Next appears a formula for determining what shall be considered monies realized by defendants upon their construction contract, and "That it is contemplated that this construction contract will be entered into by Fairway Construction Company, Inc. with Ocean Heights Development Company, a corporation now being organized. However, in the event that said contract is entered into with Frederick W. Stearns as an individual, this agreement shall nevertheless be enforceable as applicable to the said Frederick W. Stearns, and is therefore to be executed by the said Frederick W. Stearns individually, as well as the said corporation.

"It is further specifically understood that our said attorney has no further obligation to represent us as a legal representative, or otherwise, other than to do whatever may be necessary to secure the availability of approximately Fifty Thousand (\$50,000.00) Dollars as a joint venture and/or loan, and which said monies are accepted by us."

[3-6] There is no ambiguity about this document. It plainly covers compensation for Mr. Light's legal services as well as his financing efforts, and places all services

2. No differentiation is drawn by counsel for either side between defendant

Stearns and his company. They are treated as one.

upon a contingent basis. To that extent it constituted a novation, Civ.Code, secs. 1530-1532. The event calling for payment never occurred, and that fact is the ultimate basis of defendants' insistence upon the two writings as the sole contracts of employment. But defendants' own conduct prevented the occurrence of the condition which would perfect the right to compensation under the terms of the agreement because they later refused to enter into the construction contract which was the source from which monies to pay Light were to be derived. Mr. Light so testified, and there is no denial of the fact. This refusal entitled him to treat his contract as repudiated and to proceed in *quantum meruit*, as he did. "A party to a contract cannot take advantage of his own act or omission to escape liability thereon. 17 C.J.S., Contracts, § 468, p. 966; 12 Am.Jur. sec. 381, p. 957. Where a party to a contract prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability. [Citing cases.]" *Overton v. Vita-Food Corp.*, 94 Cal.App.2d 367, 371, 210 P.2d 757, 759. See, also, 12 Cal.Jur. sec. 229, p. 452.

The foregoing discussion proceeds upon the assumption that the contracts of April 8th and August 8th are binding agreements. But there was in fact no mutuality in either of them. The phrase "and it is accepted by me" was inserted in the April 8th contract at the request of Stearns who was told by Light at the time that "the interlineation rendered Defendants' obligations under the instrument illusory and the instrument thus of no legal effect"; but Stearns insisted, Light yielded, and viewing the matter in retrospect testified that he "was a fool as a lawyer," he guessed, to allow such interlineation." The August 8th agreement has the words "and accepted" interlined in the second paragraph, making it read as follows: "In the event that the aforesaid financing is made available to us, and accepted we shall pay the said Lawrence L. Light for services he has rendered as aforesaid, remuneration on the following basis: * * *" In the last paragraph Light is relieved of obligation to render further le-

gal or other services except "to do whatever may be necessary to secure the availability of approximately Fifty Thousand (\$50,000.00) Dollars as a joint venture and/or loan, and which said monies are accepted by us." The latter phrase being interlined and initialed. The settled statement summarizes the Light testimony as follows: "That at the time this said instrument of August 8, 1952, was signed by the parties, the defendant, Stearns, insisted that the interlineation 'and the monies are accepted by us' be inserted therein. Mr. Light testified that at that time he pointed out to the defendant, Stearns, that this insertion was nullifying the entire effect of the instrument as constituting a binding agreement upon the defendant, Stearns, in that he could arbitrarily refuse to accept the monies which had been secured for him by Mr. Light."

[7, 8] It will be observed that in neither writing is the exact amount of the loan specified, and that no terms or conditions whatever are outlined; that the language inserted at Stearns insistence does not say in substance or effect that the amount or terms of the loan shall be satisfactory to him, that there is no basis for construing this as a "satisfaction" contract, and that it lacks mutuality because it leaves Stearns in position to determine at his own volition whether he will pay for services rendered by Light; it leaves him in position to do just what he did do, namely, refuse to proceed with the construction project and thus render it impossible for Light to perform his part of the contract. "Where the parties assume to make a contract in which one's promise is the consideration for the promise by the other, the promises must be mutual. To be obligatory on either party, the contract must be mutual and reciprocal in its obligations. One who promises to do a thing only if it pleases him, is not bound to perform. *Central Oil Co. of Los Angeles v. Southern Refining Co.*, 154 Cal. 165, 97 P. 177; 12 Cal.Jur.2d 317, sec. 114. Where a contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation. It is elementary that where performance is optional with one of the parties no enforceable obligation

exists. [Citing cases.] This type of promise is illusory and does not result in a binding agreement even if unconditionally accepted." *Lawrence Block Co. v. Palston*, 123 Cal.App.2d 300, 308, 266 P.2d 856, 861. To the same effect see *Shortell v. Evans-Ferguson Corp.*, 98 Cal.App. 650, 660, 277 P. 519; *Charles Brown & Sons v. White Lunch Co.*, 92 Cal.App. 457, 461, 268 P. 490; 1 Williston on Contracts (rev. ed.) pp. 123-128, 349; 17 C.J.S., Contracts, § 100, p. 445. In 12 Am.Jur. sec. 66, p. 558, it is said: "A reservation to either party to a contract, of an unlimited right to determine the nature and extent of his performance, renders his obligation too indefinite for legal enforcement." Authorities cited by appellant³ are not to the contrary. In the main they are instances in which the contract was construed to require performance to the satisfaction of one of the parties.

[9, 10] In signing these agreements Light elected to rely upon defendants' good faith, knowing and stating that he had no legally enforceable agreement, and when defendants refused to make the basic contract there was no estoppel of Light to rely upon such want of mutuality and fall back on a claim for the reasonable value of his services, for he had explained to Stearns that his own insistence upon the interlineations in the contracts rendered the same legally unenforceable.

[11-13] It thus appears that the evidence warranted a verdict in plaintiff's favor upon either one of two theories. Appellants do not claim insufficiency of the evidence except indirectly. Relying upon their view that Light was entitled to no compensation because the condition of the written instruments had not been fulfilled, they made a motion for judgment *non obstante veredicto*, which was denied, and they now assert error in that ruling. That motion will not lie where, as here, there was no previous motion for a directed verdict. In re Estate of Caldwell, 216 Cal. 694, 695, 16 P.2d 139; *Fortier Trans. Co.*

v. Union Packing Co., 96 Cal.App.2d 748, 751, 216 P.2d 470; 7 Cal.Jur. 10-Yr.Supp. (1945 Rev.) sec. 30.7, p. 282. The case of *Bolar v. Maxwell Hardware Co.*, 205 Cal. 396, 271 P. 97, 60 A.L.R. 429, cited by appellant is not to the contrary. Moreover, appellants' reliance upon respondent's failure to deny, pursuant to section 448, Code of Civil Procedure, the agreements, both of which were attached to their answer, avails them nothing because the absence of such an affidavit admits nothing except genuineness and due execution. All matters in confession and avoidance are available to the plaintiff under the implied replication to new matter in the answer. *Sunset Milling & Grain Co. v. Anderson*, 39 Cal.2d 773, 777, 249 P.2d 24; *Baird v. Pacific Electric Ry. Co.*, 39 Cal.App. 512, 179 P. 449; 21 Cal.Jur. sec. 114, p. 168. Specifically, plaintiff's failure to file such an affidavit does not preclude him from relying upon defendants' refusal to enter into the construction contract.

The major contentions advanced by appellants herein concern the giving and refusal of certain specific instructions.

[14] There was no error in refusal to give defendants' Request No. 54, which reads as follows: "You are instructed that a contract whereby one person employs another to obtain a loan of moneys for the first person, is not rendered invalid by a provision that no fee is to be paid unless the first person accepts the loan." This instruction assumes the existence of mutuality which, as above shown, did not exist in the written contracts.

In response to plaintiff's claim that Light's legal services were not controlled by the written contracts, defendants undertook to defeat recovery upon the ground of dual relationship which the attorney was claimed to have occupied and which was not disclosed to, consented to, or known by the defendants. There is evidence in the record to the effect that although Light's employment originally was not that of an

3. 9 Cal.Jur.2d 256, 268, 269, 272; *Smith v. Schiele*, 93 Cal. 144, 28 P. 857; *Ball v. California Conserving Co.*, 189 Cal. 326, 207 P. 1011; *Lindley v. Fay*, 119 Cal.

239, 51 P. 333; *Bruner v. Hegyi*, 42 Cal. App. 97, 183 P. 369; *Middleton v. Findla*, 25 Cal. 76; *Leventritt v. Cowell*, 21 Cal.App. 597, 132 P. 627.

attorney, it soon became such; that Light procured and produced Sam Mitchell and Victor Brooks as prospective lenders; that he, himself, was to participate in the making of the loan and that fact was not disclosed to defendants; that his activities as attorney included many conferences with Mitchell; that he was then attorney for Mitchell and Brooks, as well as defendants, and did not disclose the fact to defendants; that he became interested with Mitchell and Brooks in purchasing the land upon which the project was to be built, and this fact was not disclosed to defendants until August 1st; that he was to receive a fee of \$5,000 from Mitchell and Brooks and never disclosed that fact until August 2nd or 3rd.

The only pertinent instruction given was No. 23: "An attorney at law is not prohibited from entering into any business transaction with a client, touching or not touching the subject matter professionally entrusted to him by his client. Such transactions are, however, subject to close scrutiny, and they must be shown to be fair in all respects."

[15] If proper requests had been made defendants would have been entitled to further instructions upon the subject. Appellant's counsel specifies proposed instructions Nos. 43, 45, 47 and 55 as requests which were improperly refused. Of course, any error in rejecting other proffered instructions which are not discussed in appellant's brief is waived. *Kritzer v. Citron*, 101 Cal.App.2d 33, 39, 224 P.2d 808. Those discussed by counsel, bearing the above numbers, were all faulty for one reason or another and hence were properly denied.

[16-18] No. 43 reads as follows: "It is an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule, an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motive of the attorney are hon-

est." (Emphasis added.) This instruction would require an attorney to devote his entire energies to the particular client's interests to the exclusion of all others. He owes no such obligation under a general employment which does not specifically call for his entire time. And the attorney had no such exclusive employment here. True, the proffered instruction was copied from *Anderson v. Eaton*, 211 Cal. 113, at page 116, 293 P. 788. But that fact does not qualify it as a proper instruction to a jury. The court was not considering a jury instruction in that case. "In concluding this subject we call attention again that it is a dangerous practice, and one not to be followed, to take excerpts from opinions of the courts of last resort and indiscriminately change them into instructions to juries. The reasons are too obvious to require further comment." *Rosander v. Market Street Ry. Co.*, 89 Cal.App. 710, 718, 265 P. 536, 540. "It has often been decided by the supreme court that the language used by the court in writing an opinion should not be used as an instruction. Assuming, without deciding, that the proposed instruction was a correct statement of the law, it is patent that it was but a mere abstract principle of law which is embodied in and forms a part of the basis for the broader instructions which were given by the court." *People v. Russell*, 80 Cal.App. 243, 245, 251 P. 699, 700. Accord: *Jones v. Bayley*, 49 Cal.App. 2d 647, 654, 122 P.2d 293; *Reagh v. San Francisco Unified School District*, 119 Cal. App.2d 65, 73, 259 P.2d 43; *McGeorge v. Charles Nelson Co.*, 107 Cal.App. 148, 152, 290 P. 75.

One of the reasons for care in adopting a court opinion verbatim as a jury instruction is that its abstract or argumentative nature may have a confusing effect upon the jury. In the *Anderson* case, and in *Hammett v. McIntyre*, 114 Cal.App.2d 148, 155, 249 P.2d 885 (which uses substantially the same language), the court was speaking of the attorney's obligation with respect to the conduct of a single piece of litigation. The attorney's services in the case at bar did not involve litigation and the statement that "an attorney is precluded from assuming any relation which would prevent him

from devoting his entire energies to his client's interests" would be accepted by the jurors as applicable to the facts at bar and would thereby direct their attention to a non-existent issue, for there was no controversy over the amount of time or energy which Mr. Light had devoted to his client's affairs—it was a question of whether he had breached his obligation of loyalty by assuming inconsistent duties. There was no duty resting upon the judge to modify the defendant's request and then give it as modified. If requested instructions are objectionable in any respect a judge in a civil case has performed his full duty in denying them. *Tossman v. Newman*, 37 Cal. 2d 522, 525, 233 P.2d 1; *Bertolozzi v. Progressive Concrete Co.*, 95 Cal.App.2d 332, 337, 212 P.2d 910.

[19] Request No. 47⁴ states that an attorney must not buy an interest in the thing in controversy adverse to his client, but it omits the important qualification that this is true only if the client does not have full knowledge and give free consent.

[20] Request No. 44⁵ consists of a series of generalities which unexplained are inappropriate to a jury instruction.

[21] Request No. 55 quotes one of the rules of professional conduct prescribed by the State Bar. Sound though it be, it is a generality which is not appropriate to a jury instruction.

[22, 23] Requests Nos. 32, 38 and 39, constitute a series of proposed instructions concerning Light's duty as an attorney to state the August 8th agreement in unambiguous terms. As heretofore indicated, the contract is not ambiguous and hence these instructions are inappropriate. Moreover, if there were any ambiguity in the instrument the judge should not have left it to the jury to determine at large what the ambiguity was and then to place upon it the proper construction. If such ambiguity existed, the trial judge should instruct as to the specific point to be decided

by the jurors, the respect in which the instrument was ambiguous, and the exact question which they should determine. See *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 18, 207 P. 527.

[24] Refusal of instruction No. 56, which undertakes to define the phrase "practice of law" was not improper. The instruction is too general in its terms to serve as a guide to jurors. Moreover, the request was directed at the April 8th agreement, according to appellants' opening brief, but that instrument is not ambiguous, it did not call for any legal services and its construction did not present a jury question. Appellants cite *Brydonjack v. Rieck*, 5 Cal.App.2d 219, 223, 42 P.2d 336, and *Carlson v. Lantz*, 208 Cal. 134, 137, 280 P. 531, but they do not sustain their position.

[25] Refusal of Request No. 37 was not error. It says in substance that an attorney's contract for additional compensation cannot be upheld unless the additional compensation is based upon services not contemplated in the original contract. The instruction was not appropriate. The new agreement (August 8) was a novation, covering both legal and financing services, and was made at the specific request of defendant Stearns.

[26] Request No. 35 was inapplicable and its terms calculated to be confusing to the jury.

[27] Request No. 33 says that an attorney may not arbitrarily repudiate a contingency agreement and claim a reasonable fee instead. This could apply only to the agreement of August 8th, because that of April 8th did not call for legal services. Nor do appellants raise any question of the repudiation of the August 8th agreement except in the sense that plaintiff is bound by it regardless of other considerations, a position already shown to be erroneous. Defendant Stearns did not deny the Light testimony that he, Stearns, in

4. It would add nothing to the body of the law or the clarity of the decision to set forth the text of each of the instructions with which we are required to deal in this case, and we therefore content

ourselves with observations which will be understandable to counsel.

5. Counsel specified No. 45 as one of those improperly refused, but discuss No. 44.

late August refused to make the construction agreement upon which the August 8th contract rested.

[28, 29] Requests Nos. 48, 49, 50, 51, 52 and 53 relate to the presumption against an attorney who makes a new contract with his client during the relationship of attorney and client. No. 53 is not good law, for it leaves to the jurors the question of whether the proof is "the clearest and most satisfactory evidence." See *Edmonds v. Wilcox*, 178 Cal. 222, 224, 172 P. 1101. The other instructions above mentioned seem to be abstractly correct, but they are directed toward striking down the contract of August 8th upon the ground of want of consideration, fraud or its equivalent. Such instructions are pertinent only upon the assumption that the relationship of attorney and client actually existed; if that be so, then the destruction of the agreement of August 8th leaves plaintiff in position to claim the reasonable value of his services (subject to defenses of fraud and the like), and so the refusal of these instructions could not be prejudicial.

[30-32] Requested instructions 40, 41, and special interrogatory 42. No. 40 presupposes a compromise of an existing controversy. It is inapplicable. No. 41 is but a continuation of 40 and also assumes a nonexistent dispute and compromise thereof. The giving of the proposed special interrogatory as to whether the agreement of August 8th became the sole instrument under which Mr. Light would be entitled to recover any fee from defendants improperly propounds a question of law for the jurors. The giving of special interrogatories lies in the discretion of the trial court. 24 Cal.Jur. sec. 155, p. 904; *House Grain Co. v. Finerman & Sons*, 116 Cal.App.2d 485, 253 P.2d 1034. It does not appear that there was error in rejecting the proposed interrogatory.

[33] The complaint of refusal to give proposed instruction 34 can avail appellants nothing. That instruction is BAJI 31-A, concerning the effect of testimony given upon deposition. The opening brief argues that it should have been given be-

cause of conflicts between evidence given by Mr. Light upon deposition and at the trial. The subject was adequately covered by instructions actually given, namely, Nos. 15, 16, 17, 19 and 20.

[34, 35] Appellants next complain of the giving of instructions 28, 29 and 31, which in substance state that in the absence of a special agreement as to compensation an attorney is entitled to recover the reasonable value of his services rendered. There was no error in 28 or 29. No. 31 should not have been given because it left it to the jury to say whether or not plaintiff could recover under the writings of April 8th and August 8th, but as we have shown he was not required to stand upon those writings, indeed could not recover thereon, and the verdict for the sum of \$3,500 cannot, upon the record before us, be said to have been computed upon the contingent basis stated in either of the written instruments. The instruction was not prejudicial.

[36] Interrogatory No. 30 was as follows: "Did plaintiff's assignor render legal services to defendants? If your answer is yes, what is their reasonable value?" This left to the jurors the determination of the question of what constitutes legal services, and should not have been given, but their verdict shows that they undoubtedly answered it in the affirmative. The evidence warrants no other inference, and it cannot be said that any prejudice ensued from the propounding of this interrogatory.

[37] The next complaint is made of the giving of instruction No. 27, which enumerates factors to be taken into consideration in determining what constitutes reasonable compensation for an attorney's services. It contains an inappropriate reference to "the nature of the litigation" but it was not misleading or under all the circumstances prejudicial.

[38-40] Appellants complain because plaintiff was permitted to have defendant Stearns read to the jury paragraph IV of the Fourth Affirmative Defense, upon the theory that it constituted an admission that Mr. Light did represent defend-

ants as their attorney until about August 8, 1952, and the court refused to permit defendants' counsel to have the witness read that portion of the Second Affirmative Defense alleging that the writings of April 8th and August 8th constituted the only agreements under which Mr. Light was retained or rendered legal services for defendants. There was no objection to the reading of said paragraph IV in evidence. If there had been the court presumably would have excluded same because the law which permits a defendant to rely upon inconsistent defenses precludes their being used against him by way of admission. *Oppenheimer v. Deutchman*, 119 Cal.App.2d 450, 453, 259 P.2d 457; *Jones v. Tierney-Sinclair*, 71 Cal. App.2d 366, 373, 162 P.2d 669. Counsel's silence and implied assent to the introduction of this improper evidence did not open the way for additional incompetent matter, for, as said in *Laursen v. Tidewater Associated Oil Co.*, 123 Cal.App.2d 813, 816, 268 P.2d 104, 105: "Failure to object to improper questions on direct may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy." Of course, the same considerations apply to improper questions on cross-examination followed by attempted eliciting of like improper matter on redirect.

Appellant also advances claims of error in rulings upon evidence. We have examined each of them and find no prejudicial error in any of the instances to which counsel refer. Likewise, there was no error in denying the motion for new trial or in denying a motion for judgment on the pleadings, or in denying the motion for judgment notwithstanding the verdict.

The judgment and the order denying motion for judgment notwithstanding the verdict are affirmed.

McCOMB, Acting P. J., concurs.

FOX, Justice.

I dissent.

The gravamen of plaintiff's case was the performance of legal services by his

assignor for which recovery of a reasonable attorney's fee was sought. Defendants contested the right to any fees, asserting in their affirmative defense that the claimed services were performed at a time when plaintiff's assignor had an interest in the transaction for which he was employed adverse to their own and also secretly represented the other parties thereto. If this was so, the right to recover attorney's fees would be forfeited. *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788.

The majority opinion concedes there was evidence to support defendants' theory of the case. Defendants proffered some ten instructions relating to the duty of an attorney to refrain from assuming a position in any transaction in which he is employed which places him either in conflict with his clients or divides his loyalties. The single instruction given is No. 23, which reads:

"An attorney at law is not prohibited from entering into any business transaction with a client, touching or not touching the subject matter professionally entrusted to him by his client. Such transactions are, however, subject to close scrutiny, and they must be shown to be fair in all respects." This does not touch the essence of the case, which was embodied in defendants' instruction No. 43, which the judge declined to give. The majority opinion concedes that defendants were "entitled to further instructions upon the subject" but maintains that the tendered requests "were all faulty for one reason or another and hence were properly denied." I cannot agree.

Instruction No. 43 reads: "43. It is an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule, an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. No[r] does it matter that the intention and motive of the attor-

ney are honest." The majority opinion states, in justifying the refusal, that "this instruction would require an attorney to devote his entire energies to the particular client's interests to the exclusion of all others. He owes no such obligation under a general employment which does not specifically call for his entire time." But this criticism of No. 43 is completely at variance with any proper construction or interpretation of the instruction. The majority opinion makes the mistake of interpreting the second sentence of the proposed instruction out of context and without regard to its plain meaning, thus distorting its import into a requirement that an attorney must devote all his energies "to the particular client's interests to the exclusion of all others." But that is clearly not the sense of the instruction. It does not purport to limit an attorney's activities to one particular client's affairs. The instruction unequivocally asserts (1) that it is a violation of an attorney's duty for him to place himself in a relationship antagonistic to his client's interests without the latter's assent based upon full knowledge of the facts; (2) that this is so regardless of the honesty of the attorney's motives; and (3) by virtue of this rule, an attorney is precluded from assuming a position which would interfere with his duty to devote his entire energies to his client's interests. It defines the duty of an attorney to his client, and the circumstances and conditions under which he may represent interests that are antagonistic to or in conflict with those of his client. *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788; *Hammett v. McIntyre*, 114 Cal.App.2d 148, 155, 249 P.2d 885.

It is thus patent that not only is instruction No. 43 an accurate and impeccable statement of the law but an examination of *Anderson v. Eaton*, supra, discloses that the instruction is taken virtually verbatim from the language of the opinion. The *Anderson* case affirms the basic principle that it is an attorney's duty to protect his client's interest in every possible way and that he violates that duty if he assumes a position adverse to his client without the

latter's free and intelligent consent given after full knowledge of the circumstances. While it is true that language from judicial opinions divorced from their context may not always be safely given as an instruction to the jury, and as an *indiscriminate* practice is not countenanced, see *Duff v. Schaefer Ambulance Service, Inc.*, 132 Cal.App.2d 655, 679, 283 P.2d 91, nevertheless its use in an instruction is unobjectionable when it is lucidly formulated in a simple proposition of law which fully covers the issues and is applicable to the evidence. Such was the nature of instruction No. 43. It would be unfortunate to hold that a clearly worded special instruction could not be given simply because it derives from the language used by a reviewing court although it is otherwise unobjectionable and no other instruction on the subject is given.

The majority purports to distinguish the *Anderson* case by suggesting that there "the court was speaking of the attorney's obligation with respect to the conduct of a single piece of litigation." It continues: "The attorney's services in the case at bar did not involve litigation * * *." This is a distinction without a difference. The language of the *Anderson* case cannot be reduced to such narrow compass. The plaintiff is here suing for legal services, and during the entire period in which such services were rendered the attorney owed the obligations of a fiduciary committed to the exacting standards of utmost good faith toward his clients. *Kornbau v. Evans*, 66 Cal.App.2d 677, 685, 152 P.2d 651; *Sanguinetti v. Rossen*, 12 Cal.App. 623, 630, 107 P. 560. The fiduciary concept applies regardless of whether litigation is the object or in contemplation when the attorney is engaged and suffuses all his professional relations with his clients. In view of the broad scope of the activities encompassed in the term "*practice of law*," to attenuate the attorney's fiduciary duty or ethical standards and relax their application in a situation where litigation is not involved would be promotive of mischief in the attorney-client relationship. As pointed out in *People v. Merchants' Protective Corp.*, 189 Cal. 531, 535, 209 P.

363, 365: "But in a larger sense it [the practice of law] includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court. * * * It is common knowledge * * * that a large, if not the greater, part of the work of the bar today is out of court or office work. Counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds * * * are activities which have been long classed as law practice. * * * " In all of these professional activities, no less than in his advocacy in court, unalloyed loyalty of counsel to his client must be ever present and prevail against the beckoning of personal advantage.

Defendants were clearly "entitled to have this instruction, embodying their theory of the case with substantial support, in the evidence, presented to the jury."

Stout v. Southern P. R. Co., 127 Cal.App. 2d 491, 503, 274 P.2d 194, 201; Bickford v. Pacific Electric R. Co., 120 Cal.App. 542, 548, 8 P.2d 186. Not a single instruction was given to enlighten the jury on the subject of an attorney's obligation to abstain from compromising his duty to his client by the avoidance of a situation which would bring his interests into conflict with theirs. Left without guidance or a criterion on this vital point, the jury might find the attorney had or represented interests that were adverse to his client and yet not perceive that his right to be paid for services rendered in the transaction could thereby be foreclosed. For these reasons, I am of the opinion that the effect of the erroneous refusal of this instruction was so prejudicial as to remove the case from the purview of section 4½ of Article VI of the California Constitution and compels a reversal of the judgment.

Hearing denied; McCOMB, J., not participating.

45 Cal.2d 634

MEMORIAL HOSPITAL ASSOCIATION OF
STANISLAUS COUNTY, a nonprofit cor-
poration, Plaintiff and Respondent,
v.

PACIFIC GRAPE PRODUCTS COMPANY,
a corporation and S. F. Triplett,
Defendants,

Pacific Grape Products Company,
Appellant.
Sac. 6538.

Supreme Court of California.
In Bank.

Nov. 29, 1955.

Action by hospital association against corporation and its president to recover on written subscription price allegedly executed by president on behalf of corporation. The Superior Court, Stanislaus County, Gregory P. Maushart, J., rendered judgment against corporation but in favor of president individually, and corporation appealed. The Supreme Court, Spence, J., held that evidence sustained finding that at time president signed pledge agreement, he had full power and authority to bind corporation, and that subscription agreement was valid obligation of corporation.

Judgment affirmed.

Opinion, 277 P.2d 878, vacated.

1. Appeal and Error ⇨931(1), 989

In passing on sufficiency of evidence to sustain judgment, power of appellate court is limited to determination of whether there is any evidence, contradicted or uncontradicted, which will support judgment rendered, and all reasonable inferences must be indulged to uphold it, if possible.

2. Corporations ⇨406(1), 425(5)

To properly prove contract claimed to be binding on corporation, it should be shown that it was made on its behalf by some one who had authority to act for it, and in case of contract executed by officer, it must be shown that officer was expressly authorized, or that act was fairly within implied powers incidental to his office, or that corporation is estopped to deny his

authority by reason of having accepted benefit of contract or otherwise.

3. Corporations ⇨406(2)

Where president of corporation is also its general manager, having power to superintend and conduct its business, he has implied authority to make any contract or do any other act appropriate to ordinary course of business, and in such case, his powers are greater than he would have as president alone.

4. Evidence ⇨22(2)

It is matter of common knowledge that trend on part of prosperous business concerns is steadily in direction of making substantial charitable contributions in community in which it is located and does business.

5. Corporations ⇨404(2)

As with execution of any act purportedly within implied power of corporation's president and general manager, there is reasonable limit to his authority to make presents to charitable enterprises, and whether or not he has exceeded such limit will depend upon particular facts and circumstances in each case.

6. Corporations ⇨432(12)

In action by hospital association against corporation and its president to recover upon written subscription pledge allegedly executed by president on behalf of corporation, evidence sustained finding that at time president signed pledge agreement, he had full power and authority to bind corporation, and that subscription agreement was valid obligation of corporation.

Nathan B. McVay and C. O. Thrasher, Jr., Modesto, for appellant.

Vernon F. Gant and Leo J. Biegenzahn, Modesto, for respondent.

SPENCE, Justice.

[1] Defendant company appeals from a judgment holding it liable on a subscription pledge for the building of a hospital. As ground for reversal, it contends that the evidence is insufficient to sustain the judgment. In deciding this question, the power

of the appellate court is limited to the determination of whether there is any evidence, contradicted or uncontradicted, which will support the judgment rendered, and all reasonable inferences must be indulged to uphold it, if possible. 4 Cal.Jur.2d § 606, p. 485; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Holmberg v. Marsden, 39 Cal.2d 592, 596, 248 P.2d 417. In the light of this time-honored rule, we have concluded that appellant's contention cannot be sustained.

Respondent, a non-profit hospital association, was engaged for some time prior to November 12, 1947, in the solicitation of pledges of funds for the construction of a general hospital near Modesto, California. Considerable publicity was given to the campaign. Solicitors on respondent's behalf called three times upon appellant, an industrial corporation located in that area. On the first visit, respondent's solicitors were informed by S. F. Triplett, appellant's president and general manager, that he would have to take up the matter with the board of directors. On the second visit, Triplett told them that he had not had an opportunity to discuss it with the board and they would have to return. Their third and final visit was made on November 12, 1947, when they received a written pledge for \$5,000, bearing the name of Pacific Grape Products Company as donor and signed by Triplett. At the trial one of respondent's solicitors related the circumstances of the third visit. He stated that they did not see Triplett at that time but that one of appellant's employees simply delivered the pledge card to them signed as above indicated.

Appellant is a canning company which buys, processes and sells canned goods. Triplett was its president and general manager since its inception in 1926; he owned 73 per cent of its outstanding shares of stock; and the general conduct of the business, including "general supervision of the departments, the operation of the factory, in the field and in the sales," was placed in his hands. The board of directors met at infrequent intervals, and ordinarily only at his call. For many years Triplett, without specific authorization from the board, had made contributions on behalf of appellant

to the Red Cross and Community Chest. Triplett testified that the donations were made on a "history basis," each year being "about the same amount," and that probably when the practice of making the donations first started, he approved and authorized such procedure.

While it appears that appellant's assistant secretary and one or two others of the directors had some knowledge of the solicited pledge, it is not clear that the matter was ever discussed at a board meeting. It is argued that such discussion might be inferred, with resulting approval, in view of the testimony by respondent's solicitors that Triplett on their first two visits had stated that he would have to take up the matter with the board and then on the third visit, the pledge card was delivered to them without further comment. Wigmore on Evidence, Third Ed. 1940, Vol. VI, § 1725, p. 79; 19 Cal.L.Rev. 231, 367; see also Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 15, 206 P.2d 847, 9 A.L.R.2d 1297. It is conceded, however, that Triplett had no specific authority, by virtue of any formal board resolution, to enter into this particular subscription agreement.

The trial court found that Triplett signed the subscription agreement as appellant's "president and general manager and not in his individual capacity"; that at that time he "owned approximately 73%" of the stock and "had and exercised almost complete control" over appellant's affairs; that as "president and general manager," he had "full power and authority to bind" the corporation and the "subscription agreement was and is a valid, binding and sustaining obligation" upon it. Accordingly, respondent recovered judgment on the pledge against appellant corporation, but Triplett was exonerated from liability. The reasonableness of the pledge is not questioned, but only Triplett's authority to bind appellant.

[2] The general rule is well stated in *Magnavox Co. v. Jones*, 105 Cal.App. 98, at page 103, 286 P. 1084, at page 1086, as follows: "To properly prove a contract claimed to be binding on a corporation, it should be shown that it was made on its

behalf by someone who had authority to act for it. It must be shown that the officer was expressly authorized, or that the act was fairly within the implied powers incidental to his office, or that the corporation is estopped to deny his authority by reason of having accepted the benefit of the contract or otherwise.”

[3] While, as above-indicated, there was no showing that Triplett was specifically authorized to bind appellant on this particular pledge agreement, respondent properly contends that the evidence was sufficient to show that the agreement was executed by Triplett pursuant to his implied authority. Where the president of a corporation is also its general manager, having the power to superintend and conduct its business, he has implied authority to make any contract or do any other act appropriate in the ordinary course of its business. In such case his powers are greater than he would have as president alone. 19 C.J.S. Corporations, § 1001, p. 466; Fletcher Cyc. Corps. [Perm.Ed. 1931], vol. 2, §§ 553, 594.

The case of *Freeman v. River Farms Co.*, 5 Cal.2d 431, 55 P.2d 199, is closely in point. There the defendant corporation was held liable on an agreement, made by its president on its behalf, to cash certain warrants issued by a levee district. Contractors had relied upon this method of financing when doing repair work on land adjoining defendant corporation's property. The end sought to be accomplished by the president was the protection of the corporation's farming property from damage by flood waters. His act in agreeing that the corporation would cash the warrants issued by the levee district was unquestionably beneficial to the corporation. It was an undertaking coming within reasonable limits of his general authority in the active management of the corporation's business, and it was therefore held to be an act binding on the corporation though it was not “absolutely necessary” nor the “usual” type of procedure followed by the corporation. *Freeman v. River Farms Co.*, supra, 5 Cal.2d 431, 435-436, 55 P.2d 199.

[4] Stronger reasons appear here for holding appellant liable on the subscription pledge signed by Triplett, who was not only appellant's president and general manager, but also the owner of 73 per cent of its stock and the person exercising complete control in the conduct of its business. It is a matter of common knowledge that the trend on the part of the prosperous business concern is steadily in the direction of making substantial charitable contributions in the community in which it is located and does business. Such donations are generally considered for its benefit as a means of increasing good will and promoting patronage. Accordingly, appellant's president on its behalf had for many years, without specific authority, contributed to Red Cross and Community Chest campaigns, consistent with the purpose of demonstrating the corporation's interest in helping worthy community endeavors. The same basic consideration operates in the present case, where respondent, a non-profit hospital association, was seeking funds to construct a large general hospital in the community and was relying on the combined assistance of the residents and business concerns in that area to finance the project. Furthermore, appellant, operating its industrial plant in the community, would be directly benefited by having such a hospital capable of furnishing needed hospital services to its employees, and it was to its advantage to promote such project. This added factor has a bearing on the determination of the reasonableness of the particular subscription pledge and, therefore, of Triplett's implied authority to make it. While the pledge was considerably more than perhaps the few hundred dollars which Triplett had ordinarily subscribed each year in appellant's behalf to the Red Cross and Community Chest campaigns, such campaigns were annual and regular events. On the other hand, respondent's solicitation was for one large building project, a non-profit general hospital; and a \$5,000 pledge in aid of such an undertaking does not appear unreasonable in view of the benefits, direct and indirect, to appellant.

Appellant analogizes this pledge agreement to a contract for life employment

made by the president and superintendent of a corporation. Such an "unusual and uncommon" transaction was condemned in *Bene v. La Grande Laundry Co.*, 22 Cal. App.2d 512, at page 515, 71 P.2d 351, at page 353, as being "unreasonable and unauthorized." But the present situation appears more closely akin to that of an ordinary contract of employment made by a corporation's president and manager, as the recognized business head of the corporation, entrusted with power to execute contracts and to bind the corporation in furtherance of the corporate interests. *Grummet v. Fresno Glazed Cement Pipe Co.*, 181 Cal. 509, 513, 185 P. 388; see also *Fletcher Cyc. Corps.* [Perm.Ed. 1931], vol. 2, § 597.

[5,6] Contrary to appellant's suggestion, the conclusion that the pledge agreement is binding on appellant does not undermine the principle of protection afforded to stockholders by the corporate structure, in that a philanthropically inclined president and general manager, without specific authority of the directors, might thereby bankrupt the corporation by making large pledges to worthy charitable enterprises. As with the execution of any act purportedly within the implied power of a corporation's president and general manager, there is a reasonable limit to his authority, and whether or not he has exceeded such limit will depend on the particular facts and circumstances in each case. Triplett, as president and general manager of appellant corporation and holder of almost three-fourths of its stock, was admittedly exercising practically complete control over appellant's corporate affairs. His execution of the pledge agreement to respondent would seem to come within his implied power as the business head of appellant in the conduct of its affairs; and while it may not have been a "usual" or "absolutely necessary" act, it appears to have been executed by Triplett as a reasonable means of benefiting the corporation and promoting its business interests. Under the circumstances, we conclude that there is ample evidence in the record to sustain the trial court's finding that at the time Triplett signed the pledge

agreement, he had "full power and authority to bind" appellant, and that the subscription agreement was a valid obligation of appellant.

The judgment is affirmed.

GIBSON, C. J., SHENK, CARTER, TRAYNOR and SCHAUER, JJ., and McCOMB, Justice pro tem., concur.



45 Cal.2d 697

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Smith Edward JORDAN and Robert Otis
Pierce, Defendants and Appellants.

Cr. 5698.

Supreme Court of California.
In Bank.
Dec. 2, 1955.

Hearing Denied Dec. 28, 1955.

Defendants were convicted of first degree murder. The Superior Court, Alameda County, Charles Wade Snook, J., entered judgments of conviction and orders denying defendants' motions for new trial, and defendants appealed. The Supreme Court, Shenk, J., held that evidence was sufficient to sustain jury's implied finding that defendants' statements to public officials prior to trial had been freely and voluntarily made.

Judgments and orders affirmed.

1. Criminal Law ⇨414

In murder prosecution, evidence was sufficient to sustain jury's implied finding that defendants' statements to public officials prior to trial had been freely and voluntarily made.

2. Criminal Law ⇨736(2)

In murder prosecution, question whether one defendant was severely beaten by

police officials while being interviewed by them was for jury.

3. Criminal Law $\S$ 1169(12)

Where jury, in murder prosecution, had been adequately instructed on the subject of confessions and admissions, and admonished that statements of each defendant were admissible only as against the defendant making them, and there was sufficient substantial evidence to otherwise sustain verdict against one defendant, admission in evidence of such statements did substantially prejudice defense of such defendant.

4. Criminal Law $\S$ 778(11)

In murder prosecution, evidence, which pertained to flight from scene of crime and from city in which crime had been committed, warranted giving of instruction on flight. Pen.Code, $\S$ 1127c.

5. Criminal Law $\S$ 775(3)

In murder prosecution, giving of instruction that defendants introduced evidence tending to prove that they were not present at time and place of commission of the alleged offense, for which they were on trial, and that, if, after consideration of all evidence, jury had reasonable doubt whether either defendant was present at time crime was committed, such defendant would be entitled to an acquittal was proper.

6. Constitutional Law $\S$ 266

Criminal Law $\S$ 393(1)

Where, while defendants were in custody, samples of their blood were taken in a medically approved fashion, without objection from defendants, and defendants' attorneys stated "no objection" upon introduction of such samples into evidence in murder prosecution, such introduction did not violate due process or right against self incrimination.

7. Criminal Law $\S$ 706, 1170½(2)

Where, in prosecution for murder of taxicab driver, one defendant was asked, on cross-examination with regard to his testimony that defendants had robbed a market in another place, whether he had grabbed one person and held knife against his neck while other defendant robbed the store, asking of such question, which was

improper, and which was answered by denial, but which was not objected to, did not require a reversal.

8. Homicide $\S$ 170

In murder prosecution, evidence of women who allegedly observed crime through a living room window and of driver of bus which defendants allegedly thereafter boarded concerning identity of defendant was not objectionable on ground that it was impossible, vague, and incredible.

9. Criminal Law $\S$ 627½

Where, in murder prosecution, professor in Criminalistics and Biochemistry testified that, on basis of certain physical evidence, there had been prior contact between clothing of defendants and that of deceased and of interior of cab in which deceased was attacked, request for production of professor's notes was properly denied, in absence of laying of proper foundation therefor.

10. Criminal Law $\S$ 1128(4)

Upon appeal from conviction for homicide, allegations that defendants did not have opportunity to anticipate or prepare to meet testimony of expert witness and that lack of funds was part of such lack of opportunity, would not be allowed to augment record to present "newly-discovered evidence", in view of fact that neither defendant waived jury trial nor requested continuance for court-appointed expert to assist them, and that nature of newly-discovered evidence was not stated.

11. Criminal Law $\S$ 573

Defendants, who, on June 3, 1954, were indicted on charge of murder which had occurred over a year before, and who had been brought to trial on July 28, were not denied a speedy trial. U.S.C.A.Const. Amend. 6; West's Ann.Const. art. 1, $\S$ 13; Pen.Code, $\S\S$ 799, 1382.

12. Criminal Law $\S$ 573

Under state and federal constitutional provisions granting an "accused" right to a speedy trial, one does not become an "accused" until filing of a complaint or other charge. West's Ann.Const. art. 1, $\S$ 13; U. S.C.A.Const. Amend. 6.

13. Criminal Law ⚖️1035(1)

Defendants, who had not asserted during the trial that they had been denied a right to a speedy trial, would not be heard to make such assertion for first time on appeal. West's Ann.Const. art. 1, § 13; U.S. C.A.Const. Amend. 6.

14. Indictment and Information ⚖️19

Indictment, which charged defendants with "a felony, to wit, murder, in that on or about the 28th day of March, 1953, in the County of Alameda, State of California, they murdered" deceased, and which followed form and language of Penal Code provision pertaining to form of indictment, was sufficient. Pen.Code, § 951.

15. Indictment and Information ⚖️110(2)

Penal Code provision that indictment "may be" in words of enactment describing the offense does not require that murder be pleaded in language of Penal Code provision defining murder, but legislature has legalized the pleading in an indictment of the conclusion "murdered". Pen.Code, §§ 187, 952.

16. Indictment and Information ⚖️55

Forms of pleading to be used in criminal actions and rules by which sufficiency of pleadings are to be determined are those prescribed by the Penal Code. Pen.Code, § 948.

Vince Monroe Townsend, Jr., Los Angeles, and Enrico Dell'Oso, Oakland, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty., Los Angeles, Robert S. Anderson and Richard C. Lynch, Deputy Dist. Attys., Los Angeles, for respondent.

SHENK, Justice.

The defendants were convicted of first degree murder and sentenced to suffer the penalty of death. Their motions for a new trial were denied. They appeal from the judgments and from the orders denying their motions for a new trial.

On Saturday evening, March 28, 1953, Charles Rose, a driver for the Yellow Cab

Company, was found slumped in a semi-conscious condition behind the wheel of his cab in front of a house located at 3428 Haven Street, Oakland. The left rear door window was broken. There was blood on the front seat. The radio microphone was off of its bracket on the dashboard. The ignition and lights were on, the brake was off, the gear was in high, and the meter flag was still in the "running" position. The driver was bleeding from four wounds on the back of his head, one of which proved to be fatal, and there were abrasions and a laceration on his right hand. He died several hours later.

The cause of death was found to be maceration of the brain and hemorrhage caused by depressed skull fracture. The autopsy surgeon testified that the head wounds were caused by a blunt instrument; that, considering the nature, size and shape of these wounds, he believed that they could have been inflicted by the butt end of a gun similar to a .45 caliber Colt revolver found in the possession of the defendants the following day.

There was evidence that the killing took place during the course of a robbery. The deceased had left home that Saturday night wearing a wrist watch and carrying a wallet with a \$5 bill in it. He had some \$2 in change in his coat pocket. He checked in at the Yellow Cab garage at 10:51 p.m. He was next seen at the Greyhound Bus depot a short distance away at 11:00 p.m. under circumstances which indicated he had just taken on some passengers. At 11:12 p.m. the police department received a call from Mrs. Julia Greenup of 3417 Haven Street which led officers to the scene of the crime. There was evidence that only one trip had been made that night by the deceased, and that was the trip from the bus station to the Haven Street address. His wallet and wrist watch and the \$5 bill were missing when he was found. Just before he died he regained consciousness and asked for his watch and wallet. The inferences from the evidence support the conclusion that the passengers on that trip robbed and killed the cab driver. The identity of the defendants as those passengers and their claimed alibi will next be considered.

On the evening of March 28, 1953, Mrs. Greenup had been sitting by the window of her living room watching television when her attention was attracted by a noise in the street. Looking out she saw a Yellow Cab zigzag slowly down the street "like someone had lost control of it", watched it angle into the curb opposite her house, bounce back and stop. She reached for the telephone to call the police but was unable to complete her call. She continued to watch the cab; saw two men get out; noted that they were dark-skinned; that one was taller and more slender than the other; that one wore a sport coat and the other a light overcoat; that one carried a suitcase; that after leaving the cab they ran back towards 34th Street and as they ran she heard one of them say "Hit it", meaning run. She was unable to positively identify either defendant at the trial.

At 11:16 p.m. that night two men answering the same general description of the defendants boarded a No. 72 Key System bus at 34th and San Pablo Avenue, some four blocks away. The driver, Billy Ray Hall, could not identify Pierce but he positively identified Jordan as being the taller of the two men who boarded his bus that night at that location. He remembered Jordan because in boarding the bus the latter had bumped a lady passenger with the suitcase he was carrying, and under the company rules the driver was required to report this as an "incident" if the passenger made any complaint. He testified that both men were Negroes; that Jordan's companion carried a light colored topcoat, and that both men got off at 13th and Washington Streets.

At the trial the defendants admitted that they were in Oakland the night of March 28, 1953, but denied that they committed the killing, that they were at the Oakland Greyhound Bus depot or in a Yellow Cab at any time during their stay in Oakland, or that they had carried their suitcase with them earlier than midnight that evening. They relied upon their own alibi evidence, namely that they had been at Walker's Tavern, a bar and restaurant located about a block from their hotel at 7th and Union Streets, from 9:30 p.m. until 1:30 or 2:00 a.m. the following morning; that they had

thereafter returned to their hotel, gotten the suitcase, and checked out. They admitted having carried a loaded Colt .45 caliber revolver with them that evening for the purpose of obtaining money with it; and that while they were at Walker's Tavern they had planned to steal a car and use the gun to hold up a liquor store later that night. About 1:30 a.m. they stole a 1950 Ford automobile, committed an armed robbery at a liquor store, and fled the city in the stolen car. They took Highway No. 99, intending to return to Los Angeles.

The jury was justified in disbelieving defendants' alibi evidence. The supporting testimony of Eddie May Hardwell, cocktail waitress at Walker's Tavern, was impeached by prior contradictory statements. From all of the evidence the jury could properly conclude that the defendants had left Walker's about 9:30 or 10:00 p.m. with the suitcase, made their way to the Greyhound Bus station and arrived there by 11:00 p.m., entered decedent's cab and directed him to the general neighborhood where the cab was found; that they viciously assaulted and robbed the driver; that they ran from the cab and boarded a No. 72 bus a few blocks away; and that thereafter they returned either to Walker's or to the hotel. The proprietor of the hotel where they were registered testified that they had checked in on Friday night for one night only; that she ordinarily did not know when guests checked out, "you just find the door open and they are gone"; that Pierce rang the desk bell a little after midnight on Saturday and said he was leaving; that he was then carrying the suitcase; and that she had not seen him come in. The owner of the stolen Ford testified that he had left it unattended with the motor running for a few minutes about 1:30 a.m. about a block from Walker's Tavern, and that when he came back it was gone. Defendants testified that it was after they stole the car that they checked out at the hotel.

Defendants drove as far as the city of Bakersfield where they were stopped the next day by police officers for investigation of a minor traffic incident. Pierce was driving and Jordan was sitting next to him.

In the back of the car were a light colored overcoat, a sport coat, a suitcase, and other articles of clothing belonging to the defendants. A loaded Colt .45 caliber revolver was in the glove compartment. Because of the inability of Pierce to answer routine questions as to the ownership of the car, the defendants were taken to the police department for questioning and were subsequently booked for possible car theft and for carrying a concealed weapon. Both men denied ownership of the gun, or knowledge that it was in the car. At the trial they admitted that it was their gun.

Jordan first told the police that he was a hitchhiker and had been picked up by Pierce. Later he stated that Pierce had picked him up the night before at the Greyhound bus station in Oakland, and that Pierce at that time had the 1950 Ford. He also said that he met Pierce at Walker's bar on 7th Street in Oakland, and that they had been teamed up for about a month. These statements were made by Jordan out of the presence of Pierce. The next day Pierce admitted, out of the hearing of Jordan, that he had stolen the 1950 Ford and stated that whatever he did "Jordan was with me." At the trial they admitted having come to Oakland together from Los Angeles via San Francisco, and that they had constantly carried the loaded gun with them for purposes of robbery.

While the defendants were in the Bakersfield jail, hold orders were placed against them by various cities on robbery charges. They were interviewed also by Oakland police officers and by representatives of the district attorney's office of Alameda County as to the car theft, the armed robbery, and the cab murder but no charges were placed against them at that time for these crimes. On April 18, 1953, after the defendants had been removed to the Fresno County jail for trial on other charges, they were present at a line-up. The only outside person present was a plain clothes inspector from Oakland, Inspector Fake. Pierce voluntarily spoke to Fake at the close of the line-up, asked him if he was an Oakland police officer, and Fake answered that he was. Pierce then stated: "Let's lay off all of

this crap and go back to Oakland and cop to the murder." There was evidence that "cop" in the vernacular means to plead guilty. Fake then turned to Jordan and asked him what he wanted to say about it. Jordan replied that he had already told his story but admitted that he was "a liar."

A further conversation took place between Fake and Pierce and was admitted solely against Pierce. It occurred about twenty minutes after the conversation above related between Pierce and Fake. Pierce told Fake that he would go back to Oakland and go to court on the murder charge if all of the robberies would be dropped. Fake replied that he didn't have the authority to agree to this but that he would inform his superiors. At the trial Pierce admitted making these statements but attempted to explain them by saying that he thought he could thereby get the robbery charges dropped, and that he always intended to plead "not guilty" if charged with the cab murder. In answer to questions put to him by Fake at the jail on April 18th, Pierce stated that the cab driver was between 40 and 45 years old (actually he was 48); that the driver had tried "to grab the goddam radio for help"; that Pierce then hit him with the butt of his gun two, three or four times; that he had taken from the driver \$7,—some dollar bills and change, also a wrist watch; that they threw the watch away because "it was hot". He also stated that Jordan had gotten out of the cab first; that he, Pierce, got out last because he was carrying the suitcase; that they were going to Los Angeles by Greyhound bus; that after the cab robbery they went back to the hotel; and that later that evening they had stolen a car, had done a "stick-up", and had left town.

On April 20, 1953, Lt. Hubert Murray of the Oakland Police Department talked with Pierce at Fresno outside of the presence of Jordan. Pierce asked him about the possibility of dropping the other charges against him if he "went for" the cab job. He said that he wanted to get the thing over with, but would not do so until Jordan was satisfied, as he would not "rat" on him. Pierce then admitted that he did

the cab job and that he would tell Murray things "you don't even know about it." Murray then talked to Jordan outside of the presence of Pierce, and told him that Pierce was ready to talk. Jordan asked, "What did he say, did he say I slugged the guy?" When Murray replied "No", Jordan said, "Okay, if he wants to go for the slugging I'll buy that."

[1] An extensive voir dire was conducted to determine whether these statements had been made because of inducements held out to Pierce by public officials that the robbery charges would be dropped, whether any promises or rewards had been offered him, and also as to whether his statements had been induced by force or fear. The court properly left it to the jury to determine any conflict in the evidence in this regard. The record supports the implied finding of the jury that the statements were freely and voluntarily made.

[2] The jury was justified in disbelieving Pierce's testimony as to an alleged incident at the Bakersfield police station on March 29, 1953, when, he claimed, he was severely beaten by uniformed officers. The defendants were at that time being separately interviewed in a public part of the temporary police headquarters when Pierce suddenly threw back his coat and cried, "Shoot me, shoot me, shoot me", and began cursing and sobbing. The desk sergeant suggested that the officers take Pierce into a semi-enclosed section so that he would be out of the public view. Pierce testified that while he was inside this room he was severely beaten. He showed to the jury a scar on his left shin which he claimed was caused by one of the officers kicking him. Jordan stated that he heard Pierce call out, and that when the latter came out of the interview room he showed to Jordan a bleeding gash on his shin. The officers denied that any brutality or beating took place. The jailer who took the clothes of defendants when they undressed at the county jail shortly thereafter, testified that he saw no blood or bruises upon Pierce. This was the only evidence of alleged brutality, and the jury was justified in disbelieving it.

[3] Pierce did not request any instructions. Jordan did not request any on confessions and admissions. The court of its own motion instructed the jury on this subject. On appeal Pierce contends that such instructions were "too general", but he does not indicate what instructions he claims were erroneous nor does he specify what instructions he contends should have been given. The record shows that the jury was adequately instructed on this subject; also, that the jury was admonished that the statements of each defendant were admissible only as against the one making them. There is no merit in Jordan's contention that the admission in evidence of these statements substantially prejudiced his defense. There was sufficient substantial evidence to otherwise sustain the verdict against him.

[4] It is contended that an instruction on flight was unsupported by the evidence and was prejudicial. The evidence showing flight from the scene of the crime and from the city was abundant. The court properly instructed the jury on the subject in accordance with section 1127c of the Penal Code. (Cal.Jury Instr.Crim. No. 36.)

[5] It is argued that the court erred in giving the following instruction: "The defendants in this case have introduced evidence tending to prove that they were not present at the time and place of the commission of the alleged offense, for which they are here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not either defendant was present at the time that the crime was committed, he is entitled to an acquittal." This instruction was proper. *People v. McCoy*, 25 Cal.2d 177, 184, 153 P.2d 315; *People v. Shaw*, 115 Cal.App.2d 597, 603, 252 P.2d 670; *People v. Lewis*, 81 Cal.App.2d 119, 124, 183 P.2d 271.

Pierce urges that the instructions given were suggestive of the defendants' guilt; that they went beyond the scope of the evidence, and invaded the province of the jury. There is no support in the record for this contention.

[6] Defendants allege that the taking of blood samples from them by police officers

while they were in custody was a violation of due process of law and of their right against self-incrimination under both the federal and state constitutions, and that these samples should not have been introduced into evidence. The samples of blood were taken in a medically approved fashion, without objection from defendants. When this evidence was introduced at the trial, their attorneys stated "no objection." There was nothing improper in the introduction of this evidence under the circumstances.

[7] Prejudicial error is claimed because of alleged misconduct on the part of the district attorney. In questioning Pierce on cross-examination with regard to his testimony that the defendants had robbed a market in Fresno, the deputy district attorney queried: "And didn't you go in and grab one chap and hold a knife up against his neck while Jordan robbed the store?" No objection to this question was interposed. See *People v. Simeone*, 26 Cal.2d 795, 806, 161 P.2d 369. When followed, as it was, by a negative answer, the question, although improper, does not require a reversal.

[8] Defendants attack the testimony of witnesses Greenup and Hall regarding the two men they saw on the night of March 28, 1953, contending that their testimony was improbable, vague and incredible. The testimony of these witnesses was not objectionable. While it was shown that Mrs. Greenup had defective vision, she wore glasses for the correction of that vision and was wearing them at the time she witnessed the cab incident. Her observations as to color were not in question, and no error is indicated in the refusal of the court to allow the defense an opportunity at the trial to test her observations as to color. An ability to distinguish color differs from an ability to distinguish dark from light. There was evidence to support her testimony that it was not a dark night; that the men were dark; and that one had a light overcoat.

Evidence of a technical nature was given by an expert witness for the prosecution, Dr. Paul L. Kirk, professor in Criminalistics and Biochemistry at the University of California at Berkeley. Upon the bases of the various tests conducted by him or under

his direction as to certain physical evidence, relating principally to blood, hair, fibers, and glass, his conclusions were that there had been a prior contact between the defendants and the deceased, and that the defendants had been inside the latter's cab. His qualifications as an expert were preliminarily objected to and an extensive voir dire was conducted as to his qualifications. The court held that he was properly qualified. Thereafter Dr. Kirk testified in minute detail as to the tests conducted, the manner in which they were carried out, the precautions taken to assure accuracy and to prevent contamination of the substances examined, and as to his conclusions that the probabilities were that there had been a prior contact between the clothing of the defendants and that of the deceased, and between the clothing of the defendants and the interior of the cab. He was cross-examined for several days as to every phase of his tests and as to the bases for his conclusions. The defense offered some counter evidence. It is not necessary to here describe these technical experiments. The jury was free to accept or reject the conclusions drawn from them.

[9,10] On July 30, 1954, two days after the trial commenced, defense counsel obtained service on Dr. Kirk of a subpoena duces tecum commanding him to bring to the trial "all original notes, computations, calculations, papers, documents, experimental data, used by him." The prosecution replied that it was extremely inconvenient to produce this material. No further attempts were made by the defendants to obtain it. Dr. Kirk's testimony began August 11th. The trial ended August 25th. No request was made at the trial by defense counsel for the production of the slides or the sweepings from which the test materials were extracted. A request was made at the trial for the production of Dr. Kirk's notes but the court properly held that no proper foundation had been laid and the request was denied. On appeal defense counsel have sought to augment the record to present "newly-discovered evidence", alleging that they had no opportunity to anticipate or prepare to meet the testimony of Dr. Kirk, and that lack of funds was part of such

lack of opportunity. However no request was made by them at the trial for a continuance or for a court-appointed expert to assist them. Neither defendant waived a jury trial. The record may not thus be augmented on appeal. *People v. Carmen*, 43 Cal.2d 342, 273 P.2d 521. The nature of the newly-discovered evidence is not stated.

The gun of the defendants was properly admitted in evidence. There was evidence that it could have been the murder weapon, and defendants admittedly had it in their possession at the time the cab driver was killed. Additionally, as to Pierce, there was his admission that he used the gun to bludgeon the victim.

[11-13] Defendant Jordan urges that the defendants were deprived of their right to a speedy trial because the prosecution failed to obtain an indictment until over a year after the cab murder took place. There is no statute of limitation as to murder. Penal Code, § 799. Defendants were indicted on June 3, 1954, and were brought to trial on July 28th, within the time prescribed by statute. Penal Code, § 1382. The constitutional guarantees of a speedy trial, U.S.Const., VI Am.; State Const. art. I, § 13, were not violated. One does not become an "accused" until the filing of a complaint or other charge. At no time did either defendant assert during the trial that he had been denied his right to a speedy trial. It cannot be asserted for the first time on appeal. *People v. Newell*, 192 Cal. 659, 669, 221 P. 622; *People v. Tenedor*, 107 Cal.App.2d 581, 237 P.2d 679.

[14-16] There is no merit in Jordan's contention that the indictment was defective in that it did not inform the defendants of the charge against them. The indictment charged them with "a felony, to wit, murder, in that on or about the 28th day of March, 1953, in the County of Alameda, State of California, they murdered Charles Rose." This follows the form and language of section 951 of the Penal Code, as am.1927, and is sufficient. *People v. Smith*, 215 Cal. 749, 751, 12 P.2d 945; *People v. Magsaysay*, 210 Cal. 301, 302, 291 P. 582; *People v. Coen*, 205 Cal. 596, 271 P. 1074. The 1929 amendment to section 952 of the Penal Code, providing that the indictment

"may be" in the words of the enactment describing the offense, does not require that murder be pleaded in the words of section 187 defining "murder". The legislature has legalized the conclusion "murdered" to be pleaded in an indictment. Penal Code, § 951. All forms of pleading in criminal actions and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by the Penal Code. Penal Code, § 948.

Without further recounting the details of the record or the contentions of the parties, it sufficiently appears that no prejudicial error occurred and that the evidence was sufficient to support the verdicts.

The judgments and orders are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



45 Cal.2d 433

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.
Henry THOMAS, Defendant and Appellant.
Cr. 5770.

Supreme Court of California,
In Bank.

Oct. 28, 1955.

Defendant, who had been convicted of murder and had received the death penalty, moved in Superior Court to vacate the judgment of conviction to withdraw the guilty plea and for a stay of execution. The Superior Court, Siskiyou County, James M. Allen, J., denied the motion. Defendant appealed. The Supreme Court, Carter, J., held that in view of the repeated adjudications of the issues raised by defendant and his erroneous making of the motion in the Superior Court rather than in the Supreme Court, (the motion being

in the nature of an application for writ of error coram nobis,) the appeal should be dismissed.

Appeal dismissed; stay of execution terminated and trial court directed to proceed with execution of sentence as provided by law.

1. Criminal Law ☞997(13)

Motion to vacate judgment of conviction, for withdrawal of guilty plea and stay of execution was in nature of petition for writ of error coram nobis and should have been presented to Supreme Court, which had affirmed conviction, rather than to Superior Court. Pen.Code, § 1265; West's Ann.Const. art. 6, § 5.

2. Habeas Corpus ☞120

Petition for habeas corpus based upon same grounds set forth in previous petition which has been denied will be denied where there has been no change in facts or law substantially affecting legal rights of petitioner.

3. Criminal Law ☞997(7)

Where proceeding in nature of application of writ of error coram nobis was based upon same grounds set forth in previous applications for habeas corpus except for omission of one ground asserted on the previous applications, and where there had been no change in fact or law asserted on previous applications, it was appropriate to apply rule that petition for habeas corpus based upon same grounds set forth in previous petition which has been denied will be denied where there has been no change in facts or law substantially affecting legal rights of the petitioner.

4. Criminal Law ☞989

Though requirement that an accused be asked if he has any reason why judgment should not be pronounced is substantial, and a failure to ask it is fatal to judgment if defendant has been deprived of counsel, it is not fatal where defendant is present and represented by counsel and no prejudice appears. Pen.Code, §§ 1200, 1201.

5. Criminal Law ☞1144(17)

In absence of any showing to contrary, Supreme Court would assume that recital

in judgment, to effect that defendant had been asked if he had any reason why judgment should not be pronounced, was correct. Pen.Code, §§ 1200, 1201.

6. Criminal Law ☞1131(4)

In view of repeated prior adjudications of issues raised by defendant on his motion to vacate judgment, for withdrawal of guilty plea and for stay of execution, and in view of his erroneous application to the Superior Court rather than to the Supreme Court, the motion being in nature of an application for writ of error coram nobis, defendant's appeal from Superior Court's denial of the motion would be dismissed. Pen.Code, § 1265; West's Ann. Const. art. 6, § 5.

A. J. Zirpoli, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

CARTER, Justice.

This is an appeal from an order of the superior court denying a motion to vacate a judgment of conviction rendered by that court which imposed the death penalty for murder of the first degree after a plea of guilty; the motion in the court below was also for withdrawal of the plea of guilty, and for a stay of execution. The proceeding in the court below would thus appear to be an application for a writ of coram nobis. This court granted a stay of execution in order that defendant's appeal might be considered. The judgment of conviction was affirmed by this court on automatic appeal. *People v. Thomas*, 37 Cal.2d 74, 230 P.2d 351.

In support of his motion defendant presented to the court below an affidavit in which he stated: (1) That he is in the custody of the warden of San Quentin Prison under the judgment of conviction; that although the judgment recites that after a hearing on the degree of the offense the court asked defendant whether he had any legal cause to show why judgment should not be pronounced and defendant

made no reply, that such was not true and he was not so asked. (2) That defendant was arraigned on December 4, 1950, and counsel for him, Brawman, was appointed. At the time to plead on December 6, after a short appearance in court, Brawman, the district attorney, and judge retired to the latter's chambers where the judge stated that Brawman had told him defendant was ready to plead guilty but hoped he might be saved the death penalty and that the district attorney would not insist on that penalty under those circumstances. The judge had told Brawman he wanted to think it over and suggested the instant conference. At the conference the judge said that he had since gone over the transcript of the preliminary examination and would not bargain since he was inclined to impose the death penalty whether the plea was guilty or not guilty. Brawman, the district attorney and judge then returned to the court room and the judge declared court in session again. Defendant claims that Brawman did not tell him of the conference and that he had no knowledge thereof. (3) That the trial was "fatally infected" because: (a) He was denied effective assistance of counsel because Brawman consulted with him for only a "few minutes" on the day of arraignment; a "few minutes" in the sheriff's office thereafter and for five minutes after the conference heretofore mentioned. (b) There was not a "competent and intelligent" waiver of a jury trial. (c) The court did not advise him of his rights and the consequences of a plea of guilty. (d) The plea was not understandingly entered and the proceedings were too hurried. (4) That he told his counsel that he had a good military record; that he had some whisky before the robbery; that there was a scuffle before he shot and he had not intended to kill Mrs. Ainsworth; that none of these things were brought out at the hearing on the degree of the crime and the punishment to be imposed. Defendant presented points and authorities with his motion. After considering defendant's affi-

davits and points and authorities the motion was denied.

The attorney general has noticed a motion to dismiss the appeal or to affirm the court's order of denial on the ground that the motion was frivolous and only to delay the execution in that the issues raised on the motion had been adjudicated adversely to defendant by this court in the original automatic appeal, *People v. Thomas*, supra, 37 Cal.2d 74, 230 P.2d 351, and in the denial of two petitions for habeas corpus, as well as by the United States District Court and Court of Appeals, *Thomas v. Teets*, 9 Cir., 220 F.2d 232; that since defendant's motion in the trial court was a petition for writ of error coram nobis it should have been addressed to this court under section 1265 of the Penal Code.¹

[1] With reference to the last contention that a petition for a writ of error coram nobis must be made to an appellate court, although this court has not passed on section 1265, supra, the District Court of Appeal has held that it is not a violation of due process nor an encroachment of the jurisdiction of the superior court as stated in our Constitution, Cal.Const. art. VI, § 5; *People v. Sica*, 116 Cal.App.2d 59, 253 P.2d 75 and that the jurisdiction of the appellate court is exclusive. *People v. Dunlop*, 102 Cal.App.2d 314, 227 P.2d 281; *People v. Schunke*, 102 Cal.App.2d 875, 228 P.2d 620; *People v. Ponce*, 103 Cal.App.2d 271, 229 P.2d 77. The language of section 1265 is clear and defendant has presented no excuse for not applying to this court for coram nobis.

With regard to the prior applications for habeas corpus both in this court and the federal courts mentioned by the attorney general, it appears that applications for habeas corpus were made to this court and denied on August 28, 1951, and July 6, 1955. The United States Supreme Court denied certiorari in each case. *Thomas v. Duffy*, 343 U.S. 906, 72 S.Ct. 637, 96 L.Ed. 1325. The grounds advanced in those proceed-

be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal." Pen. Code, § 1265.

1. " * * * if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error coram nobis shall

ings are the same, with one omission,² as in the instant one. In the federal courts the district court held a hearing to determine the facts and then denied habeas corpus. That was affirmed by the court of appeals, *Thomas v. Teets*, supra, 220 F.2d 232, 234, where the court stated the facts as follows: "It is manifest that his attorney conveyed to petitioner the substance of the conversations had with the trial judge." * * * This of course is the testimony of the lawyer which it is apparent the trial court believed. This testimony disclosed that the lawyer fully advised Thomas of the seriousness of the situation; of the difficulty of decision as to whether to plead guilty or not guilty, and that Thomas himself made the decision, against the lawyer's advice, although the lawyer did not overrule it since Thomas appeared to be a very intelligent person and he felt the decision should be made by Thomas." It was there concluded that defendant was not denied the effective assistance of counsel, or deceived by his counsel, or prevented from having a hearing on the degree of the crime and the punishment to be imposed.

[2,3] The denial of habeas corpus by this court and by analogy the denial of a writ by the federal courts makes appropriate the application of the rule that: "There is nothing * * * to exclude this case from application of the established rule that a petition for habeas corpus based upon the same grounds set forth in a previous petition which was denied will be denied where there has been no change in the facts or law substantially affecting the legal rights of the petitioner. In re Miller, 1941, 17 Cal.2d 734, 735, 112 P.2d 10." In re Chessman, 43 Cal.2d 391, 399, 274 P.2d 645, 649, quoting from In re De La Roi, 28 Cal.2d 264, 275, 169 P.2d 363. In the automatic appeal this court said: "At that time, after a brief appearance in court, counsel for defendant and McCain's counsel, and the district attorney retired to the judge's chambers where the judge said that Mr. Brawman had spoken to him in regard

to the possibility of defendant avoiding the death penalty by making a 'certain' plea. The judge remarked that he had read the transcript of the preliminary hearing and that he was 'inclined' to give the 'extreme' penalty whether he pleaded guilty or not guilty. On returning to court, defendant pleaded guilty and December 11, 1950, was fixed as the time for 'pronouncing judgment,' later continued to December 14, 1950, when the court announced it would hear evidence on the degree of the offense. The district attorney called decedent's husband, Ainsworth, to the stand and he testified to the facts relating to the killing. Defendant's counsel was asked by the court if he wished to cross-examine and declined. The court then remarked: 'Step down (addressing the witness). I don't think we will need any further.' The district attorney then made the same remark, to which the court replied 'All right.' Defendant's counsel remained silent. The court then stated that it was murder of the first degree. Thereafter when asked by the court whether he had any legal cause to show why sentence should not be pronounced, defendant stood mute. The death penalty was imposed.

"There is no question that the evidence is ample to establish murder of the first degree, for it was committed while attempting to commit robbery. Pen.Code, § 189. Defendant's excuse for not offering any evidence on the question of penalty is that the court's remark heretofore quoted foreclosed such offer. That remark may not necessarily be so construed, and the court, as seen, did not only take the evidence on the subject consisting of Ainsworth's testimony, but also the evidence given at the preliminary hearing which went into the details of the crime from the planning of it to the flight. Moreover, defendant stood mute when asked if he had any legal cause to show why sentence should not be pronounced and it was not until then that the death sentence was

2. Heretofore defendant had, in addition, claimed that the sheriff told him he had better plead guilty because if it got out that he was a negro it would be bad for

him. The facts were determined adversely to him on that issue in the federal court proceedings, *infra*.

'pronounced.'" *People v. Thomas*, supra, 37 Cal.2d 74, 75-76, 230 P.2d 351, 352.

[4,5] Insofar as the question of the alleged failure of the court to ask defendant if he had any reason why judgment should not be pronounced, we stated, as above seen, on the automatic appeal, *People v. Thomas*, supra, 37 Cal.2d 74, 76, 230 P.2d 351, that when defendant was asked the question he stood mute. Although it does not appear in the reporter's transcript whether the question was asked it was recited by the court in its judgment that it was. In any event, while the requirement, Pen.Code, §§ 1200, 1201, that the question be asked is substantial and a failure to ask it is fatal to the judgment if defendant has been deprived of counsel, *In re Levi*, 39 Cal.2d 41, 244 P.2d 403, it is not fatal where defendant is present and represented by counsel and no prejudice appears, *People v. Henry*, 86 Cal.App.2d 785, 195 P.2d 478; *People v. Hawthorne*, 63 Cal.App.2d 262, 146 P.2d 517; *People v. Swift*, 140 Cal.App. 7, 34 P.2d 1041; *People v. Wademan*, 38 Cal.App. 116, 175 P. 791. In the absence of any showing to the contrary we must assume that the recital in the judgment is correct. *People v. Wademan*, supra, 38 Cal. App. 116, 137, 175 P. 791. Defendant's counsel was fully advised of all circumstances bearing upon the degree of the crime and punishment to be imposed and had an opportunity to present them at the hearing. Both defendant and his counsel were present when judgment was pronounced and no objection was made.

[6] With respect to that part of defendant's motion which asked to withdraw his plea of guilty it has been said: "The proper procedure for withdrawal of a plea after judgment is a motion to set aside the judgment and to permit a withdrawal of the plea. Such a motion is in the nature of, and is subject to the rules governing, an application for a writ of coram nobis." 14 Cal.Jur.2d, Criminal Law, § 260. And: "An application for withdrawal of a guilty plea after judgment will be granted, however, only where there exists some fact that, had it been known to the court, would have prevented rendition of the judgment, which fact was not known to defendant at

that time, and which, without fraud, mistake, or negligence of the defendant, was not presented to the court." 14 Cal.Jur.2d, Criminal Law, § 259. No such after discovered facts appear here.

In view of the repeated adjudications of the issues raised by defendant and the making of his application for the writ of coram nobis to the wrong court in the face of section 1265 of the Penal Code, supra, defendant's appeal should be dismissed. See *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13; *People v. Shorts*, 32 Cal.2d 502, 197 P.2d 330; *In re De La Roi*, supra, 28 Cal.2d 264, 169 P.2d 363.

The appeal is dismissed, the stay of execution heretofore granted is terminated, and the trial court is directed to proceed with execution of its sentence in the manner provided by law.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



45 Cal.2d 629

**Frank C. MOSIER and Nancy M. Mosler,
Plaintiffs, Cross-Defendants, and
Appellants,**

v.

**Dewey MEAD, Roy Ustick, Paul Niman,
Richard Cooper, and J. Walter Smith, De-
fendants, Cross-Complainants, and Re-
spondents.**

Sac. 6577.

Supreme Court of California.

In Bank.

Nov. 29, 1955.

Action was brought to quiet title, and defendants filed a cross-complaint to establish that they had an easement for construction of a levee on plaintiffs' realty. The Superior Court of Stanislaus County, B. C. Hawkins, J., entered judgment adverse to plaintiffs, and they appealed. The

Supreme Court, Spence, J., held that where predecessor of plaintiffs recognized and consented to easement of defendants on predecessor's realty for purpose of constructing and maintaining a levee, and predecessor presented a claim to county for damages for building of levee, Superior Court properly sustained defendants' claim to an easement, based on implied grant, for purpose of constructing and maintaining the levee as provided by law, though at time levee was constructed, no approval had been obtained from State Reclamation Board as required by statute, and construction was illegal.

Judgment affirmed.

Opinion, 283 P.2d 378, vacated.

1. Easements ⇐1

An "easement" is an interest in land, created by grant or agreement, express or implied, which confers a right on owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Easement".

2. Easements ⇐15

Question whether easement arises by implication depends on the intent of the parties, and court will consider circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted.

3. Easements ⇐40

The effect of section of Civil Code providing that extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired, is to establish intent as the criterion for determining the extent of the servitude, in accord with the rationale of rules governing easements by implication. West's Ann.Civ.Code, § 806.

4. Waters and Water Courses ⇐156(1)

Where predecessor of plaintiffs recognized and consented to easement of defendants on predecessor's realty for purpose of constructing and maintaining a levee, and predecessor presented a claim

to county for damages for building of levee, superior court, in action to quiet title, properly sustained defendants' claim to an easement, based on implied grant, for purpose of constructing and maintaining the levee as provided by law, though at time levee was constructed no approval had been obtained from State Reclamation Board as required by statute, and construction was illegal. Water Code, §§ 8710, 8711, 8719, 8720; West's Ann.Civ.Code, § 806.

Sutter, Elledge & Carter, Modesto, for appellants.

Daniel E. O'Connell, Turlock, and Frank B. Collier, Modesto, for respondents.

SPENCE, Justice.

Plaintiffs and cross-defendants in this quiet title action appeal from a decree adjudging that defendants and cross-complainants are the owners of an easement over plaintiffs' land on which is constructed a flood-control levee, and enjoining plaintiffs from interfering in any manner with defendants' lawful use and enjoyment thereof. The cause was submitted upon an agreed statement of facts.

In 1938 an expensive levee was constructed upon plaintiffs' land to protect a county highway and the property of defendants and other landowners from flood waters of the San Joaquin River. Plaintiffs' predecessor in interest consented to this work, and thereafter filed a claim for \$1,500 with the board of supervisors for damages and for compensation for an easement to the 23 acres occupied by the levee. The stipulated facts do not show what disposition was made of this claim.

Construction work was done by the threatened landowners and county employees, the latter working under the direction of a county supervisor, using county equipment and being paid with county funds. The board of supervisors has never approved the project, and the county does not claim any easement or right to maintain the levee. Plaintiffs acquired the property involved in 1947.

The levee lies entirely within the boundaries of the Sacramento and San Joaquin

Drainage District. Plans for its construction and maintenance were never approved by the State Reclamation Board. Statutes in force when the work was done, which since have been incorporated without substantial change in the Water Code, required the board's prior approval of every plan of reclamation calling for construction and maintenance of a levee (now Water Code, § 8710) and prohibited the doing of any work pursuant to such a plan without the board's permission. § 8711. It was further provided that "[t]he doing of any act or construction of any work mentioned in this article, or permitting the work to remain after such construction, without the permission of the board and in violation of any of the provisions of this article, is a public nuisance, and the board may commence and maintain suit in the name of the people of the State for the prevention or abatement of the nuisance." § 8719. Moreover, any person violating these provisions was declared guilty of a misdemeanor. § 8720.

The levee was so located upon plaintiffs' property that it separated from their irrigation facilities about 100 acres of tillable farm land, thus requiring the construction of additional facilities. The present dispute arose when plaintiffs sought to remove the levee. Both prior to the filing of this action to quiet title (May 6, 1952) and since, plaintiffs entered upon the levee, removed dirt therefrom and "thereby destroyed substantially all of [the] levee." It was stipulated that if "defendants and cross-complainants own the easement and levee constructed thereon, as alleged in their cross-complaint, they have been damaged" but that "in lieu of damages," the court might issue a "mandatory injunction requiring plaintiffs and cross-defendants" to restore the levee.

The trial court's decree declared defendants to be the owners of an easement in the realty, for purposes of flood control and protection of property in the vicinity, with the right to reconstruct and maintain the levee, as provided by law. As stated by the trial judge in his decision, the exercise of this latter right would require the acquisition of the necessary permit re-

quired by law to be obtained from the Reclamation Board. The decree also enjoined plaintiffs from claiming any right, title, or interest in the easement adverse to defendants. The decree particularly described defendants' easement by metes and bounds; but it made no award of damages in their favor nor did it grant a mandatory injunction directing plaintiffs to restore the levee.

In attacking the decree, plaintiffs' argument rests primarily upon the premise that a quiet title action is essentially equitable in nature, *Newport v. Hatton*, 195 Cal. 132, 153, 231 P. 987; *Angus v. Craven*, 132 Cal. 691, 696-697, 64 P. 1091 and a "'court of equity will not allow itself to become a handmaid of iniquity of any kind.'" *Domenigoni v. Imperial Live Stock etc. Co.*, 189 Cal. 467, 475, 209 P. 36, 39. As above recited from the statement of facts, it is admitted that neither the plans for the levee nor its maintenance were approved by the Reclamation Board, either before or after its construction. Accordingly, plaintiffs argue that quieting title to defendants' easement constitutes affirmative sanction of a levee admittedly constructed in violation of a penal statute, an act denominated a misdemeanor, and its continued maintenance declared a public nuisance. They further argue that as landowners, they would be liable to suit, and possibly criminal prosecution, for permitting the structure to remain on their property. While plaintiffs cite a number of cases from this and other jurisdictions stating the general salutary principles guiding courts of equity in their proper disposition of controverted issues, they do not apply to the precise situation here.

Plaintiffs misconstrue the effect of the trial court's decree. The court did not determine that defendants were entitled to maintain or repair the levee without sanction or approval of the Reclamation Board. Rather, the decree simply declares that defendants " * * * were during all the times herein mentioned, and now are, the owners of an easement in, on, over and across the hereinafter described real property, on which is constructed a levee * * *." Thus, as stated by the trial

judge in his decision, defendants had an easement for the construction of a levee as actually constructed, but since the levee was illegally constructed, they had no standing in a court of equity for damages or injunction.

[1] An easement is generally defined as an "interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another." *Los Angeles Terminal Land Co. v. Muir* (Southern Pac. R. R. Co.), 136 Cal. 36, 48, 68 P. 308, 312; see 17 Cal.Jur.2d, § 2, p. 89; *Wright v. Best*, 19 Cal.2d 368, 381, 121 P.2d 702. There is no reason why defendants could not have acquired by express grant an easement to maintain a levee on plaintiffs' property. The exercise of such express grant of an easement for a use which could be made legal by obtaining the sanction of the specified state agency—that is, construction and maintenance of a levee with permission of the State Reclamation Board—would not be a grant for an illegal purpose. That being true, there could likewise be an implied grant of an easement by plaintiffs' predecessor to defendants for the same purpose; and such seems to be the case here.

[2-4] Whether an easement arises by implication depends on the intent of the parties, and the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted. 28 C.J.S., Easements, § 30, p. 686. The effect of section 806 of the Civil Code is to establish intent as the criterion for determining the "extent of a servitude", and this is in accord with the rationale of the rules governing easements by implication. *Fristoe v. Drapeau*, 35 Cal.2d 5, 9, 215 P.2d 729. Here it cannot be disputed that plaintiffs' predecessor recognized and consented to defendants' easement on her property for the purpose of constructing and maintaining a levee, for after its construction she presented her claim to the county, reading in part as follows: "For damages for building levee across my ranch and for an easement 200 feet wide running East

of Crows Landing Road and 100 feet across North side along highway, being 23 acres, more or less." In view of this evidence of intent and the situation of the parties, the court properly sustained defendants' claim to an easement, upon the basis of an implied grant, for the purpose of constructing and maintaining the levee "as provided by law," including the acquisition of the necessary permit from the Reclamation Board.

Having concluded that the trial court properly determined that defendants had a right to an easement by implied grant, it becomes unnecessary to consider whether defendants could have acquired a similar right by prescription when the construction and maintenance of the levee without the approval of the Reclamation Board amounted to a public nuisance and a misdemeanor.

The judgment is affirmed.

GIBSON, C. J., SHENK, TRAYNOR and SCHAUER, JJ., and McCOMB, J. pro tem., concur.



45 Cal.2d 738

Harold K. BERESFORD, Catherine A. Beresford and Nellie V. Beresford, Plaintiffs and Respondents,

v.

PACIFIC GAS AND ELECTRIC COMPANY, a corporation, Defendant and Appellant.
Sac. 6635.

Supreme Court of California.
In Bank.

Dec. 9, 1955.

Action against electricity supplier for fire loss. The Superior Court, Tehama County, Ben R. Ragain, J., rendered judgment on verdict for plaintiffs, and defendant appealed. The Supreme Court, Schauer, J., held that evidence was sufficient to support jury's implied findings that falling of tree had brought electric

power line into contact with telephone lines leading into plaintiffs' lodge, that falling of tree in high wind might have been foreseen, that danger could have been forestalled or alleviated by insulating tap line wires and by reducing voltage therein, that fire had resulted from contact of high voltage, uninsulated wires with telephone wires below, that defendant had been negligent in manner in which it had erected and maintained and operated tap line and wires, and that such negligence on part of defendant had been a proximate cause of fire.

Affirmed.

Opinion 285 P.2d 356, vacated.

1. Electricity ⇨19(5)

In action against electricity supplier for fire loss, evidence was sufficient to support jury's implied findings that falling of tree had brought electric power line into contact with telephone lines leading into plaintiffs' lodge, that falling of tree in high wind might have been foreseen, that danger could have been forestalled or alleviated by insulating tap line wires and by reducing voltage therein, that fire had resulted from contact of high voltage, uninsulated wires with telephone wires below, that defendant had been negligent in manner in which it had erected and maintained and operated tap line and wires, and that such negligence on part of defendant had been a proximate cause of fire.

2. Electricity ⇨19(12)

In action against electric power supplier for fire damage sustained when tree on plaintiffs' land fell across supplier's transmission line, energizing telephone wires, there was insufficient evidence to take contributory negligence issue to jury.

3. Evidence ⇨150

Testimony as to experiments is addressed primarily to discretion of trial court, but it must appear that conditions and circumstances were in general same in illustrative case and case at hand, and determination whether conditions were sufficiently similar to make experiments of any value in aiding jury is matter resting in sound discretion of judge.

4. Evidence ⇨557

In action against electric power supplier for fire damage allegedly sustained when tree fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building, admission of testimony concerning experiments illustrating effect of excessive voltage on installations such as existed in plaintiffs' building was not an abuse of discretion.

5. Appeal and Error ⇨971(2)

Evidence ⇨546

It is for trial court to determine, in exercise of sound discretion, competency and qualification of expert witness to give his opinion in evidence, and its ruling will not be disturbed on appeal unless manifest abuse of discretion is shown.

6. Evidence ⇨536

In action against electric power supplier for fire damage allegedly sustained when tree fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building, it was not error to permit two electrical engineers, qualified as experts in their field, to testify relative to insulating tap line, relocating transformer, and adjusting of circuit breaker, notwithstanding defendant's objection that they had not been qualified as experts on fire.

7. Appeal and Error ⇨1170(7)

In action against electric power supplier for fire damage allegedly sustained when tree fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building, admission of witness' testimony that he had been awakened by sparks flying from switch, that he was sure telephone line had been operating before tree fell, and that it did not operate thereafter until repaired, was, in view of great amount of like testimony by other witnesses, not prejudicial, even if unconnected with case. West's Ann.Const. art. 6, § 4½.

8. Appeal and Error ⇨1170(7)

In action against electric power supplier for fire damage allegedly sustained when tree fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building, admis-

sion of photograph of tree, if error, was not so prejudicial as to warrant interference with trial court's determination. West's Ann.Const. art 6, § 4½.

Robert H. Gerdes, John J. Briare, San Francisco, Edmund M. Moor, Red Bluff, and Anthony J. Kennedy, Sacramento, for appellant.

Rawlins Coffman, Red Bluff, and L. C. Smith, Redding, for respondent.

SCHAUER, Justice.

Defendant Pacific Gas and Electric Company appeals from a judgment rendered against it in plaintiffs' action for damages for the destruction of their property by fire, assertedly caused by negligence of defendant. As grounds requiring reversal defendant urges insufficiency of the evidence to support a finding of negligence on its part, as well as various allegedly prejudicial errors on the part of the trial court in the admission and exclusion of evidence and in instructing the jury. For reasons hereinafter stated, we have concluded that defendant's contentions are without merit, and that the judgment should be affirmed.

Plaintiffs owned and operated a resort at Mineral, which is located in the mountains in Tehama County, about 40 miles east of Red Bluff. During the early morning hours of January 10, 1949, the main lodge building at the resort was completely destroyed by fire. Plaintiffs' charge of negligence against defendant is based upon their claim that a tree which admittedly fell across defendant's power line caused that line, from the manner of its construction, maintenance and operation, to come in contact with and energize telephone lines leading to plaintiffs' lodge, thereby causing a fire to break out in the telephone switchboard located in the lodge.¹

The record shows that in 1939 plaintiffs granted to defendant a right of way for

the erection of a transmission line, referred to by the parties as a "tap line." Pursuant to the right of way so granted, defendant constructed the tap line from its main power line which was located a short distance south of the highway (California Highway 36) running easterly through Mineral. Along the north side of the highway, parallel to and 30 feet distant from it, were telephone lines, some of which led to a switchboard at the lodge building about one-half mile to the east of the "Hazen Cabin," near which stood the tree that fell. The tap line, which furnished electric power to the Hazen Cabin, as well as to a seismograph station of the University of California, crossed over the highway and the telephone lines at approximately a right angle; it was about 326 feet in length, uninsulated, and carried some 11,000 volts of electricity. Near the north end of the tap line was located a transformer from which defendant took two 110-volt service connections.

On the north side of the highway, 25 feet east of the tap line and 59 feet north of the telephone lines, stood a cedar tree 110 feet tall and between 150 and 200 years of age. It arose some 75 feet above the 35-foot poles that supported the tap line. The telephone lines were supported below the tap line, on a separate pole. At the base of the tree was a fire burn, termed by the witnesses a cat face, which "possibly weakened" the structure of the tree "some." The tree was 32 to 35 inches in diameter at breast height and leaned between 5 and 10 degrees "toward the highway down the slope." After the tree fell the presence of some dry rot was discovered, although the witness, District Forest Ranger Brokenshire, who testified as an expert on trees, stated that "I looked at the cat face and I would have noticed if it was badly dry rotted." Brokenshire examined the tree in August, 1949, some seven months after it had fallen and it "didn't appear to be extremely defective * * * It's a tree that isn't likely

1. Also named as a defendant was Public Utilities California Corporation, which the evidence showed to have installed and controlled the switchboard and the lines leading into it. A judgment of

nonsuit was entered in favor of such defendant, and plaintiffs' appeal therefrom was dismissed in 1952. (Beresford v. Pacific Gas & Electric Co., 113 Cal. App.2d 622, 248 P.2d 773.)

to die because of any disease or defect." The tree did, however, stand by itself in a cut-over area where the high winds which were "common to the Mineral area" could exert full force against it. Broken-shire stated that in view of such winds "I wouldn't say that any tree at Mineral was safe."

On the stormy night of January 9 and early morning of January 10, 1949, a so-called "very severe" wind of 25 to 30 miles an hour was blowing from the northeast. Between midnight and 1:30 a. m. the tree fell; although the exact time is unknown the records of the University seismograph station indicate a power failure at 12:35 a. m. Admittedly the tree fell across the tap line, and it is plaintiffs' theory that the tap line was thus forced into contact with the telephone lines, thereby energizing them with the high voltage current and causing the fire. Defendant urges that plaintiffs failed to prove not only such contact, but that if it occurred the fire could have been caused thereby. Defendant's Exhibit I shows the tree lying with its top pointing to the southwest, after falling across the tap line at almost the exact point of its intersection with the telephone lines running beneath it, and thence across the highway, thereby blocking the west-bound lane. Between 1:30 a. m. and 2 a. m. the fallen tree was discovered by a traffic officer, who "could see the wires rather low," although he could not state whether electric or telephone wires. When the tree fell the tap line was not broken and the power remained on until about 3:14 a. m., when a truck which was then being driven past the fallen tree contacted and broke the wires, thereby causing the circuit breaker in defendant's South Power House to operate and bells to ring, awakening the attendant. Prior to that alarm no safety or protective device on defendant's power system interfered with or shut off the escaping power.

No witness produced at the trial saw the origin of the fire, which was observed as early as 1:20 a. m. and lasted until 4 a. m., burning the entire lodge building and its contents. Shortly after 1 a. m., however, an employee of plaintiffs observed a fire in

the lodge, which he described as coming from the area of the telephone switchboard. Witnesses living in the neighborhood testified to the continuous or "hot" ringing of their telephones at various times commencing about 1:30 a. m. Also, blue flames and sparks were shooting out from electric switches in their homes, and in some instances fuses were blown in the homes and carbon blocks were burned. One of two U. S. Forest Service communications system repeater coils which were located side by side on a terminal pole near the lodge and through which the escaping power traveled, was burned out; the second, which was in no way connected with the lines on which the power was escaping, was undamaged. It was the opinion of the Forest Service communications officer that the damage "was caused by a high rate of current flow through a repeater coil for some little time—not an instantaneous surge that was discontinued," and that the damage was more severe than that caused by lightning. One of the telephone lines which led into Mineral lodge "did go into this particular repeater coil that was damaged." An electrical engineer who is defendant's retired former employe and who testified for defendant, stated on cross-examination that "if I was informed that the repeater coil burned up very shortly after the time the tree fell into the line, then I would say it had some connection with the falling of the tree. * * * It would indicate the possibility of a contact between the power wires and the telephone wires." In response to the question "Where else in the world could it get that electricity sufficient to burn out that coil except from the tap line?" the witness replied, "I don't know."

The witness Lynch, an electrical engineer and manufacturer of long distance communication equipment, who had inspected the telephone switchboard installation at Mineral lodge before the fire, stated that a protection device known as a Kellogg arrester or protector block had been installed; that such apparatus "may or may not include fuses, but it must always have what they call a gap * * * designed to be open under ordinary telephone usage. It

is merely a closely spaced device made of either carbon blocks or metal and mounted close to each other and then designed to flash or break down in the event of * * voltages in general above 600 volts" or of lightning. Its purpose is to protect the switchboard equipment from damage. A Kellogg arrester "normally does not contain both" the gap and a fuse. The witness could not say "with certainty whether there were fuses or whether there weren't fuses," on the lodge installation. Neither could he predict whether, with the arrester present, the result of the induction of more than 600 volts in the telephone lines "would be to ground," as "It has too many variables behind it." As a "rough rule of thumb" and estimate, the gap in an arrester block "has a tolerance of 5,000 volts to each quarter-inch"; i. e., the voltage would arc or jump "a quarter-inch for about 5,000 volts." Without fuses the arrester at Mineral lodge would have had a gap of four inches, but "If there were fuses there that would not be the gap. Now, I don't remember whether fuses were there or not." The probable outcome "of the induction of a greater voltage than will pass through the arrester is, in the absence of fuses, to destroy or burn the * * * outside telephone lines * * * although * * * it plays such funny pranks you can't be certain."

Two expert witnesses, both electrical engineers and at the time of trial employed as instructors at the University of California, testified on behalf of plaintiffs that it was their opinion that a tree falling on the power wires, which then contacted the telephone lines with the protector device, would result in fire to the lodge building; that insulation of the power wires would have reduced the fire hazard; that cable for effective insulation of the tap line where it crossed the telephone wires is commercially available; that if the transformer, which reduced the power to 110 volts from the 11,000 the tap line carried, had been placed south of the highway it would have likewise reduced the fire hazard; and that the circuit breaker at the South Power House could be so adjusted and timed as to cut off power in the event

of interference by a tree falling on the wire and coming into contact with the telephone lines.

[1] It is apparent that the evidence above summarized is sufficient to support the jury's implied findings that the falling of the tree brought the defendant's power line into contact with the telephone lines leading into plaintiffs' lodge; that the falling of the tree in a high wind might have been foreseen; that the danger could have been forestalled or alleviated by insulating the tap line wires and by reducing the voltage therein; that the fire resulted from the contact of the high voltage, uninsulated wires with the telephone wires below; that defendant was negligent in the manner in which it erected and maintained and operated the tap line and wires; and that such negligence on the part of defendant was a proximate cause of the fire. It follows that, contrary to defendant's contention, the trial court properly denied defendant's motions for nonsuit and for judgment notwithstanding the verdict.

Principles recently reaffirmed by this court in *Dunn v. Pacific Gas & Electric Co.* (1954), 43 Cal.2d 265, 273, 272 P.2d 745 (quoting from *Polk v. City of Los Angeles* (1945), 26 Cal.2d 519, 525, 159 P.2d 931), are that "On the subject of negligence the standard of care is, that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger. [Citations.] Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is reasonable probability of injury to persons or property therefrom. [Citations.]" Further (quoting from *Lozano v. Pacific Gas & Electric Co.* (1945), 70 Cal.App.2d 415, 422, 161 P.2d 74), "The duty of due care with which the company was charged consists not only in the proper installation of the

dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case. Even if at the outset of the installation of equipment the company may have been entirely free from fault, yet, if, under changing circumstances, a hazardous condition arose, nonaction or the failure to remedy such condition would constitute culpable negligence. [Citations.]" (At page 274 of 43 Cal.2d, at page 749 of 272 P.2d.)

In *Irelan-Yuba, etc., Mining Co. v. Pacific Gas & Electric Co.* (1941), 18 Cal.2d 557, 565-566, 116 P.2d 611, it was held not unreasonable to require the power company to anticipate that during a high wind a tree might fall across high voltage lines and result in a fire; that "If a tree is in such close proximity to a pole line that wind may cause it to fall across the wires, the failure to provide against such eventuality is negligence"; and that "It is not decisive that the tree was not within the limits of the portion of the right of way which had been cleared." Judgment for plaintiffs, whose property was destroyed, was affirmed. And in *Rocca v. Tuolumne County Electric, etc., Co.* (1926), 76 Cal.App. 569, 579, 245 P. 468, and *Smith v. San Joaquin, etc., Power Corp.* (1922), 59 Cal.App. 647, 211 P. 843, it was held that the power company is not relieved from liability for failure to protect its wires or take the precautions which the circumstances reasonably demand merely because the tree which endangers the wires stands on private property.

[2] Defendant's next contention concerns its plea of contributory negligence on the part of plaintiffs. In this connection defendant complains of the refusal of the trial court to permit cross-examination of the witness Harvey Brown, a sawmill proprietor, concerning arrangements with plaintiffs to cut down certain trees on their property. Defendant asserts that Brown was plaintiffs' agent and that the cross-examination of Brown as to his knowledge

concerning the hazardous tree which fell was material and relevant to the question of plaintiffs' contributory negligence, as such knowledge would be imputed to plaintiffs. Defendant points to no evidence, however, which would support its assertion of agency, and it is undisputed that plaintiffs were aware of the existence of the tree and its location with respect to the power and telephone lines. Neither is there any suggestion that Brown or plaintiffs knew of the location of defendant's transformer or were informed concerning the regulation and maintenance of the circuit breaker in defendant's power house. For these, and other reasons more fully discussed hereinafter, defendant's position on this point is untenable.

Defendant likewise urges that the trial court erred in taking the issue of contributory negligence from the jury.² However, defendant refers to no evidence which would indicate that plaintiffs had knowledge of or could foresee the fire hazard to their property which defendant created by its manner of construction, maintenance and operation of the tap line in proximity to the tree and the telephone wires—a hazard which was shown only through the testimony of expert witnesses at the trial, including that of the electrical engineer who was defendant's former employe—whereas recognition of such hazards may reasonably be held to lie within the expert and specialized knowledge of defendant who constructed the line and upon whom responsibility for its inspection and safe maintenance and operation lies. By contrast, it was shown in *Polk v. City of Los Angeles* (1945), *supra*, 26 Cal.2d 519, 524, 529-532, 159 P.2d 931, *Benard v. Vorlander* (1948), 87 Cal.App.2d 436, 448-449, 197 P.2d 42, and *Rojas v. Southern California Edison Co.* (1951), 105 Cal.App.2d 258, 259, 233 P.2d 141, relied upon by defendant, that plaintiffs, were aware of the hazards involved. (See also *Prescott v. Ralph's Grocery Co.* (1954), 42 Cal.2d 158, 162, 265

2. The jury were instructed: "The fact that the defendant Pacific Gas and Electric Company, with Plaintiffs Beresfords' consent, constructed its power line across the Beresfords' property does not

impose upon the Beresfords the duty to take precautions to avoid future injuries to Beresfords' own property arising from a tree falling into the defendant's power line."

P.2d 904.) Under the circumstances here present, defendant has shown no error in withholding from the jury the issue of contributory negligence.

[3,4] Defendant's next contention is that the trial court erred in admitting, over defendant's objection, testimony of the witnesses Saunders and Pritchett concerning experiments made by them. These witnesses were the two electrical engineers employed at the University of California. Following extensive questioning as to their knowledge of the case, they were permitted to testify concerning their experiments and as to whether power escaping down telephone lines and into a telephone switchboard in the manner shown by the evidence could break down the protective equipment and cause a fire. Each answered in the affirmative. There were seven experiments; testimony as to certain of them was stricken, while that concerning the remainder stayed in the case. Defendant argues that the testimony which was allowed did not meet the necessary standards as to experiments and that it permitted speculation by the jury.

Although testimony relative to experiments is primarily addressed to the discretion of the trial court "it must appear that the conditions or circumstances were in general the same in the illustrative case and the case in hand * * * [T]he determination whether the conditions were sufficiently similar to make the experiments of any value in aiding the jury is a matter resting in the sound discretion of the judge." (People v. Mondshine (1933), 132 Cal.App. 395, 397-398, 22 P.2d 779, quoting from Guinan v. Famous Players-Lasky Corp. (1929), 267 Mass. 501, 521-522, 167 N.E. 235.) "The conditions surrounding a test or experiment of this nature need not be identical with those existing at the time of the occurrence in question provided there is substantial similarity. (County of Sonoma v. Stofen [1899], 125 Cal. 32 [57 P. 681].) The admission of such evidence is largely a matter of discretion with the trial court, and such a test is merely a circumstance to be considered in connection with other evidence in the case." (Ortega v. Pacific Greyhound Lines, Inc. (1937),

20 Cal.App.2d 596, 597-598, 67 P.2d 702.) In People v. Levine (1890), 85 Cal. 39, 43, 22 P. 969, 24 P. 631, the court commented that "The proof of the result of experiments was equally as open to the defendant as the prosecution; and if other experiments would have shown a different result from that shown by the experiment proved by the prosecution, the defendant had ample opportunity to show the fact. The books are full of authorities sustaining the court in admitting evidence of the result of experiments * * * [The] result [of the experiment in this case] was not conclusive, but a mere circumstance to be considered in connection with the other evidence in the cause. It was both competent and admissible; its weight was for the jury to determine." And in County of Sonoma v. Stofen (1899), 125 Cal. 32, 38, 57 P. 681, it was declared that "Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment has been made when the conditions affecting the result are as near as may be identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible, but a substantial identity must exist to give the evidence value."

Without reciting in detail the evidence concerning the experiments it may simply be noted that they illustrated the effect of excessive voltage on a Kellogg arrester such as that attached to a pine board which constituted the base of the telephone connections in plaintiffs' lodge. Such evidence was offered as an aid to the court and jury in more clearly understanding the technical testimony presented by both sides, and no showing has been made that the court abused its discretion in permitting its introduction.

[5,6] Defendant's other contentions likewise furnish no ground for reversal. First, no error is shown in admitting the testimony of the two witnesses, Saunders and Pritchett, relative to insulating the tap line, relocating the transformer, and adjustment of the circuit breaker. These two electrical engineers qualified as experts in their field, and defendant's objection that they were not qualified as experts on fire

and so should not have been permitted to testify on the subjects mentioned, is without merit. Their testimony concerned the effects of electricity and how it could be more effectively controlled. "It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence [citation], and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown." (Lynch v. Birdwell (1955), 44 Cal. 2d 839, 849, 285 P.2d 919, quoting from Huffman v. Lindquist (1951), 37 Cal.2d 465, 476, 234 P.2d 34, 29 A.L.R.2d 485.) No such abuse is shown here.

[7] Neither is prejudicial error shown in failure to strike the testimony of the witness Eckels, who stated that he was awakened by sparks flying from a switch to which was attached an electric heater, that he was quite sure his telephone line was operating the day before the tree fell, and that it did not operate thereafter until repaired. Even if defendant were correct in its assertion that the testimony was not shown to be connected with this case, there was much other testimony by other witnesses to the same general effect and no prejudice to defendant appears from Eckels' statements.

[8] Finally, defendant complains that a photograph, introduced by plaintiffs for identification only, was permitted by the court to be taken by the jury and viewed during its deliberations and that defendant's motion for a new trial on this ground should have been granted. Defendant particularly objects that the photograph is "of the butt of an uprooted tree showing a large 'cat face' or fire damaged surface," and that in view of certain testimony that a burn will "shut off circulation to some extent * * * where it was burned * * * depending on the amount of heat created," permitting the jury to see the photograph prejudiced defendant. The same witness testified, however, that he had examined the tree after it fell, that it had a "small cat face on one side," that it did not "appear to be extremely defective," and that it was "a tree that isn't likely to die because of any disease or defect," and that

because of the high winds "I wouldn't say that any tree at Mineral was safe." He also answered "Yes," when asked whether the photograph in question "depicts the cat face to which you referred, particularly pointing to the base of the tree?" Further, the witness identified from a photograph introduced by defendant the portion of the tree upon which there was a cat face, although stating, as he had done with reference to the photograph produced by plaintiffs, that he didn't think "it's a fair representation" of the fallen tree. It is our view that under such circumstances, and in the light of the entire record, any error in permitting the jury to view the questioned photograph did not so prejudice defendant as to result in a miscarriage of justice. (Cal.Const., art. VI, § 4½.)

The judgment is affirmed.

GIBSON, C. J., SHENK, CARTER, TRAYNOR and SPENCE, JJ., and McCOMB, J. pro tem., concur.



45 Cal.2d 590

The PEOPLE of the State of California,
Plaintiff and Respondent.

v.

James TARANTINO, Defendant and
Appellant.

Cr. 5705.

Supreme Court of California.
In Bank.

Nov. 28, 1955.

Rehearing Denied Dec. 28, 1955.

Defendant was convicted of conspiring to commit extortion and of extortion. The Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., entered judgment of conviction and order denying defendant's motion for new trial, and defendant appealed. The Supreme Court held that, where excerpts of illegally obtained recordings constituted substantial

and important part of evidence pertinent to certain counts charging extortion and conspiracy to commit extortion, and it could not be said that verdicts of guilty as to such counts rested upon evidence independent of them, admission in evidence of such recordings deprived defendant of a fair trial and resulted in a miscarriage of justice.

Judgment and order affirmed in part and reversed in part, and cause remanded for new trial.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

Opinion, 279 P.2d 158, vacated.

1. Searches and Seizures ⇨7(1)

Dictograph installations, which are made by police officers and which violate constitutional provisions, cannot be made lawful by authorization of head of police department or of the district attorney. U.S. C.A.Const. Amend. 4; West's Ann.Const. art. 1, § 19; Pen.Code, § 653h.

2. Searches and Seizures ⇨7(1)

In absence of some grave emergency, the Fourth Amendment interposes a magistrate between the citizen and the police so that an objective mind might weigh the need to invade privacy of home in order to enforce the law. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇨7(4)

Lawless search and seizure by private person acting in a private capacity does not constitute a violation by a state or federal agency of constitutional guaranties. U.S. C.A.Const. Amend. 4; West's Ann.Const. art. 1, § 19.

4. Criminal Law ⇨394

Searches and Seizures ⇨7(10)

Where secret entry of defendant's room to hide microphone therein was done by engineer, who was a private person, but who was employed by district attorney and police department, installation of microphone and eavesdropping by police violated constitutional provisions against unreasonable search and seizures, and, therefore, evidence so obtained would have to be excluded in subsequent prosecution for extortion

and for conspiracy to commit extortion. Pen.Code, §§ 182, 518, 653h; U.S.C.A. Const. Amend. 4; West's Ann.Const. art. 1, § 19.

5. Threats ⇨7

Evidence, which was independent of that illegally obtained, was sufficient to sustain conviction upon one count of extortion. Pen.Code, §§ 182, 518.

6. Criminal Law ⇨394, 1186(4)

Where excerpts of illegally obtained recordings constituted substantial and important part of evidence pertinent to certain counts charging extortion and conspiracy to commit extortion, and it could not be said that verdicts of guilty as to such counts rested upon evidence independent of them, admission in evidence of such recordings deprived defendant of a fair trial and resulted in a miscarriage of justice which would necessitate a new trial as to such counts. Pen.Code, §§ 182, 518; Const. art. 6, § 4½.

7. Criminal Law ⇨1144(15)

Where jury was instructed that each count in indictment charged separate and distinct offense and that they should consider evidence applicable to each alleged offense as though it were only accusation before them, it would be presumed that jury obeyed instruction and was not influenced to return guilty verdict as to Count 2 upon evidence other than that pertinent to such count.

8. Criminal Law ⇨1144(15)

It will be presumed that jury has followed instructions pertaining to evidence offered for impeachment purposes, evidence of offenses not committed by all codefendants, evidence of prior similar offenses, extrajudicial statements of one of the codefendants, and evidence applicable only to one of the codefendants.

9. Criminal Law ⇨1137(1)

Where defendant's counsel were offered but did not avail themselves of opportunities to hear recordings from which transcripts which were admitted in evidence were obtained, defendant would not be heard to complain that he had been denied

reasonable opportunities to hear the recordings.

10. Criminal Law $\hookrightarrow$ 627½

Where defendant, whose conversations were subject of the recordings and transcriptions thereof, did not suggest what useful purpose would have been served by his counsel's hearing the recordings or reading transcriptions and did not suggest that transcriptions of portions of recordings not introduced in evidence would have contained anything relevant to his case, he would not be heard to complain of refusal to grant his request for copies of transcriptions of portions of recordings not introduced in evidence.

11. Criminal Law $\hookrightarrow$ 372(1), 1169(2)

Evidence, which tended to show extortions and attempted extortions other than those charged, was relevant to certain extortion charge on ground that it tended to show criminal methods and purposes similar to those shown by testimony of the particular extortion charged, and, therefore, that part of such evidence which was legally obtained was properly admitted, and admission of other part was not reversible error, since it was merely cumulative of proof satisfactorily establishing guilt under such count. Pen.Code, §§ 182, 518

12. Criminal Law $\hookrightarrow$ 432

Whole issues, not just portions, of defendant's magazine were relevant and admissible in extortion prosecution, in view of fact that the magazines were an instrumentality by which defendant carried out his threats to blast his victims and in which the victims, as testified to by one victim, were "told" to advertise. Pen.Code, §§ 182, 518.

13. Witnesses $\hookrightarrow$ 277(4)

Where, on direct examination in extortion prosecution, defendant testified, in effect, that he had not committed the extortions charged; in permitting prosecution, over objection, to cross-examine defendant as to similar offenses to which he had not referred in his testimony in chief was not error, since the cross-examination was directed primarily to matters in defendant's general denial, that is, his purpose and mo-

tive and his general plan and scheme. Pen Code, §§ 182, 518, 1323.

14. Witnesses $\hookrightarrow$ 301

Under statute against compelling defendant to be a witness against himself, where defendant's testimony on cross-examination amounts to a general denial of truth of charges against him, permissible scope of cross-examination is very wide. Pen. Code, § 1323.

15. Criminal Law $\hookrightarrow$ 865(2)

Where trial had consumed 44 days, trial judge's requiring jury to deliberate from morning of December 18 until verdicts were returned in evening of December 22 did not constitute an undue prolongation of their deliberations or support defendant's claim that verdicts were coerced.

16. Criminal Law $\hookrightarrow$ 863(2)

Trial judge, who, after he had received note from jurors stating that further argument was likely to result in bodily harm to one or more jurors, instructed jury that, if any juror inflicted bodily harm on any other juror, he would take care of the situation and deal with it in manner which would make offender very sorry that incident had occurred, properly dealt with the situation.

Leo R. Friedman, San Francisco, for appellant.

Charles R. Garry and George Olshausen, San Francisco, amici curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

Thomas C. Lynch, Dist. Atty., San Francisco, amicus curiae on behalf of respondent.

PER CURIAM.

Defendants Tarantino and Eichenbaum were indicted on one count of conspiracy to commit extortion, Pen.Code, § 182, and three counts of extortion, Pen.Code, § 518. Defendant Tarantino alone appeals from a judgment of conviction entered on a jury verdict of guilty on all four counts and

from an order denying his motion for a new trial.

Tarantino (herein sometimes called defendant) published a weekly magazine and made weekly radio broadcasts. Nine witnesses testified that they had been "blasted" or threatened with "blasting" by defendant, but that he stopped his attacks and threats after they paid money to Eichenbaum, sponsored advertisements in defendant's magazine, and, in one case, agreed to sell the magazine to the public. Much of the evidence against defendant consisted of recordings of conversations in his hotel room introduced over objection that they had been obtained in violation of the provisions of the United States Constitution, Amend. 4, and the California Constitution, art. 1, § 19, against unreasonable searches and seizures. An inspector in the San Francisco Police Department testified that at the suggestion of the district attorney and the chief of inspectors he employed a sound engineer and had a locksmith make a key to defendant's hotel room. In December, 1951, the engineer, acting under the direction of the inspector and using the key that the locksmith made, entered defendant's room and installed a microphone behind a small hole in the ceiling. Wires from the microphone were strung up the airshaft, across adjacent roofs, and into an apartment that the police and district attorney had rented in a nearby building. The inspector and the engineer testified that they acted without defendant's knowledge or permission. From December, 1951, until February, 1953, the police listened to every sound that was made in defendant's room. They did not consider all of the conversations they overheard relevant to the investigation, but recorded only those they considered "pertinent" and "interesting." The recordings, totalling 198 reels of tape or approximately 500 hours of listening time, were edited by the district attorney and the police, arranged according to subject matter, and rerecorded in part on composite tapes. The district attorney introduced sixty selected excerpts in evidence, and since they related to threats, promises, and demands for money, they constituted corro-

borative evidence of the testimony of the prosecution's witnesses.

[1, 2] Defendant contends that this evidence was obtained by unconstitutional means. *Irvine v. People of State of California*, 1954, 347 U.S. 128, 132, 74 S.Ct. 381, 98 L.Ed. 561; *Wolf v. People of State of Colorado*, 1949, 338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782, and should therefore have been excluded. *People v. Cahan*, 1955, 44 Cal.2d 434, 282 P.2d 905; *People v. Berger*, 1955, 44 Cal.2d 459, 282 P.2d 509. The district attorney contends, however, that section 653h of the Penal Code permits the police to install and use a dictograph as was done in this case and that unless the section is unconstitutional the recordings were not obtained in violation of the constitutions. Section 653h provides that "Any person who, without consent of the * * * occupant, installs or attempts to install or use a dictograph in any house, room, [or] apartment * * * is guilty of a misdemeanor; provided, that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals." It was pointed out in *People v. Cahan*, supra, that this section "does not and could not authorize violations of the Constitution" and that the proviso under which the officers in that case and this case "purported to act at most prevents their conduct from constituting a violation of that section itself." 44 Cal.2d at page 437, 282 P.2d at page 906. Since the statute does not purport to authorize any installations whatever, to interpret the proviso as authorizing conduct that the Constitution prohibits would not only render it subject to attack on that ground, *Irvine v. People of State of California*, supra, 1954, 347 U.S. 128, 132, 74 S.Ct. 381, but read into it words that are not there. Moreover, installations by police officers that violate the constitutional provisions cannot be made lawful by the authorization of the head of the police department or the

district attorney. Those provisions protect the people from unreasonable invasions of their privacy by the police, and the determination of what is reasonable cannot be left to them. "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald v. United States*, 1948, 335 U.S. 451, 455, 69 S.Ct. 191, 193, 93 L.Ed. 153; see also, *United States v. Jeffers*, 1951, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59; *Johnson v. United States*, 1948, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436; *United States v. Lefkowitz*, 1932, 285 U.S. 452, 464, 52 S.Ct. 420, 76 L.Ed. 877; *Drayton v. United States*, 5 Cir., 1953, 205 F.2d 35, 37.

[3,4] It is true that the secret entry of defendant's room and the hiding of the microphone were done by the engineer, a private person, and that a lawless search and seizure by a private person acting in a private capacity is not a violation by a state or federal agency of constitutional guaranties. *Burdeau v. McDowell*, 1921, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048. The engineer, however, was employed by the district attorney and the police department. He worked under the direct supervision of an inspector of police, and was paid with public funds. Accordingly, his installation of the microphone as an agent of public officials and the clandestine eavesdropping by the police violated the constitutional provisions. *Irvine v. People of State of California*, supra, 1954, 347 U.S. 128, 132, 74 S.Ct. 381; *Wolf v. People of State of Colorado*, supra, 1949, 338 U.S. 25, 27, 69 S.Ct. 1359. Evidence so obtained must be excluded. *People v. Cahan*, supra, 1955, 44 Cal.2d 434, 282 P.2d 905; *People v. Berger*, supra, 1955, 44 Cal.2d 459, 282 P.2d 509.

[5] The People contend, however, that the admission of the evidence did not result

in a miscarriage of justice and that the judgment must therefore be affirmed. Cal. Const., art. VI, § 4½. In support of this contention it is urged that the verdicts were supported by the testimony of twenty-one witnesses, that several of these witnesses testified that defendant committed acts of extortion similar to those with which he was charged, and that one of the acts of extortion for which he was indicted, that charged in Count 2, occurred before the microphone was hidden in his room. As to Count 2 it appears to us that the evidence, entirely independent of that illegally obtained, convincingly, if not overwhelmingly, establishes guilt, and, for the reasons hereinafter more particularly stated, we conclude that the verdict on this count should not be disturbed.

[6] As to Counts 1 (conspiracy of defendants Tarantino and Eichenbaum to commit extortion), 3 (extortion from Rourke), and 4 (extortion from Armstrong) the illegally obtained recordings contain evidence immediately and directly tending to prove the charged offenses. The sixty excerpts of illegally obtained recordings were played repeatedly to the court and jury. They contained the names of the complaining witnesses and defendant's recorded remarks connected these names, insofar as Counts 1, 3 and 4 are concerned, with threats and demands for money. Since the recordings clearly constituted a substantial and important part of the evidence pertinent to the last mentioned counts, it cannot be said that the verdicts as to those counts rested on evidence independent of them. See *Stevens v. Snow*, 1923, 191 Cal. 58, 67, 214 P. 968. Accordingly their admission in evidence deprived the defendant of a fair trial and resulted in a miscarriage of justice which necessitates a new trial as to such counts.

The circumstances of the commission of the offense against Paul Vlasoff, Count 2, as related in his testimony, are as follows: He had known Tarantino and Eichenbaum since 1950. In 1950 Eichenbaum came into the Club Continental, a bar operated by Vlasoff, and "told" Vlasoff to put an advertisement in Tarantino's magazine, *Hollywood Life*. Vlasoff said that he did not

care to advertise his bar in Tarantino's magazine. Eichenbaum said, "You don't have to do that, just put a blood bank ad in there." Vlasoff agreed to place the advertisement and paid \$25.

In 1951 Vlasoff operated both the Club Continental and a card room. Eichenbaum came into the card room in July or August, 1951, and said that Tarantino was "awfully mad" at Vlasoff and was going to "blast" him on his radio program the next day. At Vlasoff's request Eichenbaum placed a telephone call to Tarantino and Vlasoff talked with him. Tarantino told Vlasoff that Vlasoff was "getting away with murder, booking horses, and a crap game," and that Tarantino was going to "blast" him. Vlasoff said, "What can I do to make up? * * I don't want you to blast me on the air tomorrow, otherwise I'll have to close up the place." Tarantino replied that Vlasoff should talk with Eichenbaum. Eichenbaum talked further with Tarantino on the telephone, then told Vlasoff that Tarantino would "forget the incident" for \$500. Vlasoff protested against the amount. After further negotiations they agreed upon a figure of \$200. Also Eichenbaum told Vlasoff, "you will have to put an ad in there to keep him quiet." Vlasoff agreed to this. He paid the \$200 and was billed for but did not pay for an advertisement in *Hollywood Life*.

As stated, the offense charged in Count 2 occurred, according to the testimony of Vlasoff, in July or August, 1951. The listening and recording device by which evidence was illegally obtained was not installed until December, 1951. There is no mention in the evidence obtained by the device of the alleged offense against Vlasoff. There is brief mention by Tarantino in one of his recorded conversations of "Paul" and "the Continental" but it is not in connection with any extortion.

Independently of the recordings, the effect of Vlasoff's testimony describing the commission of the offense against him is impressively strengthened by the testimony of other witnesses, the victims of Counts 3 and 4 and the victims of extortions not charged against the defendants, showing the pattern of defendant's criminal operations.

This admissible evidence of other offenses is of such probative, corroborative effect that the record as a whole, notwithstanding its further content of illegally obtained evidence, falls short of leading us to the opinion that as to this count of the indictment (Count 2), defendant's conviction can be said to constitute a miscarriage of justice. Cal.Const., art. VI, § 4½.

[7,8] In this connection it is to be noted that the jury were instructed that "Each count set forth in the Indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendants. They may be convicted or acquitted upon any or all of the offenses charged, depending upon the evidence and the weight you give to it, under the Court's instructions." It is to be presumed that the jury obeyed this instruction and was not influenced to return a guilty verdict as to Count 2 upon evidence other than that pertinent to this count. *People v. Dabb*, 1948, 32 Cal.2d 491, 499, 197 P.2d 1 (it must be assumed that the jury followed instructions that evidence as to offenses of co-defendants which was not connected with defendant could not be considered against him); *People v. Lamendola*, 1953, 119 Cal.App.2d 570, 572, 259 P.2d 982 (it must be presumed that the jury followed instructions that they were to consider certain evidence solely for the purpose of impeachment); *People v. Grimes*, 1952, 113 Cal.App.2d 365, 371, 248 P.2d 130, 134 ("It will be presumed that the jurors were true to their oaths and followed the various admonitions and instructions of the court", particularly with reference to evidence of prior similar offenses); *People v. Martinez*, 1937, 19 Cal.App.2d 599, 604, 66 P.2d 161 (it may be assumed that the jury followed the instruction that the extrajudicial statement of each defendant could be considered only as to him and not as to his co-defendants); *People v. Griffin*, 1935, 9 Cal.App.2d 246, 249, 49 P.2d 321

(it must be assumed that jury heeded the instruction that evidence applicable to one defendant can be considered only as against that defendant).

[9,10] In addition to the claim that the recordings were inadmissible because they were illegally obtained, defendant presents other contentions. He urges that he was denied a reasonable opportunity to hear and decipher the illegally obtained recordings before or after excerpts therefrom were received in evidence. The record shows that defense counsel were offered and did not avail themselves of opportunities to hear the recordings. Defendant urges, further, that the court should have granted his requests for copies of transcriptions, prepared by the prosecution, of those portions of the recordings which were not introduced in evidence. Defendant, whose conversations were the subject of the recordings and transcriptions, does not suggest what useful purpose would have been served by his counsel's hearing the recordings or reading the transcriptions; he does not suggest that they contained anything relevant to this case.

[11] Defendant complains of the admission of evidence, some properly and some illegally obtained, which tends to show extortions and attempted extortions other than those charged. Such evidence is relevant to the Vlasoff extortion for it tends to show criminal methods and purposes similar to those shown by the testimony of Vlasoff. See *People v. Costa*, 1953, 40 Cal. 2d 160, 167, 252 P.2d 1 and cases there cited. Accordingly, such of it as was legally obtained was properly admitted; the portions of it which were unlawfully obtained were merely cumulative of the proof, which as hereinabove discussed, satisfactorily establishes guilt on Count 2 independently of the evidence improperly admitted.

[12] Defendant complains of the admission in evidence of approximately 200 issues of his magazine, *Hollywood Life*, which were found in his room at the time of his arrest. These magazines are clearly relevant and in themselves constitute overwhelming proof of certain of the elements in the case against defendant. He argues, however, that prejudice from the admission

of this evidence appears from the facts that the magazines contained not only relevant material but also material not relevant to the crimes charged and that the jury asked for and were allowed to have the magazines in the jury room during their deliberations. Defendant's original objection to the introduction of this evidence was on the sole ground that the prosecution had not shown that defendant edited or wrote the material in *Hollywood Life*. The prosecution had shown, however, that defendant was its publisher. Thereafter, defendant asked that the magazines be excluded from evidence and suggested that only such portions as were pertinent should be received in evidence. The magazines as a whole, and not merely selected portions thereof, were relevant since, as shown by other evidence, they were an instrumentality by which defendant carried out his threats to "blast" his victims and the victims, as Vlasoff testified, were "told" to advertise in the magazine.

[13,14] Tarantino on direct examination testified in effect that he did not commit the extortions charged. The prosecution, over objection, cross-examined him as to other, similar offenses to which he had not referred in his testimony in chief. He contends that his cross-examination improperly went beyond "matters about which he was examined in chief." Pen.Code, § 1323. The contention is without merit. Since Tarantino's testimony on direct examination amounted to a general denial of the truth of the charges against him, "the permissible scope of cross-examination is very wide." *People v. Zerillo*, 1950, 36 Cal.2d 222, 228, 223 P.2d 223, 227. The cross-examination here was directed primarily to matters implicit in Tarantino's general denial, i. e., his purpose and motive, his general plan and scheme.

Defendant urges that the following circumstances show that the verdicts were coerced: The jury retired to deliberate on the morning of December 18 and the verdicts were returned on the evening of December 22. At 4 p. m. on December 19 the jury came into court after they had sent the judge a note signed by the foreman which stated, "We cannot agree on any

count." The foreman told the judge that the division of the jury was nine to three. (At no time was it disclosed how many votes were for acquittal and how many for conviction.)

At 10:40 a. m. on December 21 the foreman gave the judge a note which stated that the jury "stand 11 to 1, and no chance of a change"; another juror had written, "Any further argument is very likely to result in bodily harm to one or more jurors." The judge instructed the jury at some length to consider the case dispassionately, and said, "I might just say, and this is not a threat, that if any juror inflicts any bodily harm on any other juror, I certainly would take care of that situation and deal with it in a manner that would make the offender very sorry that the incident occurred, if it does occur. Now, that is not a threat; that is just a rather blunt statement, but I beg all of you to put aside any ill feeling that you might have, if you have any. * * * You are not partisans or advocates but judges. Now, if—don't let any feeling of pride or feeling of personal hurt or animosity prevent you from discussing this case with calmness and with equanimity."

On December 22 the judge received three notes. One, written by the foreman on the night of December 21, stated, "deliberation is proceeding in a friendly atmosphere. We are determined to continue in this manner whether we eventually reach a verdict or not." A note from a juror, marked 3:35 p. m., December 22, stated, "The opposed juror states he is withholding information from us until tomorrow morning. He states he is protecting three interests, the State, the defense and the jury." And another note from the foreman, also marked 3:35 p. m., December 22, stated, "We are not deliberating now and have not been deliberating during many long periods of time previous to this. * * * It is the opinion of everyone that we cannot do any more."

At 4:30 p. m. the judge called the jury into the courtroom and said, "Now, it is your duty, under your oaths as jurors, to deliberate, and to refuse to discuss the case further is a violation of your oaths as jurors.

I know that you have been very patient and have been here a long time, and maybe tempers wear thin, but it is your duty to deliberate until the court excuses you." The judge pointed out that the jury need not be in agreement as to all counts and asked them to deliberate "somewhat further." At 8:45 p. m. they returned with the verdicts.

[15, 16] There was nothing in the statements of the trial judge, representative portions of which are quoted above, which suggested an opinion as to what verdicts should be reached, nor was there any improper pressure upon the jury to agree. Cf. *People v. Walker*, 1949, 93 Cal.App.2d 818, 821-825, 209 P.2d 834, and cases there cited and summarized; *People v. Crowley*, 1950, 101 Cal.App.2d 71, 75-78, 224 P.2d 748. It does not appear that the judge required the jury to prolong their deliberations unduly, particularly in view of the fact that the trial had consumed 44 days. The judge dealt properly with the suggested "bodily harm to one or more jurors." We conclude that the record does not support defendant's claim that the verdicts were coerced.

Other arguments of defendant do not relate to matters which could have had a prejudicial effect as to the conviction upon Count 2 and need not be specifically discussed.

The judgment and order on Count 2 are affirmed; on Count 1, 3 and 4 the judgment and order are reversed and the cause is remanded for a new trial.

SPENCE, Justice.

I concur.

The majority opinion reverses as to counts 1, 3, and 4 upon the authority of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, and *People v. Berger*, 44 Cal.2d 459, 282 P.2d 509. I dissented in those cases and my views remain unchanged concerning the undesirability there of departing from the previously established nonexclusionary rule. Nevertheless, the majority there decided that the earlier cases should be overruled, and that the exclusionary rule should be adopted. Since the decision

of the cited cases, the exclusionary rule has become the rule in this state governing the admissibility of evidence; and the trial courts have been required to accept and apply it. I have reluctantly determined that I should now yield to the views of the majority and accept the exclusionary rule as the established rule.

The reasons for my determination may be briefly stated. The exclusionary rule, as established by the Cahan and Berger decisions, is admittedly merely a "rule of evidence." *People v. Cahan*, supra, 44 Cal. 2d at page 450, 282 P.2d at page 910. Concerning the desirability of adopting the exclusionary rule, there has been sharp disagreement throughout the years among the best legal minds. It being merely a rule of evidence, I believe that the paramount consideration now, in the interest of the orderly administration of justice in this state, is that there be a firmly established rule which will not be subject to change from time to time with the possible change in the views of a single member of this court. My views respecting the desirability of adhering to an established rule constituted one of the reasons for my dissent in the Cahan and Berger cases. In the situation now confronting me, that same reason would seem to indicate that I should accept the rule established by the majority opinions in those cases.

Furthermore, it is clear from the opinion in the Cahan case, that this court still has before it the difficult task of adopting "workable rules" to supplement the general exclusionary rule. *People v. Cahan*, supra, 44 Cal.2d at page 451, 282 P.2d 905. Numerous cases are now pending here involving the determination of such workable rules. Other pending cases, like the present one, call for a determination of the question of whether the admission of evidence, which should have been excluded under the exclusionary rule, has resulted in a miscarriage of justice. Const. Art. VI, sec. 4½. It appears desirable that all members of this court should participate in the determination of the numerous questions presented by the pending cases, and it further appears that full participation by any member of this court in the determina-

tion of many of these important questions will be possible only if such member is willing to accept the exclusionary rule as the established rule. If perchance, either the exclusionary rule itself, or any other rule that this court may adopt to supplement it, should prove unsatisfactory, it is within the province of the Legislature to deal with this important evidentiary problem in such manner as it may deem appropriate.

EDMONDS, J., concurs.

TRAYNOR, Justice.

I dissent.

I would reverse the judgment and order on all counts.

Defendants were convicted of four crimes alleged to be part of an extensive criminal venture whereby Tarantino used threats of exposure by magazine and radio to extort money from his victims. Since the victims were of unsavory character, to convince the jury, it was necessary for the prosecution to substantiate its case by evidence that the victims were telling the truth. It accomplished this purpose by introducing sixty excerpts of illegally obtained recordings of conversations that took place in Tarantino's room. These recordings permeated the prosecution's case, and the record demonstrates that they weighed heavily with the jury in substantiating the testimony of the victims. After the jury had been out for over a day, the jurors reported that they could not agree on any count of the indictment. Thereafter excerpts of the recordings were repeatedly played to them at their request, and not until after four days of deliberation were they able to reach a verdict.

The majority opinion concedes that under these circumstances the admission of the illegally obtained evidence was prejudicial as to three of the counts. It concludes, however, that as to Count 2, no prejudice is shown. It reaches this conclusion on the following grounds: (1) The alleged Vlasoff extortion occurred before the microphone was hidden in Tarantino's room, and there "is no mention in the evidence obtained by the device of the alleged

offense against Vlasoff." (2) Vlasoff's testimony is "impressively strengthened by the testimony of other witnesses, the victims of Counts 3 and 4 and the victims of extortions not charged against the defendants, showing the pattern of defendant's criminal operations." (3) The jury was instructed that "Each count set forth in the Indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendants. They may be convicted or acquitted upon any or all of the offenses charged, depending upon the evidence and the weight you give to it, under the Court's instructions." (4) "It is to be presumed that the jury obeyed this instruction and was not influenced to return a guilty verdict as to Count 2 upon evidence other than that pertinent to this count." When these grounds are viewed in the light of the record they demonstrate that the admission of the illegally obtained evidence was just as prejudicial with respect to the Vlasoff count as it was with respect to the others.

Vlasoff testified that during the pendency of the present proceedings he had been indicted for attempting to steal money by means of fraudulent and marked cards and loaded dice, that he had been a pimp living off the earnings of prostitutes, and that he had been arrested at different times for vagrancy, pimping, gambling, and after-hours sales of liquor. He also admitted committing perjury for \$1,000 by signing a false affidavit. Had his testimony stood alone, it is doubtful that it would have convinced the jury of defendants' guilt on Count 2. What other evidence would the jury consider "pertinent to this count?" It would consider the same evidence that the majority opinion considers relevant to sustain the conviction on Count 2, namely, the evidence "showing the pattern of defendant's criminal operations," evidence that, with respect to crimes not charged, was only admissible because it was rele-

vant as showing "criminal methods and purposes similar to those shown by the testimony of Vlasoff." Inextricably intermixed with the admissible relevant evidence of other crimes was the inadmissible evidence of those crimes provided by the recordings. The jury could not rationally determine whether the testimony of the other victims "impressively strengthened" Vlasoff's testimony until it determined whether those victims were telling the truth, and it would inevitably turn to the recordings in making that determination.

The judgment in this case must stand or fall as a whole. Since all of the offenses charged were part of one pattern of alleged criminal conduct, evidence of each offense was relevant to prove all of the others. The indictment itself listed defendants' conversations with Vlasoff as overt acts of the conspiracy charged in Count 1. In reaching its verdict on Count 2 the jury was not required so to compartmentalize the evidence as to disregard the evidence on the other counts, for the evidence on the other counts, including the illegally obtained evidence, was not only relevant but "pertinent" to Count 2, and indeed, the majority opinion itself relies on the legally obtained evidence on the other counts to affirm the conviction on Count 2. Since the jury was instructed to consider all of the relevant evidence, it cannot be assumed that in reaching its verdict on Count 2 it relied solely on the legally obtained evidence on the other counts to substantiate Vlasoff's testimony and disregarded the illegally obtained evidence on those counts. Nor can it be assumed that it relied on both classes of evidence in reaching its verdict on Counts 1, 3, and 4 but only on legally obtained evidence in reaching its verdict on Count 2. The conclusion is inescapable that if the admission of the illegally obtained evidence was prejudicial as to Counts 1, 3, and 4, it was also prejudicial as to Count 2.

GIBSON, C. J., concurs.

CARTER, Justice.

I dissent.

I am in full accord with the views expressed by Mr. Justice TRAYNOR in his

dissenting opinion, and I do not believe it is possible for anyone to say with any degree of sincerity or conviction that the conceded error in the admission of material evidence unlawfully obtained does not permeate the entire record and equally affect the determination of the jury as to Count 2 as well as to the other counts. This must be apparent when we consider the effect of the instruction given by the court to the jury relative to the evidence offered of other similar offenses which the prosecution claims the defendant had committed.¹ In view of this instruction it must be assumed that the jury considered all of the illegally obtained evidence for whatever bearing "it might have on the question of whether defendants are innocent or guilty of any crime charged against them in this action" and if such illegally obtained evidence tended to show that defendant had a motive for the offense charged against him in Count 2, or that he entertained the intent which is a necessary element of said offense, or that he possessed knowledge that might have been useful in the commission of said offense, or that there existed in his mind a plan, scheme, system or design which fitted into the commission of said offense, or that there existed in his mind a consciousness of guilt, it would be relied upon to establish his guilt of the offense charged in Count 2. Certainly it cannot be said that the tremendous volume of illegally obtained evidence which was offered by the prosecution in this case did not tend to establish some or all of the

above mentioned elements of the offense charged in Count 2, and therefore I think it is only fair to assume that the illegally obtained evidence admitted over the objection of defendant weighed heavily with the jury in determining the guilt of the defendant Tarantino of the crime charged in Count 2. In view of this clear and obvious situation I do not think it can fairly be said that the admission of this evidence did not result in a miscarriage of justice as to Count 2 but did result in a miscarriage of justice as to Counts 1, 3 and 4.

Without considering the effect of the above quoted instruction relating to the applicability of the illegally obtained evidence to Count 2, the majority opinion states: "The sixty excerpts of illegally obtained recordings were played repeatedly to the court and jury. They contained the names of the complaining witnesses and defendant's recorded remarks connected these names, insofar as Counts 1, 3 and 4 are concerned, with threats and demands for money. Since the recordings clearly constituted a substantial and important part of the evidence pertinent to the last mentioned counts, it cannot be said that the verdicts as to those counts rested on evidence independent of them. See *Stevens v. Snow*, 1923, 191 Cal. 58, 67, 214 P. 968. Accordingly their admission in evidence deprived the defendant of a fair trial and resulted in a miscarriage of justice which necessitates a new trial as to such counts." As justification for its holding that the admission of the illegally obtained evi-

1. "Evidence was offered in this case for the purpose of showing that the defendants committed other crimes than the ones of which they are accused, and for which they are on trial in this action. Such evidence was received for a limited purpose only, not to prove distinct offenses or continued criminality, but for such bearing, if any, as it might have on the question whether defendants are innocent or guilty of any crime charged against them in this action.

"You are not permitted to consider that evidence for any other purpose, and as to that purpose, you must weigh such evidence as you do all other in the case. You are not permitted to consider that evidence for any other purpose. The value, if any, of such evidence, depends

on whether it tends to show, first, that the defendants had a motive for the commission of the offense charged against them in this action, or, second, that the defendants entertained the intent which is a necessary element of the alleged crime for which they are now on trial, as pointed out in these instructions, or, third, that the defendants possessed knowledge that might have been useful in the commission of any crime for which they are now on trial; or, fourth, that there existed in the minds of the defendants a plan, scheme, system or design, into which fitted the commission of the offense for which they are now on trial; or, fifth, that there existed in the minds of the defendants a consciousness of guilt."

dence deprived the defendant of a fair trial and resulted in a miscarriage of justice which necessitates a new trial *as to Counts 1, 3 and 4, but not as to Count 2*, the majority opinion states: "Independently of the recordings, the effect of Vlasoff's testimony describing the commission of the offense against him is impressively strengthened by the testimony of other witnesses, the victims of Counts 3 and 4 and the victims of extortions not charged against the defendants, showing the pattern of defendant's criminal operations. This admissible evidence of other offenses is of such probative, corroborative effect that the record as a whole, notwithstanding its further content of illegally obtained evidence, falls short of leading us to the opinion that as to this count of the indictment (Count 2), defendant's conviction can be said to constitute a miscarriage of justice. Cal. Const., art. VI, § 4½." The majority opinion then discusses the effect of the instructions given by the court to the jury with respect to the weighing of the evidence as to each count in the indictment and the determination of the sufficiency of the evidence as to each count independent of the other, and concludes that it must be presumed that the jury followed these instructions. But the majority makes no mention of the instruction hereinabove quoted and the effect such instruction might have in causing the jury to give consideration to the illegally obtained evidence in arriving at their verdict as to Count 2. I am disposed to agree with the majority that it must be presumed that the jury followed the instructions of the court, but in so doing they would be required to give consideration to much if not all of the illegally obtained evidence in their determination of the guilt or innocence of the defendant of the offense charged in Count 2, and therefore if, as the majority hold, such illegally obtained evidence deprived defendant of a fair trial and resulted in a miscarriage of justice as to Counts 1, 3 and 4, it is inescapable that a fair and honest consideration of the record points unerringly to the same conclusion as to Count 2.

Since the majority here invokes section 4½ of article VI of the Constitution of

California as the basis for its holding that the judgment as to Count 2 should be affirmed, I think it might be well to give consideration to the applicability of this provision to the case at bar. In my opinion section 4½ of article VI of the Constitution of California postulates a wise and salutary concept of appellate review in both criminal and civil cases. Its adoption marked a departure from the rigid application of technical rules which had been previously invoked by this court and which had resulted in the reversal of judgments in criminal cases where there was scarcely any doubt as to the guilt of the defendant and it was obvious that form rather than substance was playing too dominant a role in the decisions of our courts. Hence the people saw fit in the adoption of this provision to write into the Constitution the concept that a reviewing court should not reverse a judgment because of a mere technical error which did not go to the merits of the case or could not possibly affect the result and thereby enjoined upon the reviewing court the duty to examine the entire record and determine therefrom whether or not the error complained of had resulted in a miscarriage of justice before ordering a reversal of the judgment. This amendment was adopted about the time that I began the practice of law, and I believed at the time of its adoption and still believe that it constituted a major salutary step in the administration of justice in this state. While this constitutional provision has not been applied with uniformity by our courts, I think the best reasoned cases have uniformly held that it cannot be invoked to cure an error which affects the substantial rights of the litigant, or, in other words, an error which might affect the determination of a material issue in a case. As early as 1913 this court speaking through Mr. Justice Sloss in the case of *People v. O'Bryan*, 165 Cal. 55, at pages 65-66, 130 P. 1042, at page 1046, made the following illuminating observations with reference to the application of this section to the review of a judgment of conviction in a criminal case:

"This much, however, we think may be safely said. Section 4½ of article

6 of our Constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a *prima facie* case for reversal which must be overcome by a clear showing that no injury could have resulted.

"On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering 'justice' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected. For example, if a court should undertake to deny to a defendant charged with a felony the right of trial by jury, and after a hearing of the evidence render a judgment of conviction, it cannot be doubted that such judgment should be set aside even though there had been the clearest proof of guilt. Or, if a defendant, after having been once acquitted, should be again brought to trial and thereupon convicted, in disregard of his plea that he had been once in jeopardy, it would hardly be suggested that, because he was in fact guilty, no 'mis-carriage of justice' had occurred."

In *People v. Sarazzawski*, 27 Cal.2d 7, 11, 161 P.2d 934, 936, decided in 1945, this court declared: "When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4½ of article VI of

our state Constitution cannot remedy the vice and the judgment cannot stand. *People v. Mahoney*, 201 Cal. 618, 627, 258 P. 607; *People v. Adams*, 76 Cal.App. 178, 186-187, 244 P. 106; *People v. Gilliland*, 39 Cal.App.2d 250, 264, 103 P.2d 179; *People v. Duvernay*, 43 Cal.App.2d 823, 829, 111 P. 2d 659. That section was not designed to 'abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' *People v. O'Bryan*, 165 Cal. 55, 65, 130 P. 1042, 1046, opinion of Mr. Justice Sloss; *People v. Wilson*, 23 Cal.App. 513, 524, 138 P. 971."

In *People v. Hall*, 199 Cal. 451, 458, 249 P. 859, 861, Mr. Justice Shenk, speaking for a unanimous court, said: "The amendment by which said section 4½ was added to the Constitution was not 'designed to repeal or abrogate the guarantees accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases.' *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042; *People v. Frey*, 165 Cal. 140, 131 P. 127; *People v. Wilson*, 23 Cal.App. 513, 138 P. 971; *People v. Ho Kim You*, 24 Cal.App. 451, 141 P. 950." (Emphasis added.)

In *People v. Carmichael*, 198 Cal. 534, 547, 246 P. 62, 67, Mr. Justice Curtis speaking for this court said: "No authority has been called to our attention which can be construed as holding that section 4½ of article 6 of the Constitution can be relied upon to sustain the judgment herein. As we have already said, in our opinion it was prejudicial error for the court to refuse the appellant the right to examine the jurors as to the effect on their minds of the standing of the former jury. The ruling of the court

in thus limiting the appellant in his examination of the jurors was, in our opinion, the deprival of the appellant of a fundamental right—a right to be tried by an impartial jury. It was never intended by this provision of the Constitution to take from the defendant in a criminal action his fundamental right to a jury trial or in any substantial manner to abridge this right. *People v. Wismer*, 58 Cal.App. 679, 688, 209 P. 259."

In *People v. Bomar*, 73 Cal.App. 372, 378, 238 P. 758, 760, the court said: "Neither do we think that section 4½ of article 6 of the Constitution is applicable in the present case. Before any accused person can be called upon to defend himself on any charge prosecuted by information, he is entitled to a preliminary examination upon said charge, and the judgment of the magistrate before whom such examination is held as to whether the crime for which it is sought to prosecute him has been committed, and whether there is sufficient cause to believe him guilty thereof. These proceedings are essential to confer jurisdiction upon the court before whom he is placed on trial. To say that he was accorded a fair trial upon an information filed against him without a substantial compliance with these jurisdictional requirements, and therefore that there had been no miscarriage of justice, hardly meets the situation. Such an argument would apply with equal force to the validity of the conviction upon an information filed by the district attorney in a case where no preliminary examination at all had been held. Such practice would result, in legal effect, in wiping out all provisions of the Constitution and the Penal Code providing for preliminary examination, and in clothing the district attorney with unlimited authority to file information against whomsoever in his judgment he might consider guilty of crime. We do not believe that it was ever the intention to extend the scope of section 4½ of article 6 of the Constitution to any such limits."

In *People v. Salaz*, 66 Cal.App. 173, 185, 225 P. 777, 781, the court said: "While it is true that section 4½ of article 6 of the Constitution confers upon this court the power to weigh, to a limited extent, the en-

tire evidence upon which a conviction was had, still 'we are not substituted for the jury. We are not to determine, as an original inquiry, the question of defendant's guilt or innocence.' We are to 'decide whether, in our judgment, any error committed *has led* to the verdict which was reached.' *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042. (Italics ours.) *And whenever we are unable to determine whether the defendant would have been convicted had erroneously admitted testimony been withheld from the jury's consideration, this section of the Constitution cannot be applied to uphold the judgment.* *People v. MacPhee*, 26 Cal.App. 218, 146 P. 522. See, also, *People v. Columbus*, 49 Cal.App. [761] 763, 194 P. 288; *Freeman v. Adams*, [63 Cal. App. 225] 218 P. 600, and *People v. Roe*, 189 Cal. 548, 209 P. 560. After a most careful consideration of the entire cause, including the evidence, we are unable to determine whether the jury would or would not have convicted appellant had Dr. Wagner's opinion as to the position of the parties been withheld from them. This being so, we do not think that the judgment can be upheld by reason of this provision of the Constitution." (Emphasis added.)

In *People v. Abbott*, 132 Cal.App. 109, 114; 22 P.2d 566, 568, the court said: "Appellant, however, argues that, even if this be true, section 4½ of article 6 of the Constitution should rescue the case from the fate of a new trial. *We do not think this constitutional section permits us to consider the evidence of the whole case as a trial tribunal and sustain or reverse every judgment that reaches us upon our own 'verdict.'* It does not intend to repeal the fundamental rights of trial by judge and jury where witnesses appear, and their testimony may be given such weight as their words, conduct, and appearance would seem to justify. There is certainly great doubt that the jury disregarded the court and found defendant guilty of one of the offenses excluded by the terms of the court's instructions. It is almost certain it did not. The defendant is entitled to a jury trial on all offenses charged against him before being punished for them, and we should not take the chance of depriving

him of such right upon unreasonable and strained constructions and presumptions." (Emphasis added.)

The foregoing review of the authorities in this state relating to the application of section 4½, article VI, of the Constitution makes it crystal clear that an error such as the one here under review cannot be cured by the application of this section.

While a majority of this court has recently invoked this section for the purpose of affirming a judgment in a case where the appealing party had been denied the right to a peremptory challenge of a juror, its decision is clearly contrary to all the authorities, see my dissenting opinion in *Buckley v. Chadwick*, Cal., 289 P.2d 242, and it is obvious that this provision was only relied on in that case as some slight justification for the conclusion reached by the majority. In other words the majority desired to affirm the judgment and section 4½ of article VI was invoked even though the error there committed may have deprived the appellant of his right to a fair and impartial jury. No other case has gone this far or even approached it. The effect of such a decision is to permit the majority to resort to section 4½ of article VI as a device which may be used for the affirmation of any judgment regardless of the seriousness of the error committed. In my opinion this is the situation which exists in the case at bar. To state the matter pointedly, it simply amounts to this: A majority of this court desires to affirm the judgment in this case, and section 4½ of article VI of the Constitution is relied upon to cure any error which may have occurred so far as Count 2 is concerned.

I also agree with appellant that it was prejudicial error to admit in evidence some 200 weekly issues of *Hollywood Life*, a magazine published by defendant, and to permit these magazines to be examined by the jury during their deliberations. While these issues may have contained material evidence in support of the charges against the defendant, they also contained many articles which had no bearing whatsoever upon any of the offenses charged, but may have had the effect of prejudicing the jury against the defendant. These issues contained many articles attacking members of

the police department of San Francisco including high officials in said department. They also contained many articles attacking officials and employees of one of the most powerful newspaper syndicates in California. They also contained articles attacking many public officials of San Francisco and California including the present attorney general. None of these articles had any bearing whatsoever upon any of the offenses charged against the defendant. It was therefore error of the most prejudicial character to admit in evidence the complete issues of these magazines and permit the jury to peruse the same.

Defendant may be an undesirable character. His conduct as disclosed by the record is such that it could not help but create resentment, animosity and ill will on behalf of many prominent, influential people. His attacks upon most if not all of these people appear to be wholly unjustified and deserving of condemnation, but the problem before this court in reviewing his conviction of the offenses charged is to determine whether or not he was accorded that fair and impartial trial guaranteed by the Constitution and laws of this state. Even a wicked, disreputable scandalmonger is entitled to a fair trial before he is convicted and punished. In my opinion the admission of the illegally obtained evidence and the issues of the *Hollywood Life* magazine constituted error of such magnitude that a fair and impartial trial was not had. Had this evidence been excluded it is not beyond the realm of probability that a different result may have been reached by the jury. The jury deliberated for five days before arriving at its verdict. This fact makes it obvious that at least some of the jurors were not convinced as to the guilt of the defendant on all of the counts, and it may be that Count 2 was the one regarding which the doubt existed. In this state of the record I am convinced that the only solution which can be reached by this court which will be consonant with the quality of justice which should be administered by a court of justice, is that the judgment as to all counts should be reversed and the defendant should be granted a new trial.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

45 Cal.2d 684

CITY OF SUSANVILLE (a Municipal Corporation), Petitioner and Respondent,
v.

LEE C. HESS COMPANY (a Corporation),
Defendant and Appellant;

Ann Rathner, as City Clerk, etc., et al.,
Cross-Defendants and Respondents.
Sac. 6576.

Supreme Court of California.

In Bank.

Dec. 2, 1955.

Action brought by city to determine validity of proceedings theretofore taken under Improvement Act of 1911. The Superior Court, Lassen County, Bertram D. Janes, J., entered judgment declaring all proceedings taken to be valid, and the law-abiding contractor appealed. The Supreme Court, McComb, J. pro tem., held, inter alia, that where the city council had passed a resolution declaring a contractor to be the lowest bidder and awarding to the contractor a contract for work under the Act, the contract was thereby complete, and, in the absence of fraud, mutual mistake or some other ground of rescission, the city was without power to rescind its action and award the contract to the second lowest bidder.

Judgment reversed.

Opinion, 285 P.2d 1007, vacated.

1. Municipal Corporations ⇨374(1)

Where city council passed resolution awarding to contractor contract for work under Improvement Act of 1911 and later passed resolution rescinding first award and awarded contract to second lowest bidder, contractor did not lose its right to object to rescinding action taken by council or to litigate issue of validity of city's proceedings on ground that it had not exercised its administrative remedies by appealing to city council. Streets and Highways Code, §§ 5003, 5100 et seq., 5265 et seq., 5268.

2. Administrative Law and Procedure ⇨229

Where an administrative remedy is provided by statute, relief must be sought

from administrative body and remedy exhausted before courts will act, and a court violating this rule acts in excess of jurisdiction. Streets and Highways Code, § 5003.

3. Administrative Law and Procedure ⇨225

Where a statute provides an administrative remedy and also provides an alternative judicial remedy, the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved, having both remedies afforded him by the same statute, elects to use the judicial one. Streets and Highways Code, §§ 5003, 5100 et seq., 5265 et seq., 5268.

4. Municipal Corporations ⇨374(1)

Where contractor sought to litigate issue of validity of city proceedings and to object to action taken by city council in rescinding contract, section of Streets and Highways Code providing that exclusive remedy of any person affected or aggrieved by error, irregularity, informality, or neglect or omission of officer should be by appeal to legislative body in accordance with related provisions was inapplicable. Streets and Highways Code, §§ 5003, 5220, 5221, 5230 et seq., 5258, 5259, 5265-5268.

5. Municipal Corporations ⇨316, 490

Section of Streets and Highways Code providing that no error, irregularity, informality, and no neglect or omission of officer in any proceeding taken under certain statutes, which did not directly affect jurisdiction of legislative body to order work or improvement, should avoid or invalidate proceeding or assessment and that exclusive remedy of any person affected or aggrieved thereby should be by appeal to legislative body in accordance with related provisions, is a substantive, not procedural, provision, and grants right but provides for no machinery for enforcement. Streets and Highways Code, § 5003.

6. Municipal Corporations ⇨490

The only sections of Streets and Highways Code referring to appeal to legislative body are those sections which do not become operative until work or a part thereof has been done or assessment levied. Streets and Highways Code, §§ 5003, 5366 et seq.

7. Municipal Corporations $\S$ 321(1)

Section of Streets and Highways Code providing that no action with reference to assessments or review of proceedings, acts, determinations or to questions of validity of assessments, or to enjoin issuance of bonds, shall be maintained unless commenced within 30 days after recording of warrant, diagram and assessment is purely a statute of limitation against actions of an entirely different type from city's action to determine validity of proceedings theretofore taken under Improvement Act of 1911. Streets and Highways Code, §§ 5265 et seq., 5660.

8. Municipal Corporations $\S$ 354

Section of Streets and Highways Code describing operation of judgment upholding proceeding and conclusiveness of findings did not make council's action in rescinding first award and awarding contract to second lowest bidder "conclusive in the absence of actual fraud". Streets and Highways Code, §§ 5003, 5273.

9. Municipal Corporations $\S$ 325

Section of Streets and Highways Code describing operation of judgment upholding proceedings and conclusiveness of findings applies to those findings, conclusions and determinations which act authorizes legislative body to make. Streets and Highways Code, §§ 5221, 5233, 5273, 5368.

10. Municipal Corporations $\S$ 490

Section of Streets and Highways Code providing for written protest as remedy for an owner of property liable to be assessed must be read with succeeding section providing for disposition of such protests. Streets and Highways Code, §§ 5220, 5221.

11. Municipal Corporations $\S$ 374(1)

Section of Streets and Highways Code providing for appeal to legislative body and describing person entitled to appeal and matter appealable marks first point in any proceedings under the act at which contractor is bound, if he be aggrieved, to appeal to the council, and does not apply until some of work has been done or until assessment has been made. Streets and Highways Code, §§ 5003, 5366.

12. Municipal Corporations $\S$ 330(1)

Improvement Act of 1911 was originally enacted and has maintained its place in

statute books because of fixed legislative policy that fairness, efficiency and security in construction of public works can best be attained by statutory scheme which would require that such contracts for such work must be let at competitive bidding. Streets and Highways Code, § 5100 et seq.

13. Municipal Corporations $\S$ 266

Improvement Act of 1911 must be followed by legislative bodies, and no attempt upon their part to claim authority to act except strictly in accord with such act can be successful. Streets and Highways Code, § 5100 et seq.

14. Contracts $\S$ 22(1)

In letting of contracts for doing of public works, where legislative body or administrative officer is required by statute to call for bids and must under competitive bidding conditions let contract to lowest responsible bidder, making of award gives rise to contract between public body or agent and successful bidder. Streets and Highways Code, § 5100 et seq.

15. Municipal Corporations $\S$ 354

Though municipal corporation has discretion as to time and manner of corporate improvements and purchase of supplies, when discretion has been exercised and a contract made relative thereto, legislative function has been exhausted and duty has become purely ministerial, and contract so made cannot be impaired at option of municipality; hence, when bid has been accepted by proper authorities, such acceptance cannot be revoked. Streets and Highways Code, § 5100 et seq.

16. Municipal Corporations $\S$ 354

Where city council passed resolution declaring contractor to be lowest bidder and awarding to contractor contract for work under Improvement Act of 1911, contract was thereby complete, and, in absence of fraud, mutual mistake or some other ground of rescission, city was without power to rescind its action and award contract to second lowest bidder. Streets and Highways Code, § 5100 et seq.

17. Municipal Corporations $\S$ 336(1)

Statute requiring that notice of award of public works contract shall be published by clerks was not intended as method where-

by communication of acceptance by city should be given to bidder, but is limited in its effect to notification required to be given to property owners interested. Streets and Highways Code, § 5248; West's Ann.Civ. Code, §§ 1550, 1565, 1581.

18. Municipal Corporations ⇨336(1)

Resolution of common council making award of public works contract is public act of public body and is a matter of which notice may be presumed, so far as interested parties, such as bidders, are concerned. Streets and Highways Code, §§ 5100 et seq., 5248.

19. Declaratory Judgment ⇨395

On appeal from action brought by city to determine validity of proceedings theretofore taken under Improvement Act of 1911, District Court of Appeal could not assume that, if proceedings were declared valid, there would be on part of city any refusal to perform ministerial acts, and therefore court would not mandate city to perform affirmatively any acts. Streets and Highways Code, §§ 5100 et seq., 5265 et seq.

Clewe, Blade & McDonald and Robert W. Anderson, Oroville, for appellant.

Donald P. Cady, City Atty., Susanville, Sturgis, Den-Dulk, Douglass & Henes and Eugene K. Sturgis, Oakland, for respondents.

Richard C. Waltz, City Atty., Beverly Hills, Archie L. Walters, City Atty., Burbank, Grayson Price, City Atty., Chico, Thomas F. McBride, City Atty., Concord, Donald A. Stewart, City Atty., San Diego, Donald H. Smith, City Atty., Seaside, C. M. Ozias, City Atty., Fresno, Leo R. B. Henrickson, City Atty., La Mesa, Allen Grimes, City Atty., Modesto, John W. Collier, City Atty., Oakland, Hilton W. Melby, Asst. City Atty., Oakland, Karl Brooks, City Atty., Petaluma, J. F. DuPaul, City Atty., San Diego, and John A. Nejedly, Walnut Creek, as amici curiae on behalf of respondents.

McCOMB, Justice pro tem.

This cause was transferred to this court after decision by the District Court of Ap-

peal, Third Appellate District. Upon further examination of the record, we adopt the opinion of Mr. Presiding Justice Van Dyke, with such omissions and additions as hereinafter appear, as and for the decision of this court. As modified, it reads [285 P. 2d 1008]:

"The City of Susanville adopted a resolution of intention to do certain public work within its boundaries, proceeding under the Improvement Act of 1911, now contained in Division 7, Part 3, of the Streets and Highways Code, § 5100 et seq. All prescribed action was duly taken, up to and including a call for bids, and Lee C. Hess Company, a corporation, submitted the lowest bid. The city council passed a resolution declaring Hess Company to be the lowest responsible bidder and awarding to it the contract for doing the work. Four days later, and acting upon mistaken advice by the Assistant Director of the Department of Professional and Vocational Standards that Hess Company was not a properly licensed contractor, the city council held a special meeting attended by all its members, but without any notice to Hess Company, and thereat passed a resolution declaring that Hess Company had not been qualified to bid the work and purporting to award the contract to one Katsaros, a bidder whose bid had been next lowest to that of Hess Company.

"In this case the trial court found that the Hess Company had been properly licensed at all material times. The first resolution awarding the contract to Hess Company directed, as required by the statute, that the city clerk publish notice of that award, but no notice was published. The second resolution directed the publication of notice of award to Katsaros, and that publication was made, and a proposed formal written contract was delivered to Katsaros. At this point, and before the formal contract was executed by Katsaros, the city began this action under the provisions of chapter 10 of said division 7 of said Streets and Highways Code, to determine the validity of proceedings theretofore taken. The code provides that at any time after bids have been received, and prior to the date fixed for the beginning of the work, the legislative body

conducting the proceedings may bring an action in the superior court to determine the validity of the proceedings and the validity of any contract entered, or to be entered into pursuant thereto. Any contractor to whom a contract has been awarded may also bring the action. The action is declared to be in the nature of a proceeding in rem and anyone interested is given the right to appear and 'contest the validity of such proceedings and contract or uphold the same.' (§ 5268.) Hess Company answered the city's petition, asserting that the contract had been awarded to it and declaring its willingness to enter into the formal written contract in accordance with the award. It asked that the legislative body and other city officials be mandated to recognize it as the contractor for the work and to proceed to deal with it in that capacity. The trial court found in favor of the city, declaring all proceedings taken to be valid, including the second resolution which, in effect, rescinded the prior resolution awarding the contract to Hess Company and adjudging that a contract executed by the city and Katsaros would be a valid contract. All relief asked by Hess Company was denied. From that judgment Hess Company has appealed.

[1] "In support of its appeal Hess Company contends that when the city council made the award to it a binding contract between the city and the Hess Company arose; that the city's power to act further in the matter of making an award had been exhausted and that its action rescinding the award was a nullity. It contends further that the meeting at which the second and rescinding resolution was passed was an illegal meeting in that it was not held at the city hall as prescribed by law. Before examining these contentions we will consider the claim of the city that Hess Company lost all right it might have had to object to the rescinding action taken by the council or to litigate the issue of the validity of the city's proceedings because it had never appealed to the city council, that is to say, had not exercised its right to administrative remedies which the city contends was afforded it by the relevant

statutes. The contention cannot be sustained.

[2, 3] "It is, of course, well settled that where an administrative remedy is provided by statute relief must be sought from the administrative body and the remedy exhausted before the courts will act; and that a court violating the rule acts in excess of jurisdiction. (*Abelleira v. District Ct. of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715.) It is equally well settled that where a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved, and having both remedies afforded him by the same statute, elects to use the judicial one. (*Scripps Memorial Hospital, Inc., v. California Emp. Comm.*, 24 Cal.2d 669, 673, 151 P.2d 109, 112, 155 A.L.R. 360.) * *"

[4, 5] In the present case judicial and administrative remedies were granted the Hess Company in the alternative. Section 5003 of the Streets and Highways Code, relied on by the city, reads as follows: "This division shall be liberally construed in order to effectuate its purposes. No error, irregularity, informality, and no neglect or omission of any officer, in any procedure taken under this division, which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body in accordance with the provisions of this division." This section is inapplicable to the present case as will be seen from the following analysis of that section and various other sections of the Streets and Highways Code:

(a) Section 5003 is substantive, not a procedural provision. It grants a right but provides for no machinery to enforce this right.

(b) Sections 5220, 5258, 5259, 5265, 5266, 5267, and 5268 are purely procedural sections, providing the machinery which section 5003 does not.

(c) Section 5220 provides a remedy for an owner of property liable to be assessed and for no other class of persons. It does not provide for an appeal to the legislative body, but for a written protest.

(d) Section 5221 provides for the disposition of such protests.

(e) Sections 5230 et seq. provide for a change of work or change of assessment boundaries, and nothing else.

(f) Sections 5258 and 5259 are specifically limited by the terms of section 5258 to "any owner of, or other persons having any interest in, any lot or land liable to assessment * * *." Section 5258 does not provide for appeal to the legislative body but provides for filing a written notice with the clerk.

(g) Section 5265 provides for the bringing of an action to determine the validity of proceedings by the legislative body.

(h) Section 5266 grants the contractor the same right.

(i) Section 5267 and section 5268 merely provide what the nature of the action is, for publication of summons, and for appearance by any interested person in such action.

[6] (j) The only sections referring to appeal to the legislative body are sections 5366 et seq., and these sections do not become operative until the work or a part thereof has been done or assessment levied.

There is nothing in the act or in any of the cases interpreting the act which provides that the contractor must appeal to the legislative body, except under section 5366.

The statement in *Stotts v. Meese*, 39 Cal. App. 334, 178 P. 727, relied on by the city, that while there was nothing in the curative section (which is identical with section 5003) in the Vrooman Act which authorized the superintendent of streets to appeal to the city council for the correction of an assessment, nevertheless if the superintendent of streets had appealed, the city council could have corrected the error, was dictum in such case. Actually, the cited case is one wherein a property owner attacked the validity of an assessment, and is therefore

not authority for any proposition now presented to us.

[7] Section 5660 of the Streets and Highways Code is also urged as authority for the proposition that the Hess Company may not maintain this action. The section provides that no action, suit, or proceeding with reference to assessments or with reference to review of proceedings, acts, determinations or to questions of validity etc. of assessments, or to enjoin the issuance of bonds, shall be maintained by any person unless such action is commenced within 30 days after the recording of the warrant, diagram and assessment. This is purely a statute of limitation against actions of an entirely different type from the instant action. The time limit is 30 days after the recording of the warrant, etc. That time has not arrived.

Mathes v. City of Long Beach, 121 Cal. App.2d 473, 263 P.2d 472, 474, is also urged by the city as authority for the proposition that minor irregularities in a validation proceeding are to be ignored. This is a correct statement of the law as an abstract proposition. However, the principle has nothing whatever to do with any phase of the present case. In the first place, the action of the city council in rescinding the award to Hess Company was not a "minor irregularity," or an irregularity at all. It was an act which the council had no authority to perform and was therefore ineffective.

An examination of the facts in the *Mathes* case shows that the contractor questioned the validity of the contract awarded to him under the authority of section 5266 of the code, in some 19 particulars. The opinion does not disclose what 18 of these particulars were, but discusses only one, which was the proposed inclusion in the contract of a recital that the federal government had the power to stop the work at any time, and what would be done in the case of such termination of the work. The contractor contended that since the property owners whose lands were to be assessed were not advised as to the proposed inclusion of this clause that the contract was void, and the trial court so found. However, the District Court of Appeal reversed

the decision and held that the contract was entirely valid; that the clause under consideration, defining the rights of the parties if the federal government should stop work, was similar to clauses in contracts excusing performance because of natural calamities. The court said that "Instead of impinging upon, this clause recognized and protected substantial rights of the city, the property owners affected, and the contractor" and that "Therefore, this court has come to the conclusion that it was error to hold that this clause, measured by the provisions of the Improvement Act of 1911, imposed upon the owners within the assessment district a burden not authorized by law."

The court further said that its conclusion was supported by sections 4410 to 4412, inclusive, of the Government Code, which recognize the possibility of stoppage of public work by order or proclamation of the President of the United States, and provide that in such circumstances the contracting parties may agree for the payment of compensation for work done before it is stopped by an overriding power.

The court dismissed the other 18 asserted defects saying that they had been given careful consideration by the trial court and the findings by the trial court were that none of them affected the validity of the contract. This decision clearly is of no value in disposing of the problems presented in the instant case.

[8] It is urged that section 5273 of the Streets and Highways Code made the determination of the city council "conclusive in the absence of actual fraud." The section reads: "Operation of judgment upholding proceedings: Conclusiveness of findings, etc. If the validity of the proceedings and of the contract or proposed contract is sustained, the validity of such proceedings or contract shall not thereafter be contested in any action, suit or proceeding, and the judgment entered in the action herein provided for shall be conclusive evidence of the validity of such contract and of all proceedings prior thereto. In such action, all findings, conclusions and determinations of the legislative body which conducted the proceedings shall

be conclusive in the absence of actual fraud."

[9] Obviously this section applies to those findings, conclusions and determinations which the act authorizes the legislative body to make. It does not apply to every conceivable determination of such body for if it did, no useful purpose would be served by the validation proceedings which contemplate judicial review.

The city attempts to apply the provisions of sections 5221, 5233 and 5368 of the Streets and Highways Code to section 5273, making a point of the fact that under these sections certain findings and determinations of the city council are final and conclusive. The non-applicability of these sections to the instant case is demonstrated by the following:

[10] Section 5221 appears in chapter 8 of the 1911 Act under the chapter heading, "Protest and Hearing." It is necessary to read section 5220 with section 5221. Section 5220 provides for the hearing of objections to the proposed work and grants to any owner of property liable to be assessed the right to make written protest against the proposed work or against the extent of the district to be assessed. Section 5221 sets up the procedure for the hearing of such protests.

Section 5233 appears in chapter 8.5 of the 1911 Act under the chapter heading "Change of Work, Boundaries of Assessment District or Proceedings." This section gives the right to any interested person to file written objections to changes in the proposed work or in changes of the boundaries of the assessment district, and provides the procedure for hearing such objections by the legislative body.

Section 5368 appears in chapter 16 of the 1911 Act under the chapter heading "Making and Confirming the Assessment." This section provides that determinations of legislative bodies shall be final and conclusive upon all persons entitled to appeal to the legislative body as to matters listed in section 5366 which may be the subject of appeal to the council.

[11] This section is the first point in any proceedings under the act at which the

contractor is bound, if he be aggrieved, to appeal to the council. The matters concerning which an appeal may be taken concern the "work done," "the assessment," a claim "that the work has not been performed according to the contract in a good and substantial manner", or a claim "that any portion of the work for any reason was omitted or illegally included in the contract". It also gives a right to those persons "having or making any objection to the correctness of the assessment or diagram or other act, determination or proceedings of the superintendent of streets or engineer * * *."

Obviously this section does not apply until some of the work has been done or until an assessment has been made. Each section cited entails notice to the interested party and hearing thereafter. No notice was given to the Hess Company of the city's intention to rescind the award and no hearing was offered. None is provided by the act. The court's jurisdiction cannot be so summarily ousted.

[12, 13] "Before considering the contentions of Hess Company upon the merits, it should be said that the Improvement Act of 1911 was originally enacted and has maintained its place in the statute books because of a fixed legislative policy that fairness, efficiency and security in the construction of public works can best be attained by a statutory scheme which would require that such contracts for such work must be let at competitive bidding. From the beginning to the end the provisions of the Improvement Act of 1911 are mainly aimed at securing such competitive bidding; and the courts have consistently construed the act with that legislative purpose in mind. Legislative bodies must follow the act and no attempt upon their part to claim authority to act except strictly in accord therewith can be successful. The act contemplates that before bids are invited the public improvement shall be thoroughly planned; that detailed and exhaustive plans and specifications of the work shall have been adopted; and that every material term and condition of the proposed contract shall have been stated, all to the end that where contractors are

invited to bid they will know exactly what they are proposing to do under the contract they offer to enter into. The statute does require that after an award has been made a formal written contract shall be executed and appropriate bonds furnished for faithful performance of the work and for the payment of subcontractors, laborers and materialmen. But so well have all things been stated in the plans and specifications, in the proposal for bids, in the information and instructions to bidders, in the notice inviting bids and in the required bid forms that the formal contract is a brief document referring to these preceding writings for a statement of the obligation of the parties; these writings being expressly made a part of the formal contract.

[14, 15] "It has long been decided in this and other states and in the courts of the United States that in the letting of contracts for the doing of public works where the legislative body or the administrative officer is required by statute to call for bids and must under competitive bidding conditions let the contract to the lowest responsible bidder, the making of the award gives rise to a contract between the public body or agent and the successful bidder. * * *" [285 P.2d 1009.] (M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 700 [1], 235 P.2d 7; Williams v. City of Stockton, 195 Cal. 743, 748 [4 et seq.], 751, 235 P. 986.) In 10 McQuillin on Municipal Corporations, third edition (1950), section 29.71, page 343, the rule is accurately stated, thus: "While it is true that a municipal corporation has discretion as to the time and manner of making corporate improvements and the purchase of supplies, still when this discretion has been exercised and a contract made relative thereto, the legislative function has been exhausted, and the duty has become purely ministerial, and a contract so made cannot be impaired at the option of the municipality. Hence, when a bid has been accepted by the proper authorities, such acceptance cannot be revoked."

[16] "Applying the foregoing, we hold that the Hess Company's bid had been accepted and the contract awarded to it by

regular action of the city council in strict pursuance of the statutory scheme. All the essentials of contract were present and Hess Company was entitled as of right to have the further proceedings take their statutory way. The city was without power, in the absence of fraud, mutual mistake or some other ground of rescission, none of which is claimed to have existed, to rescind its action and to take the contract from Hess Company and award it to Katsaros.

"Respondent argues that since the statutes require that 'Notice of the award of the contract shall be published by the clerk' (Sts. & Hy.Code, § 5248), this fixes the way, and the exclusive way, in which the acceptance of the bidder's proposal can be communicated to the successful bidder and that until this has been done no contract has arisen. Says respondent:

"The provisions of the Civil Code of the State of California provide the essentials of a contract. These essentials are:

"(a) Offer;

"(b) Acceptance;

"(c) Communication by each to the other.' (Citing Civ.Code, §§ 1550, 1565 and 1581.)

[17,18] "We think the Streets and Highways Code section referred to was not intended by the legislature as a method whereby communication of the acceptance by the city should be given to the bidder, but on the contrary that it is limited in its effect to the notification which is required to be given to the property owners interested who for ten days after the giving of such notice are by the statute given the right of taking over the work themselves by entering into a written contract to do so at the price at which the award had been made to the bidder. The language of the statute bears this out. The section does not say that the notice by the clerk is a notice to the bidder of the city's acceptance of his offer, but on the contrary is a notice of the award itself. The award is treated as having been made and so far as the bidder be concerned any of the usual methods of conveying that in-

formation to him could be followed. Indeed, since the resolution making the award is the public act of a public body, it is a matter of which notice may be presumed so far as interested parties are concerned. It appears in the case at bar that the president of Hess Company was present when the bids were opened and the award was made.

[19] "Appellant asks that this Court not only reverse the judgment of the trial court but go further and mandate the city council, its members, its clerk and the city's superintendent of streets to proceed to notice the award to appellant, and if within the ten days allowed the property owners themselves do not take over the work, then to go further and enter into the formal contract with appellant and permit it to proceed to perform the work. We think it would not be proper for this Court to so order. This is a special statutory proceeding whereunder a legislative body or one who has been awarded a contract by such body for the doing of public work may, without refusing to go forward, set at rest all questions concerning the legality of what has been done by bringing this action. The matter of whether or not the legislative body or any member of that body or employee of the city has refused to perform ministerial duties is not before the Court. The sole issue is the legality of what has been done. We cannot assume that if by the court these proceedings are declared to be valid and the contract declared to have been awarded to Hess Company, there will be any refusal to perform ministerial acts arising because of that situation. We, therefore, decline to go further than to decide the issues of legality of proceedings tendered by the petition filed by the city. The proceedings were valid to the point to which they had been taken when the award was made to the Hess Company and were invalid beyond that point."

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

45 Cal.2d 640

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Irma BROWN, Defendant and Respondent.
Cr. 5765.

Supreme Court of California.
In Bank.

Nov. 29, 1955.

Rehearing Denied Dec. 28, 1955.

Prosecution for possession of heroin.

Upon defendant's motion to set aside the information, the Superior Court, Los Angeles County, Thomas L. Ambrose, J., set aside information, and the people appealed. The Supreme Court, Traynor, J., held that, where officers, who did not have reasonable cause to believe that defendant had committed a felony, arrested defendant and thereafter found that container in her left hand contained heroin, defendant's guilt of felony would not justify the arrest and search.

Order affirmed.

1. Arrest ⇨63(3)

In absence of evidence of anything apparent to officers' senses before arrest and search that defendant was committing or attempting to commit a public offense, defendant's arrest could not be justified on ground that an offense was being committed or attempted in arresting officers' presence. Pen.Code, § 836.

2. Arrest ⇨63(4)

Where officers, who did not have reasonable cause to believe that defendant had committed a felony, arrested defendant and thereafter found that container in her left hand contained heroin, defendant's guilt of felony would not justify the arrest and search. West's Ann. Health & Safety Code, § 11500; Pen.Code, §§ 836, 995; West's Ann. Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

3. Arrest ⇨71

Legality of an arrest is not necessarily determinative of lawfulness of search incident thereto. Pen.Code, § 836; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

4. Arrest ⇨71

Some searches may be reasonable and, hence, lawful in absence of warrant or an arrest, and others may be unreasonable and, hence, unlawful although incident to a lawful arrest, and, therefore, question is not whether arrest of guilty felon is lawful in absence of reasonable cause for officers to believe him guilty but whether search incident to arrest is reasonable. Pen.Code, § 836; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

5. Arrest ⇨63(4)

If it is necessary to rely on the search to justify the arrest, search, which cannot be justified by what it turns up, cannot justify the arrest. Pen.Code, § 836; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

6. Arrest ⇨63(4), 71

Regardless whether arrest of guilty defendant is lawful, it is clearly unreasonable if officer does not have reasonable cause to believe the defendant guilty, and search incident thereto can be no more reasonable than the arrest itself. Pen. Code, § 836; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Lewis Watnick and Arthur L. Alarcon, Deputy Dist. Attys., Los Angeles, for appellant.

Charles H. Matthews, Los Angeles, for respondent.

A. L. Wirin and Fred Okrand, Los Angeles, as amici curiae on behalf of respondent.

TRAYNOR, Justice.

By information defendant was charged with one count of possessing heroin in violation of Health and Safety Code, § 11500, a felony. Her motion to set the information aside (see Penal Code, § 995) was granted on the ground that all of the evidence of the crime other than admissions was obtained by an illegal search of her person in violation of her constitutional rights. The People appeal.

At about 7:30 p. m. on January 28, 1955, two deputy sheriffs of Los Angeles County parked their car at the corner of 47th Place and Avalon Boulevard. They observed defendant walk in front of their car from the southwest to the northwest corner of the intersection. She had some parcels in her right arm and a coin purse in her right hand, and her left hand was clenched in a fist. The officers left their car, and after approaching defendant from behind, one officer grabbed defendant's right wrist and the other her left wrist. They identified themselves and asked to see what she had in her left hand. She refused their request and asked them not to take her to jail but to allow her to talk to her husband. They did not inform her that she was under arrest, but one of the officers took a small rubber container from her left hand, and subsequent analysis indicated that it contained heroin. The officers took defendant to their car and talked with her. She told conflicting stories about getting the rubber container, but denied knowing that it contained heroin. After further conversation the officers took her to the county jail.

The attorney general contends that the search in this case was incidental to defendant's arrest and that if the arrest was lawful, the search was reasonable within the meaning of the constitutional provisions. U.S.Const., 4th and 14th Amendments; Cal.Const., Art. I, § 19.

Section 836 of the Penal Code provides: "A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony."

[1] There was no evidence of anything apparent to the officers' senses before the arrest and search that defendant was committing or attempting to commit a public offense. The arrest, therefore, cannot be justified on the ground that an offense was being committed or attempted in their presence, *State v. Owens*, 302 Mo. 348, 259 S.W. 100, 101, 32 A.L.R. 383; *Snyder v. United States*, 4 Cir., 285 F. 1, 2; *State v. Wills*, 91 W.Va. 659, 114 S.E. 261, 264, 24 A.L.R. 1398; *Haynes v. State*, 110 Tex.Cr.R. 553, 9 S.W.2d 1043; *State v. Jokosh*, 181 Wis. 160, 193 N.W. 976, 977; see, *Taylor v. United States*, 286 U.S. 1, 5-6, 52 S.Ct. 466, 76 L.Ed. 951; *Coverstone v. Davies*, 38 Cal. 2d 315, 320-321, 239 P.2d 876; *People v. Craig*, 152 Cal. 42, 46, 91 P. 997; *Restatement, Torts*, § 119, comment m, and the attorney general makes no contention to the contrary. Nor is there any evidence, nor is it contended, that the officers had "reasonable cause" to believe that defendant had committed a felony, that a charge based "upon a reasonable cause" had been made, or that the officers had a warrant for defendant's arrest.

[2] The attorney general contends, however, that since defendant was in fact guilty of a felony, the arrest was authorized by subdivision 2 of section 836 whether or not the officers had reasonable cause so to believe. He points out that subdivision 2 does not contain the reference to reasonable cause found in subdivisions 3, 4, and 5, that the legality of an arrest is governed by state law, *Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436; *United States v. Di Re*, 332 U.S. 581, 589, 68 S.Ct. 222, 92 L.Ed. 210, and that a reasonable search without a warrant incident to a lawful arrest is not unlawful, *Harris v. United States*, 331 U.S. 145, 150-151, 67 S.Ct. 1098, 91 L.Ed. 1399; *United States v. Rabinowitz*, 339 U.S. 56, 60-64, 70 S.Ct. 430, 94 L.Ed. 653, and concludes that defendant's guilt therefore justified the arrest and search. We cannot agree with this conclusion.

[3,4] It should be noted at the outset that the legality of an arrest is not necessarily determinative of the lawfulness of a search incident thereto. Just as some searches may be reasonable and hence lawful in the absence of a warrant or an arrest, *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543, others may be unreasonable and hence unlawful although incident to a lawful arrest. *United States v. Lefkowitz*, 285 U.S. 452, 463-467, 52 S.Ct. 420, 76 L.Ed. 877; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356-358, 51 S.Ct. 153, 75 L.Ed. 374; see, *Harris v. United States*, supra, 331 U.S. 145, 153, 67 S.Ct. 1098, 91 L.Ed. 1399. Accordingly, the question presented is not whether the arrest of a guilty felon is lawful in the absence of reasonable cause for the officer to believe him guilty, but whether the search incident to the arrest is reasonable, and it is therefore unnecessary to determine whether a requirement of reasonable cause applies by implication to subdivision 2 of section 836.¹

[5,6] The United States Supreme Court has consistently held that a search, whether incident to an arrest or not, can not be justified by what it turns up. *Johnson v. United States*, supra, 333 U.S. 10, 16-17, 68 S.Ct. 367; *United States v. Di Re*, supra, 332 U.S. 581, 595, 68 S.Ct. 222; *Lustig v. United States*, 338 U.S. 74, 80, 69 S.Ct. 1372, 93 L.Ed. 1819; *Byars v. United States*, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520; see also, *Hernandez v. United States*, 9 Cir., 17 F.2d 373; *Snyder v. United States*, supra, 285 F. 1, 3; *Poldo v. United States*, 9 Cir., 55 F.2d 866, 869; *Allen v. State*, 183 Wis. 323, 333-334, 197 N.W. 808, 39 A.L.R. 782; *State v. Pluth*, 157 Minn. 145, 195 N.W. 789, 792; *Keith v. State*, 30 Okl.Cr. 168, 235 P. 631, 633; *People v. Stein*, 265 Mich. 610, 251 N.W. 788, 790, 92 A.L.R. 481; *Smith v. State*, 169 Tenn. 633, 90 S.W.2d 523, 524; *Morgan v. State*, 197 Ind. 374, 151 N.E. 98, 100; *People v. Henneman*, 373 Ill. 603, 27 N.E.2d 448, 449; *State v. Miles*, 29 Wash. 2d 921, 190 P.2d 740, 745; *State v. George*,

32 Wyo. 223, 231 P. 683, 689; *State ex rel. Thibodeau v. District Court*, 70 Mont. 202, 224 P. 866, 870; *Aitken v. White*, 93 Cal. App.2d 134, 145, 208 P.2d 788, *semble*; *Cook v. Singer Sewing Machine Co.*, 138 Cal.App. 418, 422, 32 P.2d 430, *semble*; *contra*: *State v. Williams*, Mo., 14 S.W.2d 434, 435-436. If, therefore, it is necessary to rely on the search to justify the arrest, the conclusion is inescapable that a search that cannot be justified by what it turns up cannot justify the arrest. Moreover, whether or not the arrest of a guilty defendant is lawful, it is clearly unreasonable if the officer has no "reasonable cause" to believe the defendant guilty, and a search incident thereto can be no more reasonable than the arrest itself.

To accept the attorney general's contention would defeat the purpose of the constitutional provisions prohibiting unreasonable searches and seizures and destroy the efficacy of the exclusionary rule in many felony prosecutions. Officers would be free to arrest and search anyone, however innocent, in the hope that the search would justify the arrest. "[T]he constitutional provisions make no distinction between the guilty and the innocent, and it would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed their victims were criminals. Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with the constitutional right of all of the people to be secure in their homes, persons, and effects." *People v. Cahan*, 44 Cal.2d 434, 439, 282 P.2d 905, 907. In the light of these considerations we adopted the exclusionary rule "because other remedies have completely failed to secure compliance with the constitutional provisions on the

1. This question would be presented directly if a guilty felon sued an officer for false arrest on the ground that the officer had no reasonable cause to believe him guilty (see, *Restatement, Torts*,

§ 119, comment g), or sought to justify resisting arrest on the same ground. See, *State v. Nolan*, 354 Mo. 980, 192 S.W.2d 1016, 1019-1022.

part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." 44 Cal.2d 445, 282 P.2d 911. We were fully aware that in its immediate operation the exclusionary rule would permit guilty persons to escape punishment, but were convinced that it was necessary to secure respect by law enforcement agencies of constitutional guarantees. It would fail of its purpose, if in the only area of its effective operation it could be defeated because the arresting officer guessed correctly in making an arrest.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., and McCOMB, J. pro tem., concur.

Rehearing denied, McCOMB, J., participating in place of EDMONDS, J.

SHENK and SPENCE, JJ., dissenting.



45 Cal.2d 645

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Charles A. SIMON, Defendant and
Respondent.

Cr. 5768.

Supreme Court of California,
In Bank.

Nov. 29, 1955.

Rehearing Denied Dec. 28, 1955.

Prosecution for possession of narcotic. The Superior Court, San Diego County, John A. Hewicker, J., set aside information, and the people appealed. The Supreme Court, Traynor, J., held that, where arresting officer, who merely felt that defendant and another did not have any lawful business in warehouse district at 10:40 p. m., and who saw that the other, who was under 21, had a liquor bottle in his possession, searched defendant first and asked questions only after his search uncovered marijuana cigarette in his possession, and there was nothing to indicate that, had officer confined himself to a reasonable in-

quiry, he would have discovered anything to confirm his suspicion that defendant did not have lawful right to be where he was, defendant was entitled to have information set aside on ground that all evidence against him, other than admissions, had been obtained by illegal search of his person.

Order affirmed.

1. Arrest ⇨71

Search incident to an arrest cannot be justified, in absence of reasonable cause, merely because it revealed defendant was in fact guilty of a felony, and search of defendant's person may be justified only if he was committing or attempting to commit an offense in the arresting officer's presence or if officer had reasonable cause to believe that he had committed a felony, but it is not significant whether the search precedes or follows the arrest. Pen.Code, § 836.

2. Arrest ⇨71

If arresting officer is entitled to make an arrest on basis of information available to him before he searches, and, as an incident to such arrest, is entitled to make a reasonable search of person arrested and place where he is arrested, there is nothing unreasonable in his conduct if he makes a search before instead of after the arrest, and a search is not unlawful merely because it precedes rather than follows the arrest. Pen.Code, § 836.

3. Arrest ⇨63(4)

Mere fact that defendant was walking on street with 20 year old friend, who had bottle of liquor, did not constitute reasonable cause to believe that defendant was committing or attempting to commit an offense in arresting officer's presence either by aiding or abetting his friend in committing a crime or contributing to the delinquency of a minor. West's Ann.Bus. & Prof.Code, § 25662; Welfare and Institutions Code, § 702; Pen.Code, § 836.

4. Arrest ⇨63(4)

Mere fact that defendant and another had walked a few blocks in warehouse district at night and then had retraced their

steps would not constitute reasonable cause to believe that either had committed a felony, even if the arresting officer had entertained such a belief. Pen.Code, § 836.

5. Arrest ☞63(4)

There is nothing unreasonable in an officer's questioning of persons outdoors at night, and it is possible that, in some circumstances, even a refusal to answer would, in light of other evidence, justify an arrest. Pen.Code, § 836

6. Arrest ☞71

Indictment and Information ☞137(1)

Where arresting officer, who merely felt that defendant and another did not have any lawful business in warehouse district at 10:40 p. m., and who saw that the other, who was under 21, had a liquor bottle in his possession, searched defendant first and asked questions only after his search, uncovered marijuana cigarette in his possession, and there was nothing to indicate that, had officer confined himself to a reasonable inquiry, he would have discovered anything to confirm his suspicion that defendant did not have lawful right to be where he was, defendant was entitled to have information set aside on ground that all evidence against him, other than admissions, had been obtained by illegal search of his person. West's Ann.Health & Safety Code, § 11500; Pen.Code, §§ 836, 995; West's Ann.Bus. & Prof.Code, § 25662; Welfare and Institutions Code, § 702.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for appellant.

Oscar F. Irwin, San Diego, for respondent.

A. L. Wirin and Fred Okrand, Los Angeles, as amici curiae on behalf of respondent

TRAYNOR, Justice.

By information defendant was charged with one count of possessing a narcotic in violation of Health and Safety Code, § 11500, a felony. His motion to set the information aside (see Penal Code, § 995)

was granted on the ground that all of the evidence against him, other than admissions, was obtained by an illegal search of his person in violation of his constitutional rights. The People appeal.

At about 10:40 p. m. defendant, age 21, and a friend, age 20, were observed walking on the sidewalk in a warehouse district by a San Diego police patrolman who was walking his beat. The officer testified that "Well, I observed [defendant] walking south on Seventh Avenue, from Island, he went south to J Street, turned left on J, proceeded east on J Street to the corner of Ninth and J, where he turned around and followed the same course back to Seventh and Island." The officer then stopped defendant and his friend and searched them both, and in one of defendant's pockets he found a marijuana cigarette. Defendant told him that he had bought it in Tijuana, but he did not acknowledge knowing what it was. Defendant's friend had a bottle of liquor, and the officer arrested them both. After he was taken to the police station, dust and lint were collected from defendant's pockets and analysed, and particles of marijuana were found.

With respect to his reasons for the searches and arrests the officer testified as follows: "I suspected [defendant] of committing a crime. What crime? Possession of alcoholic beverages. Did you see him with an alcoholic beverage? His partner had a bottle. Oh, his partner had one, did he? I wanted to find out so I searched him. Did he have an alcoholic beverage on him? I didn't find any. Why did you assume that he had an alcoholic beverage on him, why would you suspect that was a crime? Because of his age. Did you ask him how old he was? Yes, I did. Before or after you made the search of him? I searched his partner first and he was twenty years old— The partner was twenty years old? Yes, sir * * *. After you searched his partner then you searched this defendant? Yes, sir. * * * Did you ask him his name and age, before you searched him? I never asked him, they had I.D. cards. Did you look at the I.D. cards? Yes, sir. How old did it show he was? Twenty-one, I believe. Twenty-

"one? Yes, sir. * * * I assumed him to be under twenty. * * * Didn't you say his I.D. card shows him to be twenty-one? I searched him before I looked at his I.D. card. Oh, you did, and you didn't try to ascertain his age before you conducted the search, did you? No sir, he looked younger than his partner. And the search was made solely because of the fact that you thought he was [a] minor in possession of alcoholic beverage? * * * Not solely for that purpose. What other reason? Well, the area that the boys were found in, it is not a residential area and I didn't feel that they had any lawful business down there. It was a warehouse district and it was late at night."

The attorney general contends that the search in this case was incidental to a lawful arrest and was therefore reasonable. Defendant, on the other hand, contends that the search preceded the arrest and was not incidental thereto and that in any event the arrest was unlawful.

[1,2] In *People v. Brown*, Cal., 290 P. 2d 528, we held that a search incident to an arrest could not be justified in the absence of "reasonable cause" under Penal Code, § 836 merely because it revealed that defendant was in fact guilty of a felony. Accordingly, the search of defendant's person may be justified only if he was committing or attempting to commit an offense in the officer's presence, Penal Code, § 836, subd. 1, or the officer had reasonable cause to believe he had committed a felony. Penal Code, § 836, subd. 5. In such circumstances, however, it has been held that it is not significant whether the search precedes or follows the arrest. *State v. Mc-*

Daniel, 115 Or. 187, 231 P. 965, 237 P. 373, 376; *State v. Reynolds*, 101 Conn. 224, 125 A. 636, 637-638; *Ingle v. Commonwealth*, 204 Ky. 518, 264 S.W. 1088, 1090; *Knight v. State*, 171 Ark. 882, 286 S.W. 1013, 1014-1015; see also *Clark v. State*, 78 Okl.Cr. 423, 149 P.2d 994, 997; *State v. Rotolo*, 39 Wyo. 181, 270 P. 665, 666-667. Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it. In either case the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest. See, *United States v. Rabinowitz*, 339 U.S. 56, 60-64, 70 S.Ct. 430, 94 L.Ed. 653. We conclude, therefore, that a search is not unlawful merely because it precedes rather than follows the arrest.¹

1. In most of the cases cited for a contrary rule, *United States v. Swan*, D.C., 15 F.2d 598, 599; *Raniele v. United States*, 8 Cir., 34 F.2d 877, 880; *Papani v. United States*, 9 Cir., 84 F.2d 160, 164; *United States v. McCunn*, D.C., 40 F. 2d 295, 296; *United States v. Setaro*, D.C., 37 F.2d 134, 136-137; *United States v. Sully*, D.C., 56 F.Supp. 942, 943-944; *United States v. Waller*, D.C., 108 F.Supp. 450, 452-453, there were either other reasons for holding the search unreasonable or the statement of the rule was dictum. Thus, in *United States v. Waller*, supra, although the

court stated that a search that preceded an arrest could not be justified as incident thereto, it held that defendant had consented to the search. In *Raniele v. United States*, supra, the court was of the opinion that before the search the officers had insufficient grounds for believing an offense was being committed in their presence (see also, *United States v. Setaro*, supra), and in *United States v. Swan*, supra, and *United States v. McCunn*, supra, defendant was not present or discovered by the officers until after the search was completed.

[3] In the present case, however, there was no evidence of anything apparent to the officer's senses before the arrest and search that defendant was committing or attempting to commit an offense in his presence, see, *People v. Brown*, Cal., 290 P.2d 528, and it does not appear that the officer had reasonable cause to believe he had committed a felony. It is true that defendant's friend had a bottle, and it may be assumed without deciding that the appearance of the bottle and of defendant's friend were sufficient to justify the officer's concluding that the friend was committing a misdemeanor in his presence. Bus. and Prof.Code, § 25662 (possession of alcoholic beverage by a minor on a public street); see *Coverstone v. Davies*, 38 Cal.2d 315, 319-321, 239 P.2d 876. The mere fact, however, that defendant was walking on the street with a 20 year old friend who had a bottle did not constitute reasonable cause to believe that defendant was committing or attempting to commit an offense in the officer's presence by either aiding or abetting his friend in committing a crime or contributing to the delinquency of a minor. Welfare and Institutions Code, § 702; *United States v. Di Re*, 332 U.S. 581, 592-594, 68 S.Ct. 222, 92 L.Ed. 210; see also *Hernandez v. United States*, 9 Cir., 17 F.2d 373; *Pearson v. United States*, 10 Cir., 150 F.2d 219, 221; *Morgan v. State*, 197 Ind. 374, 151 N.E. 98, 100.

[4,5] Similarly, there is no merit in the attorney general's contention that the officer had reasonable cause to believe that defendant had committed a felony. The officer's own testimony does not indicate that he believed defendant guilty of a felony; he merely felt that the boys did not have any lawful business in a warehouse district at 10:40 p. m. Moreover, the mere fact that two persons walked a few blocks in a warehouse district at night and then retraced their steps would not constitute reasonable cause to believe either had committed a felony, even if the officer had entertained such a belief. *State v. Miles*, 29 Wash.2d 921, 190 P.2d 740, 747; *People v. Henneman*, 273 Ill. 603, 27 N.E.2d 448, 449; *People v. Stein*, 265 Mich. 610, 251 N.W. 788, 790; see also,

Hernandez v. United States, supra, 17 F.2d 373; *Pearson v. United States*, supra, 150 F.2d 219, 221; *Morgan v. State*, supra, 197 Ind. 374, 151 N.E. 98, 100. This is not a case in which the officer knew or reasonably believed that a felony had recently been committed in the neighborhood, see, *Gisske v. Sanders*, 9 Cal.App. 13, 15, 98 P. 43, or in which a response to a reasonable inquiry elicited evidence that defendant may have been guilty of a crime. See, *Hughes v. Oreb*, 36 Cal.2d 854, 858, 228 P.2d 550. There is, of course, nothing unreasonable in an officer's questioning persons outdoors at night, *Gisske v. Sanders*, supra, 9 Cal.App. 13, 16-17, 98 P. 43; *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56, 60; *People v. Henneman*, 367 Ill. 151, 10 N.E. 2d 649, 650; *United States v. Jankowski*, 2 Cir., 28 F.2d 800, 802; see also *Morgan v. United States*, 10 Cir., 159 F.2d 85, 86-87; *Kaiser v. United States*, 8 Cir., 60 F.2d 410, 412-413; *Strogan v. United States*, 3 Cir., 60 F.2d 483; *Brinegar v. United States*, 338 U.S. 160, 178, 69 S.Ct. 1302, 93 L.Ed. 1879, *Burton, J.*, concurring, and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest. See, *Gisske v. Sanders*, supra, 9 Cal.App. 13, 17, 98 P. 43. Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from an attack with a hidden weapon, certainly a search so intensive as that made here could not be so justified. In the present case the officer searched first and asked questions only after his search uncovered the incriminating cigarette, and there is nothing to indicate that had he confined himself to a reasonable inquiry, he would have discovered anything to confirm his suspicion that defendant had no lawful right to be where he was.

[6] Under these circumstances, to permit an officer to justify a search on the ground that he "didn't feel" that a person on the street at night had any lawful business there would expose anyone to having his person searched by any suspicious officer no matter how unfounded the sus-

pitions were. Innocent people, going to or from evening jobs or entertainment, or walking for exercise or enjoyment, would suffer along with the occasional criminal who would be turned up. As pointed out by Mr. Justice Jackson in a similar case, "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them." United States v. Di Re, *supra*, 332 U.S. 581, 595, 68 S.Ct. 222, 229.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., and McCOMB, J. pro tem., concur.

Rehearing denied, McCOMB, J., participating in place of EDMONDS, J.

SHENK and SPENCE, JJ., dissenting.



45 Cal.2d 652

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Maxine Ann BOYLES, Defendant and
Respondent.

Cr. 5766.

Supreme Court of California.
In Bank.

Nov. 29, 1953.

Prosecution for possession of heroin. The Superior Court, Los Angeles County, David Coleman, J., set aside information on ground that all evidence of the crime, other than admissions, had been obtained by an illegal search of defendant's person, and the people appealed. The Supreme Court, Traynor, J., held that, where, de-

fendant successfully prevented prosecution from presenting evidence as to reasonable cause which would have justified defendant's arrest, she would not be heard to contend that evidence before committing magistrate was necessarily illegally obtained and, therefore, insufficient to support the information.

Order reversed.

1. Criminal Law $\hookrightarrow$ 394

Where arresting officers had cooperation of hotel manager and could have apprehended defendant just as well from another nearby vantage point without committing any trespass, their ability to arrest and search defendant was not dependent upon their presence in hotel room, and, therefore, trespass, if any, was entirely unrelated and collateral to securing of evidence to which defendant objects and could not render inadmissible evidence which was obtained when arresting officers seized defendant as she entered hotel room. West's Ann. Health & Safety Code, § 11500; Pen.Code, § 836.

2. Arrest $\hookrightarrow$ 71

Where there is no evidence that defendant was committing or attempting to commit a public offense in presence of arresting officer, search of defendant may be justified only if it was incidental to a lawful arrest under Penal Code provision authorizing arrest without warrant when felony has in fact been committed and arresting officer has reasonable cause for believing the person arrested to have committed it. Pen.Code, § 836, subd. 3.

3. Arrest $\hookrightarrow$ 71

If arrest made under Penal Code provision authorizing arrest without warrant when felony has in fact been committed and arresting officer has reasonable cause for believing the person arrested to have committed it, search incident to such arrest would not be unlawful merely because it preceded, rather than followed the arrest. Pen.Code, § 836, subd. 3.

4. Arrest $\hookrightarrow$ 63(4), 71

Where arresting officer's belief of defendant's guilt is based upon reasonable

cause, and a felony has in fact been committed, not only are requirements of Penal Code provision authorizing arrest without warrant when felony has in fact been committed and when arresting officer has reasonable cause for believing the person arrested had committed it satisfied, but a search incident to an arrest thereunder is reasonable. Pen.Code, § 836, subd. 3.

5. Arrest ☞63(4)

Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence which would be admissible at trial on issue of guilt.

6. Criminal Law ☞1137(7)

Where, in prosecution for possession of heroin, defendant successfully prevented prosecution from presenting evidence as to reasonable cause which would have justified defendant's arrest, she would not be heard to contend that evidence before committing magistrate was necessarily illegally obtained and, therefore, insufficient to support the information. West's Ann. Health & Safety Code, § 11500; Pen.Code, §§ 836, subds. 1, 3, 995.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

Alan Ross, Los Angeles, for respondent.

A. L. Wirin and Fred Okrand, Los Angeles, as amici curiae on behalf of respondent.

TRAYNOR, Justice.

By information defendant was charged with one count of possessing heroin in violation of Health and Safety Code, § 11500, a felony. Her motion to set the information aside (see Penal Code, § 995) was granted on the ground that all of the evidence of the crime other than admissions was obtained by an illegal search of her person in violation of her constitutional rights. The People appeal.

At about 10:00 a. m. on May 2, 1955 three officers of the Los Angeles police de-

partment obtained the key to a hotel room from the manager of the hotel and entered the room and waited. About 11:00 a. m. defendant knocked on the door or made some signal. The officers opened the door and one of them grabbed defendant's hands and found two bindles of heroin in her right hand. One of the officers testified that he asked defendant "if she had any more stuff. She said no. That is all there was. I asked her how much was there and she said a gram and a half. I asked her where she got it and she said she scored it from a friend down on Second Street. I asked her what it cost her. She said \$30." He also testified that he believed a felony was being committed at the time of the arrest. The prosecuting attorney then asked what reason he had for his belief, and defendant objected on the ground that the answer would be hearsay and a conclusion of the witness. The prosecuting attorney stated that he had a right to show that the arrest was legal and that the search was incident to the arrest, but the court indicated that since the officer had made a positive statement as to his belief, any question as to its validity should come from cross-examination. On cross-examination the officer was asked, "You personally did not witness any activity of this defendant with regard to narcotics before the date of this arrest, did you?" He answered, "I did not." No further questions with respect to the basis of his belief were asked. It does not appear from the record who was the regular occupant of the hotel room where the officers waited. They did not have a search warrant or a warrant for defendant's arrest.

[1] It should be noted at the outset that whether or not the officers were trespassers in the room where they waited for defendant is immaterial in this case. It does not appear that the room was searched, and even if it was, nothing that may have been found in the room was offered or introduced in evidence. It is apparent that the officers were waiting and watching for someone to enter the room. Since they had the cooperation of the manager of the hotel, however, any such person could have been apprehended just as well from some

other vantage point nearby without committing any trespass, and thus their ability to arrest and search defendant was not dependent on their presence in the room. Under these circumstances, the trespass, if any, was entirely unrelated and collateral to the securing of the evidence to which defendant objects, and it could not therefore render that evidence inadmissible. *Goldman v. United States*, 316 U.S. 129, 134-135, 62 S.Ct. 993, 86 L.Ed. 1322; see also, *United States v. Mitchell*, 322 U.S. 65, 70-71, 64 S.Ct. 896, 88 L.Ed. 1140; *McQuire v. United States*, 273 U.S. 95, 99-100, 47 S.Ct. 259, 71 L.Ed. 556; *United States v. Lee*, 274 U.S. 559, 563, 47 S.Ct. 746, 71 L.Ed. 1202.

The Attorney General contends that the search in this case was incidental to a lawful arrest and was therefore reasonable. Defendant, on the other hand, contends that the search preceded the arrest and was not incidental thereto and that in any event the arrest was unlawful.

[2,3] In *People v. Brown*, Cal., 290 P.2d 528, we held that a search incident to an arrest could not be justified in the absence of "reasonable cause" under Penal Code, § 836 merely because it revealed that defendant was in fact guilty of a felony. We also held in that case that an arrest could not be justified under subdivision 1 of section 836 when there was no evidence of anything apparent to the officer's senses before the arrest and search that defendant was committing or attempting to commit a public offense in his presence. Accordingly, since there was no such evidence in this case, the search may be justified only if it was incidental to a lawful arrest under subdivision 3 of section 836. If, however, an arrest under that subdivision was lawful, the search incident thereto would not be unlawful merely because it preceded rather than followed the arrest. *People v. Simon*, Cal., 290 P.2d 531.

Section 836, subd. 3, provides that an officer may make an arrest without a warrant "When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it."

[4] Defendant contends that to justify a search incident to an arrest under this

subdivision there must be evidence, other than any turned up in the search, that a felony has in fact been committed. Such evidence is present in any case in which the officer has reasonable cause to believe defendant guilty of a felony. When his belief of defendant's guilt is based on reasonable cause and a felony has in fact been committed, not only are the requirements of subdivision 3 satisfied, but a search incident to an arrest thereunder is reasonable. See, *United States v. Di Re*, 332 U.S. 581, 591, 68 S.Ct. 222, 92 L.Ed. 210; *Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436; *In re Dixon*, 41 Cal.2d 756, 761-762, 264 P.2d 513; cf., *People v. Brown*, Cal., 290 P.2d 528.

[5,6] In the present case one of the arresting officers testified that he believed a felony was being committed at the time of the arrest. Since the court and not the officer must make the determination whether the officer's belief is based upon reasonable cause, the officer must testify to the facts or information known to him on which his belief is based. *United States v. Bianco*, 3 Cir., 189 F.2d 716, 719; *United States v. Heitner*, 2 Cir., 149 F.2d 105, 106-107; see also, *Grau v. United States*, 287 U.S. 124, 127, 53 S.Ct. 38, 77 L.Ed. 212; *Byars v. United States*, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520; *People v. Tarantino*, Cal., 290 P.2d 505; *Michel v. Smith*, 188 Cal. 199, 206, 205 P. 113. Under the peculiar circumstances of this case, however, defendant is not in a position to challenge the failure of the record to establish the basis for the officer's belief. When the prosecuting attorney sought to establish that basis, defendant objected and the committing magistrate ruled that the matter should be gone into on cross-examination. At that time defendant limited the examination to a determination that the officer had not personally witnessed any activity of defendant with regard to narcotics. It is settled, however, that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. *Brinegar v. United States*, 338 U.S. 160, 171-176, 69 S.Ct. 1302, 93 L.Ed. 1879; *United States*

v. Li Fat Tong, 2 Cir., 152 F.2d 650, 652; Aitken v. White, 93 Cal.App.2d 134, 145, 208 P.2d 788; Cook v. Singer Sewing Machine Co., 138 Cal.App. 418, 422-423, 32 P.2d 430. Thus in the present case it is entirely possible that the officer's belief that defendant had narcotics in her possession was fully justified by reliable information obtained by him from others in carrying out his duties. Since defendant successfully prevented the prosecution from presenting such evidence, if any, she cannot now contend that the evidence before the committing magistrate was necessarily illegally obtained and therefore insufficient to support the information.

The order is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., and McCOMB, J. pro tem., concur.



45 Cal.2d 613

**PEOPLE of the State of California, Plaintiff
and Appellant,**

v.

**ONE 1948 CHEVROLET CONVERTIBLE
COUPE, License No. 1 P 46718, Engine
No. FAA 433685, Defendant,**

**Bank of America National Trust and Sav-
ings Association, a national banking asso-
ciation, Legal Owner and Respondent.**

L. A. 23728.

Supreme Court of California.

In Bank.

Nov. 29, 1955.

As Modified on Denial of Rehearing

Dec. 28, 1955.

Proceeding by the People to forfeit an automobile as used in violation of narcotics laws. From a judgment of the Superior Court, Los Angeles County, James G. Whyte, J., forfeiting the automobile to the

State, subject to the interest of defendant bank, and ordering release of automobile to bank in satisfaction of its lien thereon for sum exceeding value thereof, the People appealed. The Supreme Court, Traynor, J., held that plea of guilty of unlawful possession of marijuana in automobile by its registered owner's son in possession of automobile and his statement to police inspector that he knew that another occupant of automobile had marijuana in his possession were admissible in evidence to forfeit both registered owner's and bank's interests in automobile.

Judgment reversed.

Opinion, 280 P.2d 193, vacated.

1. Forfeitures ☞5

In proceeding to forfeit automobile as used in violation of narcotics laws, police officer's testimony that one of occupants of automobile dropped a can containing marijuana into bushes beside street as they were leaving automobile following arresting officers' orders was competent evidence proving, independently of any extrajudicial statements, that a narcotic drug had been in automobile. West's Ann.Health & Safety Code, § 11610.

2. Forfeitures ☞3, 5

A bank's lien on automobile was subject to forfeiture for use thereof in violation of narcotics laws by son of purchaser thereof only if purchaser's interest was properly forfeited, though bank did not make reasonable investigation, required by statute, of purchaser's moral responsibility, character and reputation, before creation of lien, and bank could protect its interest by asserting any defense of purchaser to forfeiture, though she defaulted in forfeiture proceeding. West's Ann.Health & Safety Code, §§ 11610, 11620.

3. Forfeitures ☞5

Judicial inquiry as to collusion between person making unlawful use of another's property and alleged innocent owner surrendering control over property to such person is unnecessary to authorize forfeiture of property.

4. Forfeitures ☞5

A registered automobile owner, entrusting vehicle to her son, accepted risk of his use thereof in violation of narcotics laws. West's Ann.Health & Safety Code, § 11610.

5. Forfeitures ☞5

When a narcotic is found on occupant of automobile, there is no presumption or inference that registered owner of automobile or person entrusted therewith by such owner knew of narcotic's presence, and People, in proceeding to forfeit automobile as used in violation of narcotics laws, must establish such knowledge by other evidence. West's Ann.Health & Safety Code, §§ 11610, 11619, 11620.

6. Evidence ☞207(4), 239

In proceeding to forfeit automobile as used in violation of narcotics laws by registered owner's son and others, son's plea of guilty of unlawful possession of marijuana in automobile and his statement to police inspector that he knew before and at time of his arrest and seizure of automobile that another occupant thereof had marijuana in his possession, were admissible in evidence to forfeit interests of both such owner and bank having lien on automobile, in absence of proof of statutory defense. West's Ann.Health & Safety Code, §§ 11610, 11620.

7. Forfeitures ☞5

A proceeding by State to forfeit automobile as used in violation of narcotics laws is in rem, though claimants of automobile are entitled to jury trial. West's Ann.Health & Safety Code, § 11610.

8. Evidence ☞239

Declarations, as well as acts, of person in control of automobile at time of its seizure as used in violation of narcotics laws, bind automobile and all claimants thereof in proceedings to forfeit it. West's Ann. Health & Safety Code, § 11610.

9. Evidence ☞239

A registered automobile owner's son, to whom she entrusted automobile, had authority to speak for it while he had right to its possession and responsibility for its use, and his admissions to police officers were as binding as such owner's would have been in proceeding to forfeit automobile as used by son in violation of narcotics laws. West's Ann.Health & Safety Code, § 11610.

10. Evidence ☞239

In proceeding to forfeit automobile as used in violation of narcotics laws, statement to police inspector by registered automobile owner's son, who was in possession of automobile at time of its seizure, that he knew before and at such time that another occupant of vehicle had marijuana in his possession, was admissible in evidence to prove son's knowledge of presence of narcotic in automobile. West's Ann.Health & Safety Code, § 11610.

11. Evidence ☞268

Ordinarily, a declaration of state of mind is admissible only to prove declarant's state of mind at time of declaration.

Edmund G. Brown, Atty. Gen., Donald D. Stoker and W. B. Thayer, Deputy Atty. Gen., for appellant.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer and Joseph S. Potts, Los Angeles, for respondent.

TRAYNOR, Justice.

In this proceeding the People seek the forfeiture of an automobile for being used in violation of section 11610 of the Health and Safety Code. The notice of seizure and intended forfeiture, Health & Safety Code, § 11612 et seq. was directed to Mrs. V. E. Phillips, the registered owner, Ronald Leon Phillips, her son, and the Bank of America, the legal owner. Mrs. Phillips

defaulted. The bank answered, denying that the vehicle was used in violation of the narcotics laws and that any narcotic was unlawfully in the possession of any occupant thereof.

[1] The cause was tried by the court sitting without a jury. See, *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 300, 231 P.2d 832. Officer Brogan of the Long Beach Police Department testified that on August 3, 1953, he and officer O'Rourke saw the vehicle parked at the curb of a city street near school grounds where no cars are ordinarily parked. They decided to investigate and found four occupants in the vehicle. Clothier was in the front seat behind the wheel, see, *People v. One 1951 Ford Sedan*, 122 Cal.App.2d 680, 691-692, 265 P.2d 176. Dean and DeCordova were also in the front seat, and Phillips was in the rear seat. As they were getting from the vehicle to the sidewalk following orders of the officers, Clothier dropped a can containing marijuana into the bushes. The four suspects were arrested, and the vehicle was seized. Thus, by competent evidence, independently of any extrajudicial statements, the People proved that a nar-

cotic had in fact been in the vehicle. *People v. One 1941 Buick Club Coupe*, 72 Cal. App.2d 593, 596, 165 P.2d 44; *People v. One 1940 Buick 8 Sedan*, 70 Cal.App.2d 542, 545-546, 161 P.2d 264.

Phillips' plea of guilty in a criminal action for unlawful possession of the marijuana was admitted in evidence against the registered owner but was excluded as against the bank. See, *Vaughn v. Jonas*, 31 Cal.2d 586, 593-596, 191 P.2d 432; *People v. One 1940 Oldsmobile Club Coupe*, 80 Cal.App.2d 372, 377-378, 181 P.2d 950; *Langensand v. Obert*, 129 Cal.App. 214, 218, 18 P.2d 725; *People v. Sanderson*, 129 Cal.App. 531, 533, 18 P.2d 982. Inspector Doyle, the officer in charge of the Narcotics Division of the Long Beach Police Department testified that at "2:15 in the morning of the day of the arrest" he questioned the suspects and that "at a later time after the arrest", in the presence of Clothier and the other occupants of the vehicle, he had a conversation with Phillips in which Phillips stated in effect that he knew before and at the time of the arrest and seizure that an occupant of the vehicle had marijuana in his possession.¹

1. The testimony of the police officer as to the conversation with Phillips was: "I questioned Phillips as to the—in fact, I questioned him generally as to who was the registered owner of the car. Phillips admitted he was.

"I asked him to relate what had occurred in regard to purchasing this marijuana. Phillips stated that he had met Clothier, who was down here on leave from a naval vessel which was moored at San Francisco,—which was moored in San Francisco Bay, and they had picked up the other party Dean, and DeCordova also was from another vessel in the same area, came down here to Long Beach with Clothier and he had agreed to drive them back to San Francisco in time to be on their vessel by 8:00 o'clock Monday morning, and that on the afternoon before the arrest they decided they would purchase some marijuana, they would take it to San Francisco and sell it, and that the four of them had pooled their funds and that he then drove the other three occupants in this car to Tijuana, and there on the street, he and Clothier contacted a Mexican and Clothier left with

this Mexican, at which time he returned and had this marijuana.

"It was shown to them there and then Phillips was worried about the Customs officials finding it in his car. Clothier and DeCordova had their sailor uniforms in a parcel or package within the car; that they had decided to change into their clothes later on in the trip. They decided that the two boys would change into their sailor clothes, and take the marijuana and walk across the border ahead of the car. There would be less suspicion.

"They both agreed to it, and Clothier took the narcotics and he and DeCordova walked across the border.

"After waiting for sometime across the border, Dean came up to them on the United States side and told them not to get restless, that Phillips had sent him ahead to tell them he was in the line. After Phillips crossed the line, he picked up the suspects and proceeded north back to Long Beach.

"At a place outside of San Diego they stopped at a service station and Clothier got out of the car and went to the rest room at which time he came back and

This statement was also admitted against the registered owner but excluded as against the bank.

The court found that Phillips had no interest in the vehicle, that at the time of the arrest and seizure Phillips was in possession of the vehicle, that it was being used to transport marijuana on the person of Clothier, an occupant thereof, that, as against the registered owner only, on the basis of the admissions, Phillips was aware of the presence of marijuana on the person of an occupant of the vehicle at the time of seizure. The court also found that the bank had not made a reasonable investigation of the moral responsibility, character, and reputation of the purchaser before its lien was created, Health & Safety Code, § 11620, that as against the bank, the admission of Phillips that he knew Clothier had marijuana at the time of the seizure was inadmissible hearsay, and that there being no other sufficient evidence of that fact, Phillips had no knowledge of the presence of any narcotic in the vehicle. Accordingly, judgment was entered forfeiting the vehicle to the state subject to the interest of the bank in the sum of \$855.02. Since that sum was in excess of the value of the vehicle at the time of the seizure, it was ordered that the vehicle be released to the bank in satisfaction of its lien. The People appeal.

[2] Even though the bank did not make the investigation required by section 11620, its interest is not subject to forfeiture in the absence of a proper forfeiture of Mrs. Phillips' interest, *People v. One 1937 Plymouth 6 4-Door Sedan*, 37 Cal.App.2d 65, 72-74, 98 P.2d 750, and despite the fact

that she defaulted, the bank may protect its own interest by asserting any defense she had to the forfeiture. *People v. One 1939 La Salle 8 Touring Sedan*, 45 Cal.App.2d 709, 713, 115 P.2d 39. The basic question on this appeal, therefore, is whether there was a proper forfeiture of Mrs. Phillips' interest in the vehicle.

[3-6] It was not necessary that Mrs. Phillips know of the illegal use. "* * * certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner." *Van Oster v. State of Kansas*, 272 U.S. 465, 467, 47 S.Ct. 133, 134, 71 L.Ed. 354. The purpose of the statutes is to curb the narcotic traffic, and "The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced". *People v. One 1941 Ford 8 Stake Truck*, 26 Cal.2d 503, 508, 159 P.2d 641, 643. By entrusting the vehicle to her son, Mrs. Phillips accepted the risk that it would be used contrary to law. *People v. One 1940 Ford V-8 Coupe*, 36 Cal.2d 471, 476, 224 P.2d 677; *People v. One 1933 Plymouth Auto*, 13 Cal.2d 565, 568, 90 P.2d 799; *People v. One 1951 Ford Sedan*, 122 Cal.App.2d 680, 687, 265 P.2d 176; *Dobbins' Distillery v. United States*, 96 U.S. 395, 398, 402, 24 L.Ed. 637; *Van Oster v. State of Kansas*, supra, 272 U.S. 465, 467, 47 S.Ct. 133, 71 L.Ed. 354; *Goldsmith Jr., Grant Co. v. United States*, 254 U.S. 505, 512-513, 41 S.Ct. 189, 65 L.Ed.

Phillips was driving, and after they left this rest room and got about two miles, Clothier broke out a marijuana cigarette which he told them he had rolled in the washroom and lit it and passed it round to all four of them.

"At a place—they weren't certain whether it was in the City limits of Long Beach or on the border, they stopped for a cup of coffee or sandwich. When they got back in the car, Phillips, having driven, Clothier offered to drive,

and he permitted Clothier to drive the car back to Long Beach, and Clothier did drive it, and they came back to the area which is north of where they were arrested, and which had been the original point of departure, and none of their other companions were around, and they drove around the block and stopped, at which time the police car came up to them and found them and shook them down as they took them out of the car."

376. When, as in this case, the narcotic is found on an occupant of the vehicle, there is no presumption or inference that the registered owner or person entrusted with the vehicle had knowledge thereof (see *People v. One 1941 Buick Sport Coupe*, 28 Cal.2d 692, 695, 171 P.2d 719) as there is when the narcotic is found on the person of the registered owner or his trustee, *People v. One 1952 Chevrolet*, 128 Cal.App.2d 414, 417, 275 P.2d 509; *People v. One 1940 Chrysler*, 77 Cal.App.2d 306, 314, 175 P.2d 585, and the People must establish by other evidence that the registered owner or the person entrusted with the vehicle had knowledge of the presence of a narcotic therein. *People v. One 1951 Mercury Sedan*, 116 Cal.App.2d 692, 693-694, 254 P.2d 140. The People established that knowledge herein by Phillips' plea of guilty in the criminal action and by his statement to Inspector Doyle. These admissions were admissible to forfeit Mrs. Phillips' interest (for the reasons set forth below) and were therefore admissible to forfeit the bank's, for once the vehicle is shown to have been illegally used as to the registered owner, the only defense available to the lien claimants is Health and Safety Code, section 11620. *People v. One 1940 Ford V-8 Coupe*, supra, 36 Cal.2d 471, 474, 224 P.2d 677.

[7-9] The proceeding under section 11610 is in rem, *People v. One 1933 Plymouth Auto*, supra, 13 Cal.2d 565, 569, 90 P.2d 799, even though it is a kind of in rem proceeding in which the claimants to the property are entitled to a jury trial, *People v. One 1941 Chevrolet Coupe*, supra, 37 Cal.2d 283, 286, 300, 231 P.2d 832, and the declarations as well as the acts of the person in control of the vehicle bind the vehicle

and thereby bind all claimants thereto. *Dobbins' Distillery v. United States*, supra, 96 U.S. 395, 398-402, 24 L.Ed. 637; *Interstate Securities Co. v. United States*, 10 Cir., 151 F.2d 224, 226; *United States v. One Buick Automobile*, D.C., 21 F.2d 789, 790-791; *United States v. One 1952 De Soto Club Coupe*, D.C., 122 F.Supp. 568, 569. In *United States v. One 1949 Pontiac Sedan*, 7 Cir., 194 F.2d 756, 761, certiorari denied *Moses v. United States*, 343 U.S. 966, 72 S. Ct. 1061, 96 L.Ed. 1363, cited for a contrary rule, the court declared, "However, in view of our further conclusions, the propriety of the exclusion of this evidence is not decisive of the issues herein." In *United States v. Packard Sedan*, 23 F.2d 865, 869, the United States District Court for the Southern District of Florida reached a contrary result without reference to the *Dobbins' Distillery* case and similar cases. If Mrs. Phillips had been in possession of the vehicle and made these admissions, there could be no doubt that they would bind the vehicle and justify the forfeiture of her interest and necessarily therefore the interest of the bank. *People v. One 1951 Ford V-8 Coupe*, 119 Cal.App.2d 612, 613, 259 P.2d 693. She entrusted the vehicle to Phillips, and while he had the right to its possession and responsibility for its use, he had authority to speak for it and his admissions are as binding on it as hers would have been. *Dobbins' Distillery v. United States*, supra, 96 U.S. 395, 398-402, 24 L. Ed. 637; *United States v. One Buick Automobile*, supra, 21 F.2d 789, 791. The statement in *People v. One 1950 Mercury*, 116 Cal.App.2d 746, 751, 254 P.2d 666, that the driver's admissions do not bind the other claimants was unnecessary to the decision therein and is disapproved.²

2. In that case the forensic chemist "would not say that these were the same cigarettes that he examined in his laboratory and that the specific cigarettes be-

fore him were narcotic. * * * Therefore so far as the record in this case is concerned the cigarettes found in the coat and in the car are brown

[10] Even if Phillips' plea of guilty and his statement to Inspector Doyle were not binding on the vehicle as vicarious admissions, his statement to the Inspector was admissible to prove his state of mind, i.e., his knowledge of the presence of a narcotic in the vehicle. Although the People did not state for what purpose Phillips' statement to Inspector Doyle was offered, the court admitted it as against Mrs. Phillips, the registered owner, and it is clear from the record that the court considered the admissibility of Phillips' statement on the issue of knowledge apart from the issue as to whether or not a narcotic was in the vehicle. The presence of a narcotic in the vehicle had already been proved by direct evidence independently of any extrajudicial statements. The remaining issue in the case was Phillips' knowledge, and the record leaves no doubt that the court considered Phillips' statements as offered to prove that knowledge, for it found as against her "on the basis of admissions of Ronald L. Phillips that he was aware of the presence of marijuana on the person of an occupant of said vehicle," but that as against the bank that Phillips "had no knowledge" of the presence of any narcotic in the vehicle. See, *Cripe v. Cripe*, 170 Cal. 91, 94, 148 P. 520.

[11] Ordinarily a declaration of a state of mind is admissible only to prove the declarant's state of mind at the time of the declaration. See, *Adkins v. Brett*, 184 Cal. 252, 255, 193 P. 251; *In re Estate of Carson*, 184 Cal. 437, 445, 194 P. 5, 17 A.L.R. 239; *In re Estate of Anderson*, 185 Cal. 700, 718, 198 P. 407. It has been held in this state, however, that under certain circum-

stances declarations are admissible to prove a state of mind at a particular time although uttered before or after that time, apparently on the theory that under these particular circumstances "[t]he stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current." *Chaffee*, *Progress of the Law—Evidence*, 1919-1922, 35 Harv.L.Rev. 428, 444; *In re Estate of McDevitt*, 95 Cal. 17, 26, 30 P. 101; *In re Estate of Ricks*, 160 Cal. 450, 466, 117 P. 532 [declarations of testator after will was executed admissible to show mental condition at time it was executed]; *Williams v. Kidd*, 170 Cal. 631, 648 et seq., 151 P. 1; *Donahue v. Sweeney*, 171 Cal. 388, 391-392, 153 P. 708; *De Cou v. Howell*, 190 Cal. 741, 750, 214 P. 444 [declarations of grantor made after making a deed admissible on issue of delivery]; *In re Estate of Anderson*, supra, 185 Cal. 700, 720, 198 P. 407, 416 [declarations of testatrix at a "not far distant time" after execution of will that she then feared her aunt admissible to show attitude toward her aunt at the time she executed will]; *Schooler v. Williamson*, 192 Cal. 472, 476, 221 P. 195 [declarations of decedent made a week after the time of alleged transfer to plaintiff that envelope and endorsement thereon were the ones referred to by him in a conversation two years earlier admissible to show intent of decedent in making such indorsement whenever it was made]; *Whitlow v. Durst*, 20 Cal.2d 523, 525, 127 P.2d 530 [declarations of husband a few days after alleged reconciliation, admissible to show lack of intent to reconcile]; *Hansen v. Bear Film Co.*, 28 Cal.2d 154, 173-174, 168 P.2d 946 [declarations of deceased owner of stock after transfer of

paper cigarettes, no more." 116 Cal. App.2d at pages 750-751, 254 P.2d at page 669. There was thus no evidence other than the admission of the driver, one of the registered owners, that the vehicle was used illegally. For the same reasons that a conviction in a criminal proceeding cannot be had without proof of the corpus delicti independently of admissions of the defendant, *People v. Cullen*, 37 Cal.2d 614, 624-625, 234 P.2d

1, a forfeiture of a vehicle cannot be had without proof independently of admissions that a narcotic was in the car. There was therefore no basis for the forfeiture of even the driver's interest in the vehicle. The rule admitting declarations of a state of mind was not invoked or considered in that case and it is therefore no authority one way or the other as to the application of that rule.

stock admissible to show stock was to be held in trust]; In re Estate of Sargavak, 35 Cal.2d 93, 96-98, 216 P.2d 850, 21 A.L.R. 2d 307 [declarations of decedent before and after execution of an instrument admissible to show intent with which it was executed]; Casey v. Casey, 97 Cal.App.2d 875, 878-883, 218 P.2d 842 [declarations of grantor before and after conveyance admissible to show whether she intended the grant as a gift or a trust]. See, 141 A.L.R. 704-710; McBaine, Admissibility in California of Declarations of Physical and Mental Condition, 19 Cal.L.Rev. 231, 367; McCormick on Evidence [1955] 466-467, 567-570.

In this case Phillips knew that he was arrested, he knew that the vehicle was seized because an occupant thereof possessed a narcotic. There was no reason to hold him under arrest, if, prior thereto, he did not know of such possession, yet, he not only did not disclaim such knowledge but while under arrest and at a time in close proximity to the arrest and seizure freely admitted his knowledge in the presence of the other suspects. Under the circumstances his statement was plainly relevant to show his knowledge at the time of the arrest and seizure. The matters admitted were within his special knowledge, the hearsay dangers of faulty perception and memory were not present, there was no apparent motive for misstatement, and the fact that his statement was not only against his interest in the possession of the vehicle as well as his mother's interest therein, but against his interest penally, gives reasonable assurance of his veracity. Under these circumstances Phillips' statement was admissible to prove that he knew at the time of the seizure of the vehicle that there was a narcotic therein.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

45 Cal.2d 546

DE LUZ HOMES, Inc., a corporation,
Plaintiff and Respondent,

v.

COUNTY OF SAN DIEGO, a Body Corporate and Politic, Defendant and Appellant.

WIRE MOUNTAIN HOMES, Inc., No. 1, a corporation, Plaintiff and Respondent,

v.

COUNTY OF SAN DIEGO, a Body Corporate and Politic, Defendant and Appellant.

WIRE MOUNTAIN HOMES, Inc., No. 2, a corporation, Plaintiff and Respondent,

v.

COUNTY OF SAN DIEGO, a Body Corporate and Politic, Defendant and Appellant.

DE LUZ HOMES, Inc., a corporation,
Plaintiff and Respondent,

v.

COUNTY OF SAN DIEGO, a Body Corporate and Politic, Defendant and Appellant.

L. A. 23564, 23656.

Supreme Court of California,
In Bank.

Nov. 25, 1955.

Rehearing Denied Dec. 21, 1955.

Actions were brought by taxpayers against county to recover taxes paid under protest. The Superior Court of San Diego County, L. N. Turrentine, J., entered judgments in favor of taxpayers and orders remanding the proceedings to county board of equalization, and the county appealed. The Supreme Court, Traynor, J., held that Superior Court erred in determining the full cash value of leasehold estates of lessee taxpayers who had erected housing projects on military installations of the federal government under the National Housing Act, where Superior Court deducted annual burdens, including payments of principal and interest on mortgage debts, from annual benefits, and thereby computed a value that was inversely pro-

portional to the size of the mortgage debt payments.

Judgments and orders reversed with directions to remand proceedings to county board of equalization.

1. Taxation ⚡318

When property is not assessed between the first Mondays in March and July for any tax year, assessor must assess it when he discovers its physical existence, its taxable status, or fact that it has not been assessed. Revenue and Taxation Code, § 531.

2. Taxation ⚡318

Only if delayed assessment has been caused by negligence of assessor and will cause substantial injury to taxpayer, is the assessment invalid because not timely. Revenue and Taxation Code, § 531.

3. Taxation ⚡362

When both taxpayer and assessor appeared before county board of equalization on third Monday in July and argued, respectively, that an immediate assessment should be made and that assessment should be delayed, matter was "investigated" within meaning of section of Revenue and Taxation Code providing that after five days succeeding time when notice of date when matter will be "investigated" is sent by clerk of county board to all persons interested, county board may direct assessor to assess any taxable property other than state assessed property that has escaped assessment, and therefore neither taxpayer nor assessor could complain in the Supreme Court that it did not receive five days' notice of meeting. Revenue and Taxation Code, § 1611.

See publication Words and Phrases, for other judicial constructions and definitions of "Investigated".

4. Taxation ⚡318

Where there was no indication either that assessor was negligent or that taxpayer acted to its detriment in reliance on fact that it was not assessed during regular assessment period, and taxpayer appeared before county board of equalization on third Monday in July of 1953 and asked

that it be assessed at figures that it supplied, and assessor appeared in opposition to petition and stated that he had insufficient information properly to assess taxpayer at that time, and that he had attempted to cooperate with taxpayer, but that taxpayer had given him conflicting information, and board passed motion authorizing assessor to enter assessment as soon as he secured sufficient information, 1953 assessment was not invalid, on ground that it was not timely. Revenue and Taxation Code, § 531.

5. Taxation ⚡347

Provision of the Revenue and Taxation Code that all taxable property shall be assessed at its "full cash value" requires an assessment at price that property would bring to its owner if it were offered for sale on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. Revenue and Taxation Code, §§ 110, 401.

See publication Words and Phrases, for other judicial constructions and definitions of "Full Cash Value".

6. Taxation ⚡347

Phrase "full cash value" as used in provision of the Revenue and Taxation Code that all taxable property shall be assessed at its "full cash value" is a measure of desirability translated into money amounts, and may be called the market value of the property for use in its present condition. Revenue and Taxation Code, §§ 110, 401.

7. Taxation ⚡40(8)

The Constitution requires not only that all nonexempt property be taxed, but that, except as otherwise specified, all property be assessed by the same standard of valuation. West's Ann.Const. art. 13.

8. Taxation ⚡348

Since nonexempt possessory interests in land and improvements, such as leasehold estates under leases by the United States government of realty on military installations for construction of housing projects under the National Housing Act, are taxable property, they must be assessed at full cash value. National Housing Act,

§§ 801-809, 803 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b; 34 U.S.C.A. § 522a; Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

9. Taxation ⇨80

Since practice of assessors of entering entire value of land and improvements on tax roll without distinction between possessory and reversionary interests results in a single amount reflecting both interests on the roll, the constitutional mandate that all property be taxed is obeyed, and as between reversioners and possessors, payment of the tax is a private arrangement. West's Ann.Const. art. 13.

10. Taxation ⇨80

When possessory interest in realty is taxable, and reversion is exempt, only the possessory interest is subject to assessment and taxation. West's Ann.Const. art. 13.

11. Taxation ⇨348

Since possessory interest in realty must be assessed in accord with standard of valuation applicable to all other property, its estimated value is the price it would bring if offered on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and such hypothetical market price is its value, even though a sale of the property has not been made or contemplated. Revenue and Taxation Code, §§ 110, 401.

12. Taxation ⇨348

The absence of an actual market for a particular type of property does not mean that it has no value or that it may escape from the constitutional mandate that all property shall be taxed in proportion to its value, but only that the assessor must then use such pertinent factors as replacement costs and income analyses for determining valuation. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

13. Taxation ⇨348

Assessors generally estimate value by analyzing market data on sales of similar real property, replacement costs, and income from property, and, since no one of these methods alone can be used to estimate the value of all property, the assessor,

subject to requirements of fairness and uniformity, may exercise his discretion in using one or more of them. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

14. Taxation ⇨493(8)

Where assessing authority's estimate of value of specific property at a specific time is reviewed by county board of equalization at request of taxpayer, board's decision in regard to specific valuations and methods of valuation employed are equivalent to findings and judgment of a trial court and are reviewable only for arbitrariness, abuse of discretion, or failure to follow standards prescribed by the legislature. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

15. Taxation ⇨348

Capitalization of income is a generally accepted method of valuing property, from which income may be or is derived, for tax assessment purposes. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

16. Taxation ⇨348

Under the "capitalization of income" method of valuing property from which income may be or is derived, for tax assessment purposes, the value of property is the sum of anticipated future installments of net income from the property, less an allowance for interest and the risk of partial or no receipt. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

See publication Words and Phrases, for other judicial constructions and definitions of "Capitalization of Income".

17. Taxation ⇨348

The "capitalization of income" method of valuing property, for which income may be or is derived, for tax assessment purposes, involves a capitalization or discounted valuation of the realized or prospective net monetary income derivable by continuous exploitation rather than by resale. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

18. Taxation ⇨348

The first step in the process of applying the capitalization of income method to

value property, for which income may be or is derived, for tax assessment purposes, is to determine prospective net income, and that is done by estimating future gross income and deducting therefrom expected necessary expenses incident to maintenance and operation of the property, and in instances in which future income cannot be estimated with reasonable accuracy or is not ascribable entirely to the property, prospective net monetary income is imputed in an amount equal to a minimum reasonable return on estimated market value. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

19. Taxation ⇨348

Where capitalization of income method is used for valuing property, from which income may be or is derived, for tax assessment purposes, the second step, after determining prospective net income, is to discount each future installment of income by a rate of interest that takes into account the hazards of the investment and the accepted concepts of a fair return, and the sum of the discounted installments is the present value of the property. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

20. Taxation ⇨348

In valuing real property, assessor must adhere to the statutory standard of "full cash value," and must therefore estimate the price the property would bring on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and net earnings to be capitalized therefore are not those of the present owner of the property, but those that would be anticipated by a prospective purchaser. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

21. Taxation ⇨348

The standard of "full cash value" in section of the Revenue and Taxation Code providing that all taxable property shall be assessed at its "full cash value" applies equally to a leasehold interest, and, accordingly, assessor must estimate price a leasehold would bring on an open market under conditions, in which neither buyer

nor seller could take advantage of the exigencies of the other, and assessor must therefore capitalize, not the anticipated net earnings of the present lessee, but those of a prospective assignee. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

22. Taxation ⇨348

In assessing a leasehold interest by capitalizing anticipated net earnings of a prospective assignee, the anticipated net earnings equal expected gross income less necessary expenditures for maintenance, operation and taxes, and no deduction is made for cost of lease to present lessee. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

23. Taxation ⇨355

In determining income to be capitalized to establish value of leasehold for appraisal purposes, no deduction can be made for amortization. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

24. Taxation ⇨348

In establishing value of leasehold for tax appraisal purposes, no concept of income, which includes depreciation in capital value as a positive or negative item of income, is acceptable as a basis of valuation under the capitalization of income method. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

25. Taxation ⇨348

In establishing value of leasehold for tax appraisal purposes, rent paid for leasehold interest, like cost of improvements that revert to the lessor, is part of the cost of the purchase price of the leasehold by a prospective purchaser, and to include a deduction for it is improper. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

26. Taxation ⇨348

Since the full cash value for tax assessment purposes of a long-term possessory interest in realty may approach the value of the fee, near equality between the two estimated values does not of itself demonstrate invalidity in the valuation of

either one. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

27. Taxation ⚡5

The near equality of leasehold values to those of fee belonging to the United States government does not constitute a violation of the immunity of the federal government from taxation by the states. Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

28. Taxation ⚡5

Where tax was imposed solely on privately owned possessory interest of lessees in land owned by the federal government, and, under terms of contract between the federal government and the lessees, would be paid entirely by the lessees, neither the legal nor economic incidence falls on the federal government. Revenue and Taxation Code, §§ 104, 107, 201; National Housing Act, § 807 as amended 12 U.S.C.A. § 1748f.

29. Taxation ⚡348

In determining value of leaseholds of lessees to whom the federal government leased lands on military installations for construction of housing projects under the National Housing Act, assessor erred in imputing an income of 6 percent and taxes of 2 percent to an amount somewhat less than the estimated fee value of the lands and improvements, and in deducting the \$100 rent paid to the federal government, and in capitalizing the difference at 8 percent. National Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b, 1748f; 34 U.S.C.A. § 522a; Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

30. Taxation ⚡348

Where expected annual expenditures for housing projects on military installations of the federal government under the National Housing Act by lessees, had been estimated by both the Federal Housing Administration and the lessees and therefore there was carefully formulated evidence as to anticipated expenses available to assessing authorities, value of possessory interests of lessees for tax assessment purposes could best be estimated in terms of actual income rather than imputed income. Na-

tional Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b, 1748f; 34 U.S.C.A. § 522a; Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

31. Taxation ⚡349

Trial court erred in determining the full cash value of leasehold estates of lessees, who had erected housing projects on military installations of the federal government under the National Housing Act, where court deducted annual burdens, including payments of principal and interest on mortgage debts, from annual benefits, and thereby computed a value that was inversely proportional to the size of the mortgage debt payments. National Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b, 1748f; 34 U.S.C.A. § 522a; Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13, § 1.

32. Taxation ⚡348

County equalization board in estimating, for tax assessment purposes, the full cash value of the possessory estates of lessees, who constructed housing projects on military installations of the federal government under the National Housing Act, should deduct annual operating and maintenance expenses and deposit to replacement reserve from annual gross income, and should capitalize the difference at the rate that it determines will allow for risk, interest and taxes, and the period of capitalization should be the remaining years of the lease. National Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b, 1748f; 34 U.S.C.A. § 522a; Revenue and Taxation Code, §§ 110, 401; West's Ann.Const. art. 13.

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TRAYNOR, Justice.

Actions to recover taxes, levied against possessory interests in tax exempt land and improvements and paid under protest, were brought against the County of San Diego, Revenue & Taxation Code, §§ 5103, 5138, in 1953 by De Luz Homes and in 1954 by De Luz Homes, Wire Mountain Homes No. 1 and Wire Mountain Homes No. 2. The county appeals from judgments in favor of plaintiffs and from orders remanding the proceedings to the county board of equalization. The 1953 and 1954 actions raise the same substantive question and have been consolidated on appeal.

De Luz Homes is a 562-unit housing project located on land owned by the United States Government at Camp Pendleton, a military installation in San Diego County. The project provides housing for military and civilian personnel stationed at the camp at maximum rentals prescribed by the Federal Housing Administration and the Department of the Navy and was constructed under the provisions of Title VIII of the National Housing Act (12 U.S.C.A. §§ 1748-1748h [known as the Wherry Act]) and section 522a of Title 34 of the United States Code Annotated. Title VIII provides, "In order to assist in relieving the acute shortage of housing which now exists at or in areas adjacent to military installations * * * and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations, the [Federal Housing] Commissioner is authorized * * * to insure mortgages * * * [on] property * * * designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force * * * assigned to duty at the military installation at or in the area of which such property is constructed." * 12 U.S.C.A. § 1748b(a), (b) (2); see, Senate Report on Military and Naval Installations—Construction, 82d

Cong., 1st Sess., Sen.Rep. No. 727. Section 522a of Title 34 of the United States Code Annotated authorizes the Secretary of the Navy to lease property under the control of the Department of the Navy whenever it shall be advantageous to the government.

In July, 1952, the United States Government, acting through the Secretary of the Navy, leased a single parcel of 95.22 acres at Camp Pendleton to De Luz Homes, Inc., a Delaware Corporation, for a period of 75 years at an annual ground rental of \$100. The lease, as amended, states that the Secretary of the Navy has determined that lease of the premises will effectuate the purpose of "erecting, maintaining, and operating thereon a housing project, consisting of approximately 562 units, substantially in accordance with detailed plans and specifications submitted by the Department of the Navy * * * and approved by the Federal Housing Commissioner." In addition to building and equipping the project and paying the ground rental, the lessee is required to obtain mortgage insurance from the Federal Housing Administration, to lease the units at rents specified by the Federal Housing Administration and the Department of the Navy to persons designated by the commanding general of the camp, to maintain the premises for the term of the lease, to provide protection against fire and other losses, and to "pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises." The Government promises to provide "when and as available" fire and police protection on a nonreimbursable basis and has reserved rights of inspection and a right of way to connect the project with the school site adjoining it. The buildings and other improvements erected by De Luz became the property of the United States as they were completed, and all ranges, refrigerators, and other items required by the plans must remain on the premises and will become the

property of the United States after the mortgage debt is paid. Under its contract of mortgage insurance with the Federal Housing Administration, the lessee is required to pay an annual insurance premium, to insure the improvements against fire and other losses, and to accumulate a fund for replacing worn-out improvements and equipment. Under the terms of the lease, the lessee must continue to insure and to accumulate a replacement reserve for the remainder of the lease after the mortgage debt is paid. The lease cannot be transferred or assigned by De Luz without written approval of the Government, but may be terminated by the Government upon sixty days' notice in the event of default by De Luz in the payment of the annual ground rental or accumulation and maintenance of the replacement reserve, or, irrespective of default, after fifty years from execution of the lease.

De Luz, at its sole expense, had 562 housing units constructed in accordance with the plans drawn by the Department of the Navy and installed therein ranges, refrigerators, screens, shades, and other items designated in the plans. Construction of the entire project cost somewhat in excess of \$4,516,000, and to finance it De Luz borrowed from the Republic National Bank of Dallas, Texas, approximately \$4,600,000, at 5% per year, payable in full thirty days after completion of the project. After the project was completed, De Luz refinanced the loan by borrowing from the First National Bank of Boston approximately \$4,516,000, at 4% per year and repayable in fixed annual installments, including interest, of \$248,388. The installment payments began on February 1, 1954, and will continue thereafter for 32 years and eight months until 1986. To secure the loan, De Luz gave the bank a mortgage on its leasehold interest and, as required by its lease, purchased a mortgage insurance policy from the Federal Housing Administration.

All net income from subrentals becomes the property of De Luz, and the company estimates that its maximum potential gross income, assuming 100% occupancy, is \$552,354 per year. It forecasts, however, that after making a 20% allowance for vacancies and paying \$27,967 into the replacement reserve, \$251,271 for maintenance and operating expenses, and \$248,388 in payment of its loan, it will expend \$55,238 annually in excess of income until its mortgage debt is repaid. After 1986, however, when it will have repaid the loan, it expects income to exceed disbursements by \$214,762 per year.¹ The Federal Housing Administration estimates that at 100% occupancy De Luz would receive a gross income of \$554,980 per year, and that with a 3% vacancy allowance and deductions of \$156,401 for operating expenses, \$27,967 for accumulation of the replacement reserve, and \$38,400 for taxes, but without a deduction for repayment of the loan, De Luz will receive an annual net income of \$305,862.

On Monday, July 20, 1953, after the regular assessment period for the tax year 1953-1954, Rev. & Tax.Code, § 405 and during the period for equalization, Rev. & Tax.Code, § 1603, De Luz appeared by counsel before the Board of Supervisors of San Diego County sitting as a board of equalization. It stated that De Luz Homes had not been assessed, that it waived the five day notice to which it was entitled by statute, Rev. & Tax.Code, § 1611, and that it petitioned the board "to add an assessment of a possessory interest to the De Luz Homes * * * the same being exempt property of the United States, and the assessment to be of a possessory interest therein with a full cash value of \$40,350.00." The assessor objected, stating that he had not been able to assess De Luz because of insufficient information as to personal property on the premises, that his office had delayed the assessment to give the taxpayer sufficient time to gather information, and

1. In July, 1953, when the project was about 70% completed, De Luz predicted that maximum gross income, after a 10% vacancy allowance, would be \$490,482, that disbursements would exceed income

by \$35,267.08 per year until 1986, and that thereafter, with the loan repaid, annual income would exceed expenses by \$235,701.92.

that his office had "not had any cooperation from the taxpayer." The board denied the petition by De Luz with the understanding that as soon as the assessor obtained a full statement of personal property the entire assessment would be put on the roll. On July 31, 1953, the assessor entered an assessment of De Luz for the tax year 1953-1954 at a valuation of \$86,690 for the possessory interest in land, \$487,380 for the possessory interest in improvements, and \$61,380 for personal property, and he levied taxes thereon totalling \$35,013.29. De Luz filed an application with the board to reduce the assessment, Rev. & Tax.Code, §§ 1604, 1607, and on August 24, 1953, the board held a hearing, received oral and written evidence, and denied the application. De Luz thereupon paid the full amount of the levy, filed a protest contending that \$29,738.57 of the tax was excessive and void, and filed an action to recover the allegedly excessive amount and for revaluation of its possessory interest in land and improvements. Rev. & Tax.Code, § 5138. The court found that the assessment had not been made during the regular assessment period, that it was not properly an "escape assessment", Rev. & Tax.Code, § 531, and that it therefore was void. The court also concluded that certain personal property on the premises had been transferred to the United States Government prior to the first Monday in March of 1953 and was not taxable, and that in valuing the possessory interest in land and improvements the assessor had used an illegal method that resulted in a constructively fraudulent tax. The court found, however, that De Luz "expressly waive[d] any objection to said assessment so far as said 'personal property' was concerned * * * [and] at all times herein has conceded an equitable and moral duty to be assessed in the sum of not more than \$40,350 for said tax year on its possessory interest in exempt land and improvements and to pay taxes in a total sum of \$1,892.68 therein." The court ordered the board of equalization to reconvene, to take new evidence of value, to recompute the value of the possessory interest in accord with the formula offered by De Luz, and to enter such value on the tax roll in

lieu of the value entered by the assessor, provided that no amount less than \$40,350 be entered.

During the next regular assessment period for the tax year 1954-1955, the assessor valued the possessory interest of De Luz Homes in land at \$108,909 and in improvements at \$896,518, resulting in a total valuation of \$1,005,427, and levied a tax thereon of \$50,372.04. An application for reduction of the valuation and the tax thereon was filed with the board of equalization and denied. Rev. & Tax.Code, §§ 1605, 1607. De Luz paid the tax under protest, filed a claim for refund with the board of supervisors, Rev. & Tax.Code, § 5096, and, after its denial, filed an action in the superior court to recover the taxes. Rev. & Tax.Code, § 5103.

Wire Mountain Homes No. 1 and Wire Mountain Homes No. 2 also are housing units for military and civilian personnel assigned to duty at military bases in San Diego County. As in the case of De Luz Homes, they are located on land leased from the federal government, were constructed pursuant to Title VIII of the National Housing Act, 12 U.S.C.A. §§ 1748-1748h, were financed by loans secured by mortgages insured by the Federal Housing Administration, and are subleased at rents prescribed by the Federal Housing Administration and the Department of the Navy. Until 1986, when the mortgage loan will have been repaid, annual disbursements, including debt repayment, are expected to exceed income from subrentals and thereafter income is expected substantially to exceed disbursements. For the tax year 1954-1955 the assessor valued the possessory interests of the Wire Mountain projects by the same method used for De Luz Homes. Wire Mountain Homes paid the taxes levied on the possessory interests under protest, filed claims for refund with the board of supervisors, and, after the claims were denied, filed actions for recovery of the amounts paid.

The 1954 actions by De Luz and Wire Mountain Homes were consolidated for trial, and the court found that the value of each of the possessory interests was

zero, that the method valuation used by the assessor was improper, and that the tax based on such method constituted constructive fraud. As in the 1953 action by De Luz, the court ordered the board of equalization to reconvene, to take new evidence of value, to recompute the value of the possessory interests by a method specified by the court, and to order the assessor to enter the new assessment on the tax roll in lieu of the amount previously approved by the board. The court retained jurisdiction to review the proceedings of the board and to make such further orders, findings of fact, and judgments, including repayment of taxes, Rev. & Tax. Code, § 5141, as might be necessary.

In the method of valuation employed by the assessor, the fee value of the land is estimated "by the same methods and approaches to value that [are used in assessing] all other taxable land in the county, similarly situated and of a similar nature." A percentage of the amount so estimated is deducted as an allowance for restrictions on the use of the property imposed by the lease, and to the difference, known as the base value, is imputed an income equal to a reasonable rate of return on the base value. In the case of De Luz, the assessor found the reasonable rate of return to be 6%, and he added an additional 2% for taxes. The percentage representing reasonable income and taxes, known as the "economic rental" of the leasehold, was translated into numerical figures from each of the leaseholds, and from it was deducted the lessee's rent to the government, a nominal amount of \$100 reduced to \$35 to allow for the ratio of assessment value to market value normally used by the assessor. The difference between the imputed income and the rent charged by the government, known as the lessee's "equity" or "bonus value" in the leasehold, was capitalized at the rate of 8% for the remaining years of the lease, and the amount so computed was deemed the present value of the lessee's equity. A safety factor for overlooked burdens was deducted from it, and the remaining amount was entered on the tax roll as the value of the possessory interest in the government-owned land. The im-

provements were valued in an essentially identical manner: Their value was estimated as if they were owned in fee; percentage deductions were made for depreciation and restrictions on use imposed by the lease; an "economic rental" of 8% was imputed to the difference. Since the government charges no rent for the improvements, the "economic rental" equaled the lessee's "equity," and its present value, when capitalized at 8% for the remaining years of the lease and reduced by a safety factor for undiscovered burdens, was deemed the taxable value of the improvements.

Concluding that this method failed to take annual benefits and burdens into account and therefore was improper, the court directed the board of equalization to take evidence on expected annual gross income, expected annual operating expenses, the rate of capitalization that would allow for ad valorem taxes, the amount of money that plaintiffs had invested in their leaseholds, and the annual sum required to amortize their investments together with interest thereon at 6%. The board was ordered to compute the value of the possessory interests by using actual expected net income, rather than imputed income. It was directed to deduct annual operating expenses and amortization from annual gross income, to capitalize the difference for fifty-two years at a rate equal to 6% plus an appropriate allowance for taxes, to reduce the amount so computed to 35% thereof to allow for the "proper" ratio of assessed value to market value, and to enter the net result on the tax roll as the value of the possessory interests in the leaseholds.

In addition to remanding the proceedings to the board, the court made specific findings as to the values of the possessory interests for the tax years 1953-1954 and 1954-1955. It found the possessory interest of De Luz to have a total value in 1953, for both land and improvements, of \$7,700, as opposed to the assessor's total valuation of \$574,070, and in 1954 it found that each of the possessory interests had a value of zero, as compared with estimates by the assessor of \$1,005,427 for De Luz, \$112,440

for Wire Mountain Homes No. 1, and \$129,750 for Wire Mountain Homes No. 2. In reaching these results, the court employed a method of valuation different from that which it ordered the board to follow. It deducted "annual burdens" (total annual disbursements, including operating expenses, payments into the replacement reserve, and payments of principal and interest on the mortgage debts) from "annual benefits" (annual gross income), and found that until 1986, when the debts will have been repaid, annual burdens will exceed annual benefits, and that thereafter annual benefits will exceed burdens. Capitalizing the expected excess of burdens over benefits and the expected excess of benefits over burdens over a period of fifty-two years, the court found that the capitalized value of net burdens exceeded the capitalized value of net benefits. It interpreted this result to mean that the present value of future income from the leaseholds was less than zero, and that therefore the possessory interests have no value at this time. In the case of De Luz, for example, it found that "burdens" will exceed "benefits" by \$55,238 per year until 1986, and that "benefits" will exceed "burdens" thereafter by \$214,762 per year. It computed the present value of \$55,238 per year for thirty-two years commencing in 1954 as \$1,043,813 and the present value of \$214,762 per year for nineteen years commencing in 1986 as \$218,474. Subtracting the present worth of net "benefits" from the present worth of net "burdens," it obtained a figure of \$825,339. It interpreted this figure to mean that the present value of expenditures was greater than the present value of profits, and that therefore De Luz had no taxable value at the time of assessment. The county contends that the 1953 assessment of De Luz was timely, that the method of valuation employed by its assessor is valid, and that the values of the leaseholds as found by the assessor and approved by the board of equalization are correct.

Timeliness of the 1953 Assessment of De Luz Homes.

[1-4] "If any property belonging on the local roll has escaped assessment, the as-

essor shall assess the property on discovery at its value on the lien date for the year for which it escaped assessment * *." Rev. & Tax.Code, § 531. Thus, when property is not assessed between the first Mondays in March and July for any tax year, the assessor is required to assess it when he discovers its physical existence, its taxable status, see, *Imperial Irrigation District v. County of Riverside*, 96 Cal.App. 2d 402, 407, 215 P.2d 518, or the fact that it has not been assessed. *Carpenter v. Pacific Coast Ins. Ass'n*, 10 Cal.2d 304, 306, 74 P.2d 511. Only if a delayed assessment were caused by the assessor's negligence and would cause substantial injury to the taxpayer has it been suggested that such assessment may be improper. See, *Carpenter v. Pacific Coast Ins. Ass'n*, supra, 10 Cal.2d 304, 306, 74 P.2d 511. In the present case, however, there is no indication either that the assessor was negligent or that De Luz acted to its detriment in reliance on the fact that it was not assessed during the regular assessment period. Instead, the record discloses that De Luz appeared before the board of equalization on the third Monday in July of 1953 and asked that it be assessed at figures it supplied. The assessor appeared in opposition to the petition and stated that he had insufficient information properly to assess De Luz Homes at that time, that he had attempted to cooperate with the taxpayer, and that the taxpayer had given him conflicting information about personal property on the premises. The board passed a motion authorizing the assessor to enter an assessment as soon as he secured sufficient information. It is contended that this authorization was improperly granted because it was not preceded by five days' notice as required by section 1611 of the Revenue and Taxation Code. That section provides: "After five days succeeding the time when notice of the date when the matter will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the assessor to: (a) Assess any taxable property other than State assessed property that has escaped assessment." When both De Luz and the assessor appeared before the board on the

third Monday in July and argued, respectively, that an immediate assessment should be made and that assessment should be delayed, the matter was "investigated" within the meaning of the statute, and neither De Luz nor the assessor can now complain that they did not receive five days' notice of the meeting. De Luz, moreover, specifically waived notice and requested immediate assessment at the valuations it offered. Since the board could have concluded that the assessor had not had sufficient information to make an assessment up to the time of the hearing, and since there is no evidence that the board acted arbitrarily or abused its discretion, its directions to the assessor cannot be set aside, *McClelland v. Board of Supervisors*, 30 Cal.2d 124, 129, 180 P.2d 676; *Los Angeles Gas & Electric Co. v. County of Los Angeles*, 162 Cal. 164, 170, 121 P. 384, 9 A.L.R. 1277; *Utah Construction Co. v. Richardson*, 187 Cal. 649, 655, 203 P. 401; cf. *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 356, 357, 153 P.2d 746. The assessor entered his assessment without further notice to De Luz on July 31, 1953, and since neither the order of the board nor any statute required such notice, and since the assessment was made in accord with the directions of the board, it was validly entered on the tax roll.

The Valuation of Possessory Interests in Tax Exempt Property

[5,6] The standard of valuation prescribed by the Legislature is that, "[A]ll taxable property shall be assessed at its full cash value." Rev. & Tax.Code, § 401. "Full cash value", as defined in section 110 of the Revenue and Taxation Code, "means the amount at which property would be taken in payment of a just debt from a solvent debtor." It provides, in other words, for an assessment at the price that property would bring to its owner if it were offered for sale on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. It is a measure of desirability translated into money amounts,

see, *Brandeis, J.*, concurring in *State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm.*, 262 U.S. 276, 310, 43 S.Ct. 544, 67 L.Ed. 981, and might be called the market value of property for use in its present condition. Indeed, section 401 of the Revenue and Taxation Code, as originally enacted (Pol.Code, § 3627) contained the words "market value" as the standard for valuation of the stock of domestic corporations, and after "market value" was deleted in 1881 (Stats., 1881, Ch. LIII, p. 57), this court stated that the term had been synonymous with "full cash value." *Crocker v. Scott*, 149 Cal. 575, 585, 87 P. 102, 104; see also, *San Francisco National Bank v. Dodge*, 197 U.S. 70, 79, 25 S.Ct. 384, 49 L.Ed. 669.

[7] This standard of value must be used in the assessment of all taxable property, for the Constitution of California states, "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." Art. XIII, § 1. The Constitution requires not only that all nonexempt property be taxed, *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 568-569, 96 P. 288; *Crocker v. Scott*, 149 Cal. 575, 585, 87 P. 102, but that except as otherwise specified all property be assessed by the same standard of valuation. *Mahoney v. City of San Diego*, 198 Cal. 388, 398, 403, 245 P. 189; *Wilson v. Supervisors of Sutter Co.*, 47 Cal. 91, 92 [construing substantially similar provision in section 13 of Article XI of the Constitution of 1849]. Thus, it was held reversible error for a board of equalization to value one type of property at the price it would bring as salvage while valuing other property at the price it would bring in its present use and condition. *Mahoney v. City of San Diego*, supra, 198 Cal. 388, 400-402, 245 P. 189.

[8-10] Since nonexempt possessory interests in land and improvements, such as the leasehold estates involved in the present actions,² are taxable property, Rev. &

2. The possessory interest is admittedly taxable in the hands of the present lessees, and would be taxable even if they

defaulted and the leaseholds were assumed by the Federal Housing Commissioner. 12 U.S.C.A. § 1748f.

Tax.Code, §§ 201, 104, 107; *Parr-Richmond Industrial Corp. v. Boyd*, 43 Cal.2d 157, 164, 272 P.2d 16; *Kaiser Co. v. Reid*, 30 Cal.2d 610, 618, 184 P.2d 879; see, *Delaney v. Lowery*, 25 Cal.2d 561, 564, 154 P.2d 674, they too must be assessed at "full cash value." In practice, assessors usually enter the entire value of land and improvements on the tax roll without distinction between possessory and reversionary interests, and since this practice results in a single amount reflecting both interests on the roll, the constitutional mandate that all property be taxed is obeyed. *San Pedro, L. A. & S. L. R. Co. v. City of Los Angeles*, 180 Cal. 18, 22, 179 P. 393. As between reversioners and possessors payment of the tax is a private arrangement. *Simms v. County of Los Angeles*, 35 Cal.2d 303, 313, 217 P.2d 936; *San Pedro, L. A. & S. L. R. Co. v. Los Angeles*, supra, 180 Cal. 18, 22, 179 P. 393; *Lick v. Austin*, 43 Cal. 590, 594-596. When, however, the possessory interest is taxable and the reversion is exempt, only the possessory interest is subject to assessment and taxation. *City of Pasadena v. County of Los Angeles*, 182 Cal. 171, 176, 187 P. 418; *People v. Shearer*, 30 Cal. 645, 661. "When * * * there is a lease of land owned by the state or a municipality, the reversion being exempt from taxation, the usufructuary interest alone is subject to tax in proportion to its value; and in the absence of agreement to the contrary, the tax necessarily falls upon the lessee." *Hammond Lumber Co. v. County of Los Angeles*, 104 Cal.App. 235, 240, 285 P. 896, 898.

[11,12] Since the possessory interest must be assessed in accord with the standard of valuation applicable to all other property, its estimated value is the price it would bring if offered on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and this hypothetical market price is its value even though a sale of the property has not been made or contemplated. It is well settled that "the absence of an 'actual market' for a particular type of property does not mean that it has no value or that it may escape

from the constitutional mandate that 'all property * * * shall be taxed in proportion to its value' (Art. XIII, sec. 1) but only that the assessor must then use such pertinent factors as replacement costs and income analyses for determining 'valuation.'" *Kaiser Co. v. Reid*, 30 Cal.2d 610, 623, 184 P.2d 879, 887.

[13,14] Assessors generally estimate value by analyzing market data on sales of similar property, replacement costs, and income from the property (see, 1 Bonbright, *Valuation of Property*, pp. 113-266; American Institute of Real Estate Appraisers, *The Appraisal of Real Estate*, pp. 75-85; Fisher, *Real Estate in California*, p. 157), and since no one of these methods alone can be used to estimate the value of all property, the assessor, subject to requirements of fairness and uniformity, may exercise his discretion in using one or more of them. *Utah Construction Co. v. Richardson*, 187 Cal. 649, 652-653, 203 P. 401; *Southern California Tel. Co. v. Los Angeles County*, 45 Cal.App.2d 111, 116-118, 113 P.2d 773. The assessing authority's estimate of the value of specific property at a specific time is reviewed by the board of equalization at the request of the taxpayer, Rev. & Tax.Code, §§ 1601-1615, and the board's decision in regard to specific valuations and the methods of valuation employed are equivalent to the findings and judgment of a trial court and reviewable only for arbitrariness, abuse of discretion, or failure to follow the standards prescribed by the Legislature. *McClelland v. Board of Supervisors*, supra, 30 Cal.2d 124, 129, 180 P.2d 676; *Universal Consol. Oil Co. v. Byram*, supra, 25 Cal.2d 353, 356, 153 P.2d 746; *Miller & Lux, Inc., v. Richardson*, 182 Cal. 115, 128, 187 P. 411; *Los Angeles Gas & Electric Co. v. County of Los Angeles*, supra, 162 Cal. 164, 168, 121 P. 384, 9 A.L.R. 1277.

[15-19] In the present case, the assessor purported to value the leaseholds by the capitalization of income method, a generally accepted method of valuing property from which income may be or is derived. *Kaiser Co. v. Reid*, 30 Cal.2d 610, 623, 184 P.2d 879; *Pullman Co. v. Richardson*, 185 Cal. 484, 496, 197 P. 346; Al-

paugh Irrigation Dist. v. County of Kern, 113 Cal.App.2d 286, 293, 248 P.2d 117; Birch v. County of Orange, 59 Cal.App. 133, 138, 210 P. 57; H. & W. Pierce v. Santa Barbara County, 40 Cal.App. 302, 306, 180 P. 641; see, Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 341, 212 P. 711. According to this method, the value of property is the sum of anticipated future installments of net income from the property, less an allowance for interest and the risk of partial or no receipt. (See, American Institute of Real Estate Appraisers, The Appraisal of Real Estate, Ch. 17, 18; Babcock, The Valuation of Real Estate, pp. 39, 127-129; 1 Bonbright, The Valuation of Property, Ch. XI.) "[I]t involves a capitalization or discounted valuation of the realized or prospective net monetary income derivable by continuous exploitation rather than by resale." (1 Bonbright, op.cit. supra, p. 230.) The first step in the process is to determine prospective net income and this is done by estimating future gross income and deducting therefrom expected necessary expenses incident to maintenance and operation of the property. In instances in which future income cannot be estimated with reasonable accuracy or is not ascribable entirely to the property, pro-

spective net monetary income is imputed in an amount equal to a minimum reasonable return on estimated market value. See, Kaiser Co. v. Reid, 30 Cal.2d 610, 623, 184 P.2d 879. Since it is generally accepted that a person who agrees to receive payment in the future is entitled to interest both for waiting and the risk of partial or no receipt, the second step is to discount each future installment of income by a rate of interest that takes into account the hazards of the investment and the accepted concepts of a "fair return." The sum of the discounted installments is the present value of the property.³ An apt example of determining the value of property by the capitalization of net income method is given by counsel in a companion case: Assume that the most effective use that may be made of an item of property is the rental thereof, that the property may be rented for a period of three years (at the end of which it will be worthless) for a gross rental of \$120 a year, to be paid at the end of the year, that the expenses, e.g., repairs, of the lessor incident to the property will be \$20 a year, also to be paid at the end of the year, and that a 6 percent rate of return is appropriate to the amount of risk involved to the lessor. The value of the property will be determined as follows:

Annual gross income	\$120.00
Annual expense	20.00
Annual net income	\$100.00
Present worth of \$100 to be received:	
1 year in the future ($\$100 \times .9434$) ⁴	\$94.34
2 years in the future ($\$100 \times .89$) ⁴	89.00
3 years in the future ($\$100 \times .8396$) ⁴	83.96
Value of property	\$267.30

[20] In valuing property, the assessor must adhere to the statutory standard of "full cash value", and must therefore estimate the price the property would bring on an open market under conditions in

which neither buyer nor seller could take advantage of the exigencies of the other. The net earnings to be capitalized, therefore, are not those of the present owner of the property, but those that would be

3. In practice, the present value of an amount to be received in regular future installments is computed by multiplying the annual amount by a present value factor that reflects interest, risk, and, if applicable, a decline in income in later years. (See, American Institute of Real Estate Appraisers, The Appraisal

of Real Estate, Appendix, Tables I-IX; Finney, Principles of Accounting, [3d ed.] Ch. 10; Schmutz, Condemnation Appraisal Handbook, Ch. 9.)

4. The coefficients for a 6% return were taken from a standard discount table printed in Babcock, Valuation of Real Estate, p. 538.

anticipated by a prospective purchaser. "Anticipated future earning power is the sole matter of consequence, since reported earnings are already water under the mill." (Bonbright, op. cit. supra, p. 229; see also Babcock, op. cit. supra, pp. 229-230.) The present owner may have invested well or poorly, may have contracted to pay very high or very low rent, and may have built expensive improvements or none at all. To value property by capitalizing his anticipated net earnings would make the value of property equal to the present value of his profits, since, however, the legislative standard of value is "full cash value", it is clear that whatever may be the rationale of the property tax, it is not the profitability of property to its present owner. If a purchaser would buy a given property on an open market, the property has a value equal to the price such purchaser might be expected to pay.

[21,22] The standard of "full cash value" applies equally to a leasehold interest. Accordingly, the assessor must estimate the price a leasehold would bring on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. He must therefore capitalize, not the anticipated net earnings of the present lessee, but those of a prospective assignee. To a prospective assignee, anticipated net earnings equal expected gross income less necessary expenditures for maintenance, operation, and taxes.⁵ No deduction is made for the cost of the lease to the present lessee, i. e., his charges for rent and amortization of improvements, for to a prospective assignee the value of a leasehold is measured solely by anticipated gross income less expected necessary expenditures.

In *Blinn Lumber Co. v. County of Los Angeles*, 216 Cal. 474, 481, 14 P.2d 512, 84 A.L.R. 1304, this court stated that a person who has assumed a lease will deduct from his annual income statement an aliquot portion of the price he paid to acquire

the lease and of the cost of improvements that he installed. Such practice is in accord with generally accepted principles of accounting to determine the net income and net worth of the present owner. (See, Finney, op. cit. supra, chs. 11, 12.) By allocating past costs to present and future income, the income recipient apportions expenditures for long-term benefits to each revenue period in which some of the benefit is realized. The remaining unamortized cost appears on the balance sheet as an asset valued at cost less the amounts already charged to income. (See, Finney, op. cit. supra, pp. 192, 207; 2 Bonbright, op. cit. supra, p. 894 et seq.) Although this procedure is sound accounting practice to determine the net income and net worth of the present owner, it will not reflect the "full cash value" of the property. The accountant deals with past historical cost to the present owner and by the process of amortization spreads the cost of property over its useful life. (Babcock, op. cit. supra, pp. 402-403.) The unamortized cost reflected on the balance sheet has no relation to the "full cash value," i. e., the price that a willing buyer would pay a willing seller.

[23-25] Furthermore, in determining the income to be capitalized to establish value for appraisal purposes, no deduction can be made for amortization. (Fisher, *Nature of Capital and Income*, pp. 238, 255.) "[N]o concept of income which includes * * * depreciation in capital value as a positive or negative item of income, is acceptable as a basis of valuation under the 'capitalized-income' method." (Bonbright, op. cit. supra, p. 910 citing Fisher.) "[I]n valuation, net earnings are net 'before depreciation,' i. e., net earnings are a combination of income and capital returns and are computed as the actual difference between the 'puts' and 'takes.' Appraising presupposes a purchaser, and the valuation is made at a figure which the net earnings can support including a return

5. Although taxes are themselves based on value, the tax rate is known, and therefore an allowance for taxes can be expressed as a percentage of the value to be found. In practice, an allowance for

taxes is usually made as an addition to the capitalization rate and is reflected in the present worth factor. (See 1 Bonbright, *The Valuation of Property*, p. 257.)

of capital equal to the successive losses of value expected in the depreciation of the property. Since the value is the end and object of valuation, the process cannot include an expense item based upon the answer." (Babcock, op. cit. supra, p. 420.) Rent paid for a leasehold interest, like the cost of improvements that revert to the lessor, is part of the cost or purchase price of the leasehold, and to include a deduction for it, is likewise to include an item of expense based on the answer, i. e., the value of the property. Thus, it would not only be anomalous to deduct any part of that value, the very answer sought, from the income that is to be capitalized to obtain that answer, it would be a duplication, for the interest rate applied in capitalizing net income provides for a return of capital value as well as interest. (American Institute of Real Estate Appraisers,

The Appraisal of Real Estate, p. 321; *ibid.*, p. 214; Babcock, op. cit. supra, p. 230; see example given below, note 7.

It is apparent, therefore, that in requiring the assessor to deduct the present lessee's charges for rent and amortization from estimated gross income the court in the Blinn case confused income for accounting purposes with income for appraisal purposes.⁶ Moreover, there will be no "waste of capital" as feared by the court in the Blinn case, 216 Cal. at page 478, 14 P.2d at page 514, when the purchaser's cost equals the capital value of the property.⁷ If the cost exceeds this value, then there is a wastage of capital, but only at the time of purchase and it is properly disregarded by persons valuing property in terms of future income.

To deduct amortization charges of the present lessee not only is to subtract a part

6. The Blinn case also erred in ordering that actual rent and amortization be deducted from imputed gross income without making an adequate distinction between imputed gross and imputed net income. An imputed gross income must be sufficiently large to allow for expenditures and therefore must exceed the minimum reasonable return on an investment. The court in Blinn, however, deducted actual rental and amortization charges from an imputed gross income of 6% of the fee value of the leased land, and also used 6% as the rate of capitalization. 216 Cal. at page 479, 14 P.2d 512. It can hardly be assumed, however, that the same percentage that reasonably reflected the risk and interest incident to capitalizing net income was sufficient to serve as a basis for the deduction of the lessee's charges.

7. That this capital value will be restored to the purchaser through operation of the capitalization of income method may be demonstrated by continuing the example above, note 6. If a purchaser buys the property for the capitalized value of \$267.30, he will receive each year a return of capital and interest as follows:

Year	Net Amount Rec'd.	Interest at 6% on Unrecovered Capital Value	Annual Partial Return of Capital Value	Amount of Capital Value Unrecovered at End of Year
1st	\$100	\$16.04 (\$267.30x.06)	\$83.96 (\$100-16.04)	\$183.34 (\$267.30-83.96)
2nd	100	11.00 (183.34x.06)	89.00 (\$100-11.00)	94.34 (183.34-89.00)
3rd	100	5.66 (94.34x.06)	94.34 (\$100- 5.66)	0 (94.34-94.34)
Total capital value returned \$267.30.				

Thus, the value determined by applying the capitalization rate to net income, exclusive of amortization, results in no waste of capital, for the annual net receipts result in a complete return of the original capital of \$267.30 plus interest at the rate of 6% on the unrecovered value remaining at the end of each year.

8. Thus, using the figures of the previous example, a deduction for amortization of the investment in the property in estimating future net income gives the following absurd result:

"Annual income	\$120.00
"Annual expense	
"(a) Repairs	\$20

"(b) Amortization of cost in equal annual payments over 3 years with 6% interest on unrecovered cost

	100
"Net income to be capitalized	\$000.00
"Value determined by capitalization of income	\$000.00"

of the very figure that is being determined, the value of the property, from the elements of the computation, but is to reach a valuation of zero in every case in which the lessee had estimated future earnings correctly and had invested their present value in the leasehold.⁸ Under such circumstances, the lessee, although paying no property taxes would recover the full amount of his investment plus interest over the life of the lease (see example *supra*). Thus, in the case of De Luz, the Federal Housing Administration estimates that annual net income, after deducting operating expenses, the required contribution to the replacement reserve, and taxes, will be \$305,862 per year. The present value of the right to receive that amount for the period of the lease, 75 years, is \$5,033,255, when capitalized at 6%. If, however, an annual deduction of \$274,279 is made from gross income to allow for recoupment of the lessee's investment at 6%,⁹ annual income is but \$31,583 per year, with a present value of \$393,555. According to the estimates of De Luz, annual net income, except for amortization of its investment and taxes, will be \$162,645 per year, which has a present value of \$2,026,719 at 8%. If amortization is deducted, the net income is a negative figure, and the leasehold has a value of zero. There is no doubt, however, that the right to receive \$162,645 per year for 75 years has a value equal to the sum of the amounts to be received less a discount for risk and interest. De Luz invested approximately \$4,516,000 to receive the annual income from the lease, and in reliance on its receipt the First National Bank of Boston loaned the principal of the investment and the Federal Housing Ad-

ministration insured the loan. In the light of these facts, to hold that the leasehold has a value of zero would require a unique concept of value for purposes of taxation entirely different from that used in the ordinary course of business. Statements in the Blinn cases, 216 Cal. 474, 478-482, 14 P.2d 512, 84 A.L.R. 1304; *Id.*, 216 Cal. 468, 472-473, 14 P.2d 516, requiring the assessing authorities to deduct the present lessee's charges to rent and amortization from expected income when valuing possessory interests by an analysis of anticipated earning power are therefore disapproved.¹⁰

[26-28] It is contended that the value of the leaseholds, when no deduction from income is made for amortization and rent, will approach the estimated fee values of the land and improvements. Since it is conceivable that the "full cash value" of a long-term possessory interest may approach the value of the fee, near equality between the two estimated values would not of itself demonstrate invalidity in the valuation of either one. Nor does near equality of the leasehold values to those of the fee constitute a violation of the immunity of the federal government from taxation by the states. Since the tax is imposed solely on the privately owned possessory interest of the lessee, Rev. & Tax.Code, §§ 201, 104, 107, and under the terms of the contract between the federal government and the lessee will be paid entirely by the lessee (see also, 12 U.S.C.A. § 1748f), neither its legal nor economic incidence falls on the federal government. See, *Wilson v. Cook*, 327 U.S. 474, 483, 66 S.Ct. 663, 90 L.Ed. 793; *S. R. A., Inc., v. State of Minnesota*, 327 U.S. 558, 569, 66 S.Ct. 749, 90 L.Ed. 851; *Oklahoma Tax Comm. v. Texas Co.*,

9. The amount is predicated on the compound interest, equal yearly installments, and declining income assumptions of the Inwood Coefficient. (See, American Institute of Real Estate Appraisers, *The Appraisal of Real Estate*, Appendix, Table III.)

10. In *Hammond Lumber Co. v. County of Los Angeles*, 104 Cal.App. 235, 285 P. 896, the District Court of Appeal, in affirming a judgment denying recovery of taxes on a possessory interest, ex-

plained a method of valuation that deducted the lessee's rent from imputed gross income and that was presented in evidence to the county board of supervisors by the assessing authorities. 104 Cal.App. at page 244, 285 P. 896. That method did not control the decision of the court in the *Hammond* case, see especially, 104 Cal.App. at page 246, 285 P. 896, and it should not be inferred that it now controls assessing authorities.

336 U.S. 342, 364, 69 S.Ct. 561, 93 L.Ed. 721; *State of Alabama v. King & Boozer*, 314 U.S. 1, 9-14, 62 S.Ct. 43, 86 L.Ed. 3; cf. *Society for Savings in City of Cleveland v. Bowers*, 349 U.S. 143, 75 S.Ct. 607, 610.

[29] In determining the value of the leaseholds, the assessor imputed an income of 6% and taxes of 2% to an amount somewhat less than the estimated fee value of the land and improvements, deducted the \$100 rent paid to the government therefrom, and capitalized the difference at 8%. This method is erroneous in several respects. First, the deduction from imputed income of the \$100 rent paid to the government substitutes valuation according to the profitability of the property to its present owner for the statutory standard of "full cash value." As pointed out above, the price that a leasehold would command on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other is based on expected future net income from the leasehold without regard to rent paid by the present lessee. Second, no adequate distinction is made between imputed gross income and imputed net income. An imputed gross income would have to be sufficiently large to allow for deduction of anticipated necessary expenses incident to operating and maintaining the project, but no deduction for these items, either actual or imputed, is made. Imputed net income would equal the minimum reasonable return on the investment, but the assessor's method deducts the \$100 rent to be paid the government, and thereby reduces imputed income to a rate of return less than the rate of capitalization.

[30] The value of the leaseholds involved in the present case can be estimated more accurately by capitalizing expected future actual net income instead of an imputed income. According to the imputed income analysis used by the assessor, the value of the leaseholds was deemed to be equal to the present value of an income imputed to the "base value" of the leaseholds, the "base value" being equal to the estimated value of the fee less a deduc-

tion for "burdens and restrictions of the lease." The initial step in the computation, an estimation of the fee value of the land and improvements "by the same methods and approaches to value that [are used in assessing] all other taxable land in the county, similarly situated and of a similar nature," necessitates an assumption that land and improvements located in a military installation and devoted solely to housing designated persons at rents regulated by the government can be said to be "similarly situated and of a similar nature" to privately owned lands and improvements in the county, even though great differences exist in geographic location, expected stability of income, and the range of uses for which the properties are available. The second step in the assessor's computation was to deduct a "restriction percentage for limitations on the use prescribed by the lease," the amount "depending upon the burdens and restrictions of the lease," but there is no indication either that the percentage deducted is an adequate or proper measure of such limitations, or that the lease in fact imposes any burdens on the fee, for it is doubtful that the land would promise the substantial income that it now does were it not for the assurance of continued occupancy by military personnel provided by the lease. See, *Meade Heights, Inc., v. State Tax Comm. of Md.*, 202 Md. 20, 31, 95 A.2d 280. After deducting an allowance for limitations, the assessor imputed an income of 6% to the remainder, but it is not at all clear that actual anticipated income less expenses will approximate such imputed income. Moreover, to obtain the present value of the imputed income, the assessor capitalized the income at a rate of 8%. The capitalization rate is supposed to reflect risk and interest attributable to the particular investment to which it is applied (see, 1 Bonbright, *The Valuation of Property*, pp. 259-264), but the assessor's rate appears to measure, not the risk and interest attributable to the investment at bar, but that attributable to an income hypothetically imputed to a "base value." In summation, the assessor's valuation of the

leaseholds is predicated on the assumption that a certain percentage of an amount somewhat less than the fee value, when capitalized at an abstractly reasonable rate, equals the value of the possessory interest. In some cases this assumption may have to be made, and we do not condemn all estimates of value based on capitalization of an imputed income. In valuing property wherein actual income is derived in large part from enterprise activity and cannot be ascribed entirely to the use of the property, an imputed income analysis may be both useful and appropriate. In the present actions, however, the income from the possessory interests will be from sub-rentals and can be ascribed entirely to the possessory estates. Moreover, future income can be expected to remain stable, for rents are controlled in amount by the Federal Housing Administration and the Department of the Navy and occupancy is assured by the fact that the project is located on a military installation that is "deemed to be a permanent part of the Military Establishment." * (12 U.S.C.A. § 1748b(b) (2).) Expected annual expenditures have been estimated by both the Federal Housing Administration and the lessees and therefore carefully formulated evidence as to anticipated expenses is available to the assessing authorities. Under these circumstances, the value of plaintiffs' possessory interests can best be estimated in terms of actual income rather than imputed income. See, *Pullman Co. v. Richardson*, 185 Cal. 484, 496, 197 P. 346; *Alpaugh Irrigation Dist. v. County of Kern*, 113 Cal.App.2d 286, 293, 248 P.2d 117; *Birch v. County of Orange*, 59 Cal.App. 133, 138, 210 P. 57; *H. & W. Pierce, Inc., v. Santa Barbara County*, 40 Cal.App. 302, 306, 180 P. 641; *Wild Goose Country Club v. County of Butte*, 60 Cal.App. 339, 341, 212 P. 711.

[31] Although the trial court employed methods of actual income analysis both in its findings and in its order of remand, we have concluded that both of the court's methods are improper for estimating the

"full cash value" of possessory estates. In its findings the court deducted annual "burdens," including payments of principal and interest on the mortgage debts, from annual "benefits," and thereby computed a value that was inversely proportional to the size of mortgage debt payments. Since deduction of "credits secured by mortgage or trust deed" is contrary to section 1 of Article XIII of the California Constitution and to well established decisions of this court, *Lick v. Austin*, 43 Cal. 590, 594; *Eisley v. Mohan*, 31 Cal.2d 637, 643, 192 P.2d 5; cf. *Henne v. Los Angeles County*, 129 Cal. 297, 298, 61 P. 1081, decided before repeal in 1910 of former section 4 of Article XIII, the method is erroneous. Moreover, in stating that net "burdens" have a present value, the court assumed that annual losses expected to be sustained in future years have a present value in the same sense as money to be received in regular future installments, and it also assumed that such present value may be used in valuing possessory interests for purposes of taxation. Although the assumption that future losses have a present value could rest on the theory that a sum of money invested at present to provide for the payment of expected losses might be termed their present value, a property valuation computed in the manner illustrated by the court's findings and resting on the court's assumptions would in effect alter the property tax from a levy on the present value of property to a tax on the net worth of the individual taxpayer. Plaintiffs, however, do not rely on the method used in the court's findings, but contend that the method outlined in the order of remand is controlling. According to this method, the present lessee's anticipated annual charges to operating expenses, taxes, rent, and amortization of money invested in the leasehold together with interest thereon are deducted from anticipated annual gross income. The difference, when capitalized and reduced to the "proper" ratio of assessment to market values, is deemed the value of the possessory interest. The error of this

* 63 Stat. 572.

method is that deduction of amortization does not conform either to the statutory standard of value or to the accepted principles of capitalization heretofore discussed.

[32] The proceedings must be remanded to the county board of equalization for determination of the value of the possessory interests and the taxes thereon. *Universal Consol. Oil Co. v. Byram*, 25 Cal.2d 353, 362-363, 153 P.2d 746. The board shall take evidence on annual anticipated gross income, operating and maintenance expenses, the amount required to be deposited in the replacement reserve, and the percentage that will adequately allow for taxes. Moreover, since the rate of capitalization is predicated on the risk, interest, and provisions for replacement of capital relative to the investment to which it is applied (see, 1 *Bonbright*, op. cit. supra, pp. 259-262), the board shall take evidence on these matters and ascertain therefrom the proper rate of capitalization. It shall deduct annual operating and maintenance expenses and the deposit to the replacement reserve from annual gross income, and shall capitalize the difference at the rate that it determines will allow for risk, interest, and taxes. The period of capitalization shall be the remaining years of the lease, for although the government is authorized to terminate the leases at the end of fifty years, the terms of the leases and the statute under which they were drawn (see especially 12 U.S.C.A. § 1748b (b) (2)) clearly contemplate that the leases will exist for their full terms. *Kaiser Co. v. Reid*, 30 Cal.2d 610, 620, 184 P.2d 879.

The judgments and orders are reversed with directions to the trial court to remand the proceedings to the county board of equalization for action in accord with this opinion. Each party shall bear its own costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

FAIRFIELD GARDENS, Inc., a corporation,
Plaintiff and Appellant,

v.

COUNTY OF SOLANO, a Body Corporate
and Politic, Defendant and Respondent.

Sac. 6568.

Supreme Court of California.

In Bank.

Nov. 25, 1955.

Rehearing Denied Dec. 21, 1955.

Taxpayer brought action against county to recover taxes paid under protest. The Superior Court of Solano County, Harlow V. Greenwood, J., entered judgment adverse to the taxpayer, and the taxpayer appealed. The Supreme Court, Traynor, J., held that in determining assessment values of leaseholds of lessee taxpayer, which constructed housing projects on lands of the federal government at air force base, deductions should not be made for lessee's debt payments or amortization of its investment in the leaseholds from anticipated gross income.

Judgment affirmed.

1. Taxation ☞355

In determining assessment values of leaseholds of lessee, which constructed housing projects on lands of the federal government at air force base, deductions should not be made for lessee's debt payments or amortization of its investment in the leaseholds from anticipated gross income. National Housing Act, §§ 801-809, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748f; 10 U.S.C.A. § 1270; Revenue and Taxation Code, §§ 104, 107, 110, 401, 1603, 1605, 1607, 1609, 4986; West's Ann.Const. art. 13, § 1.

2. Taxation ☞355

In determining assessment values of leaseholds of lessee, which constructed housing projects on lands of the federal government at air force base, deductions should not have been made for rent paid by lessee to the government from anticipated annual gross income. National Housing

Act, §§ 801-809, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748f; 10 U.S.C.A. § 1270; Revenue and Taxation Code, §§ 104, 107, 110, 401, 1603, 1605, 1607, 1609, 4986; West's Ann.Const. art. 13, § 1.

3. Taxation ⇨495

Tax assessment would not be set aside on appeal because of erroneous deduction of rent paid by taxpayer to the government, where only the taxpayer appealed and not county, since the error was favorable to the taxpayer.

4. Taxation ⇨495

Tax assessment of leasehold interests would not be set aside because of the erroneous deduction of \$200 rent paid by the taxpayer, since *de minimis non curat lex*.

5. Taxation ⇨348

In determining assessment values of leaseholds of lessee, which constructed housing projects on lands of the federal government at air force base, fact that separate deduction was made from present value of future net income for restrictions in leases, consisting of rent ceilings, replacement requirements, etc., would not invalidate assessor's method of valuation. National Housing Act, §§ 801-809, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748f; 10 U.S.C.A. § 1270; Revenue and Taxation Code, §§ 104, 107, 110, 401, 1603, 1605, 1607, 1609, 4986; West's Ann.Const. art. 13, § 1.

Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., and Francis H. O'Neill, Los Angeles, for appellant.

Kenneth I. Jones, County Counsel, James M. Shumway, Asst. County Counsel, Fairfield, Felix S. Wahrhaftig, Edmund G. Brown, Atty. Gen., E. G. Benard and James E. Sabine, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

Fairfield Gardens, Inc., a California corporation, hereinafter called Fairfield, brought an action against the County of Solano to recover taxes paid under protest that were levied against its possessory interest in tax exempt land and improvements. Revenue & Taxation Code, § 5138.

It appeals from a judgment that it recover nothing and that defendant recover costs.

Fairfield constructed two housing projects containing 980 dwelling units on separate plots of land owned by the United States Government at Travis Air Force Base in Solano County. The projects were built pursuant to the provisions of Title VIII of the National Housing Act, 12 U.S.C.A. §§ 1748-1748h (known as the Wherry Act) and section 1270 of Title 10 of the United States Code Annotated, were financed by loans secured by mortgages insured by the Federal Housing Administration, and were subleased to military and civilian personnel assigned to duty at the base and designated as tenants by the commanding officer at rents regulated by the Federal Housing Administration and the Air Force. On completion, all improvements became the property of the federal government, and each of the projects is leased to Fairfield for 75 years at an annual ground rental of \$100. The provisions of the lease are essentially identical with those of the lease between the government and De Luz Homes, see *De Luz Homes, Inc., v. County of San Diego, Cal.*, 290 P.2d 544, and, as in that case, state that the lessee shall pay all "taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises." See, 12 U.S.C.A. § 1748f.

The assessor valued Fairfield's possessory interests in the land and improvements, Rev. & Tax.Code, §§ 107, 104, for the tax year 1953-1954 at \$1,574,880 and levied a tax thereon of \$64,727.56. Contending that the value of the leasehold was worth no more than a nominal sum of \$20, Fairfield filed an application for reduction of the valuation and cancellation of the tax thereon with the county board of equalization. Rev. & Tax.Code, §§ 1603, 1605, 1607, 4986. At the hearing of the application, Rev. & Tax. Code, § 1609, Fairfield introduced forecasts of maximum potential gross income, expected vacancies, and anticipated expenses, including operating expenses, required payments into a replacement reserve, and payments of principal and interest on its mort-

gage debt. It contended that in valuing the leaseholds, the assessing authorities should deduct all of the foregoing expenses from gross income and should capitalize the difference for a period of time equal to the anticipated useful life of the improvements at a rate adequate to allow for risk, interest, and taxes. It also advocated an alternative method of valuation, whereby its total investment in the leasehold, together with interest thereon, would be deducted in annual aliquot portions from anticipated annual gross income, and the difference would be capitalized over the remaining term of the lease. Under either method, it asserted, the capitalized value of future income is less than zero, and therefore the leasehold has no taxable value.

In opposition to the application, the assessor stated that he estimated that gross income from the leasehold, after a vacancy allowance of 3% in dwelling units and 50% in carports, will be \$892,000 per year and that net income, after an allowance of \$321,872 for operating expenses and the required payment into the replacement reserve, will be \$571,020 [sic] per year. He stated that in his opinion a discount of 6% for risk and interest and 2% for taxes would be adequate, and that future annual net income from the leasehold, when capitalized at such discount, has a present value of \$7,160,000. He stated that he deducted 10% for "restrictions in the leases," reduced the difference to 25% thereof to allow for the ratio of assessment value to market value, apportioned the net amount, \$1,574,880, between the two projects in proportion to the number of dwelling units in each, and entered \$792,030 and \$792,850 on the tax roll as the value of the possessory interests in each project. In allowing for anticipated annual expenses, the assessor included, *inter alia*, office salaries, telephone and telegraph, legal and auditing services, janitorial materials, water and sewage, cleaning and grounds payroll, painting, repairs, insurance, and rent paid to the government by Fairfield, but he did not include either Fairfield's payments of principal and interest on its mortgage debt or an allowance for amortization of its investment in

the leasehold. Although some differences existed between the assessor and Fairfield in respect to amounts of anticipated income and expenses, the major point at issue was whether deductions for the lessee's debt payments or amortization of its investment in the leasehold should be made from anticipated gross income.

The board sustained both the method of valuation used by the assessor and the amount of the valuation. After receiving in evidence the documents and transcript of testimony introduced before the board, the court reduced the present value of anticipated net income to \$6,977,692 to correct arithmetical errors and affirmed the decision of the board. Fairfield appeals, contending that in valuing its leasehold by an analysis of earning power, the assessing authorities must deduct payments of its mortgage debt or amortization of its investment from anticipated annual gross income.

[1] Fairfield's contentions have been determined adversely to it in *De Luz Homes, Inc., v. County of San Diego, Cal.*, 290 P.2d 544, wherein it was stated that deduction of mortgage payments would be contrary to section 1 of Article XIII of the California Constitution and that a deduction for amortization of the lessee's investment would substitute a method of valuation dependent on the profitability of property to its present owner for the statutory standard of "full cash value." *Rev. & Tax. Code*, §§ 401, 110.

[2-4] The method used by the assessor in the present case is similar to that approved in *De Luz*, but we must disapprove it to the extent that it deducts rent paid by Fairfield to the government from anticipated annual gross income. The rent that a leasehold would command on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other is based on expected future net income from the leasehold without regard to the rent presently paid by the lessee, and therefore such rent is not deducted in estimating the earning power of the leasehold. The assessment of the possessory interest of Fairfield for the tax year 1953-1954, however, need not be set aside

because of the erroneous deduction of the \$200 rent paid to the government, for although the error was favorable to the taxpayer, the county did not appeal, *Hamilton v. Abadjian*, 30 Cal.2d 49, 53, 179 P.2d 804; *In re Estate of Keith*, 175 Cal. 26, 28, 165 P. 10, and, moreover, *de minimis non curat lex*. *Merrill v. Hurlburt*, 63 Cal. 494, 497; see, *Miller & Lux, Inc., v. Richardson*, 182 Cal. 115, 128, 187 P. 411; *H. & W. Pierce, Inc., v. Santa Barbara County*, 40 Cal.App. 302, 306, 180 P. 641 and cases there cited.

[5] A second difference between the method used by the assessor in the present case and that approved in *De Luz* is the deduction from the present value of future net income in the present case for "restrictions in the lease, consisting of rent ceilings, replacement requirements, etc." In *De Luz*, the assessor estimated the fee value of land and improvements in the leasehold and deducted a percentage thereof as an allowance for limitations imposed by the lease. We disapproved the entire method of valuation, and stated in regard to the deduction from the value of the fee that there was no indication "either that the percentage deducted is an adequate or proper measure of such limitations, or that the lease in fact imposes any burdens on the fee." The deduction in the present case, however, is not from the value of the fee but from the expected earning power of the leasehold, and makes proper allowance for the risk that earnings may be less than presently expected. Although the risk that future income may be less than presently expected may be reflected adequately in the estimate of future annual incomes and in a capitalization rate computed according to risk, interest, and provisions for replacement of assets, see *De Luz Homes, Inc., v. County of San Diego*, Cal., 290 P.2d 544; 1 Bonbright, *The Valuation of Property*, pp. 259-262; *Finney, Principles of Accounting* (3d ed.), ch. 10, the fact that a separate deduction was made for it in the present case does not invalidate the assessor's method of valuation.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

VICTOR VALLEY HOUSING CORPORATION, a Corporation, Plaintiff and Respondent,
v.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic, Defendant and Appellant.

MESA ESTATES, Inc., a Corporation, Plaintiff and Respondent,
v.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic, Defendant and Appellant.
L. A. 23494, 23495.

Supreme Court of California.

In Bank.

Nov. 25, 1955.

Rehearing Denied Dec. 21, 1955.

Taxpayers brought actions against county for recovery of taxes paid under protest. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgments and orders adverse to the county, and the county appealed. The Supreme Court, Traynor, J., held that in determining assessment values of possessory interests of taxpayer lessees in housing projects constructed on air force base of United States government under the National Housing Act, limitation of anticipated earnings to period of cost amortization would make value dependent on income accounting of present owner of property, and would be contrary to the statutory standard of "full cash value," and, in estimating value of future earning power, it was necessary to take into account anticipated net earnings for full period during which it was expected that income would be received.

Judgments and orders reversed with directions to remand proceedings to county board of equalization.

I. Taxation 348

In determining assessment values of possessory interests of lessees in housing projects constructed on air force base of United States government under the National Housing Act, limitation of antici-

pated earnings to period of cost amortization would make value dependent on income accounting of present owner of property, and would be contrary to the statutory standard of "full cash value," and, in estimating value of future earning power, it was necessary to take into account anticipated net earnings for full period during which it was expected that income would be received. National Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b(b) (2), 1748f; Revenue and Taxation Code, §§ 110, 401, 5096-5099, 5103; 10 U.S.C.A. §§ 1270, 1270d.

2. Taxation ⇨348

In determining assessment values of possessory interests of lessees in housing projects constructed on air force base of United States government under the National Housing Act, it was proper, in estimating future net earnings, to deduct expected maintenance expenditures from anticipated gross income of years in which such expenditures will be made or incurred, and anticipated net income accordingly is reduced for years in which large expenditures are anticipated. National Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b(b) (2), 1748f; Revenue and Taxation Code, §§ 110, 401, 5096-5099, 5103; 10 U.S.C.A. §§ 1270, 1270d.

3. Taxation ⇨348

In determining assessment values of possessory interests of lessees in housing projects constructed on air force base of United States government under the National Housing Act, deductions under accounts entitled "deferred maintenance," "future but presently anticipable ordinary maintenance and repair," or "depreciation," for amounts that do not reflect anticipated expenditures for years in which they are deducted but that instead represent amortization of investment, is to substitute improperly a method of valuation dependent on profitability of property to its present owner for statutory standard of "full cash value." National Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b(b) (2), 1748f; Revenue and Taxation Code, §§ 110, 401, 5096-5099, 5103; 10 U.S.C.A. §§ 1270, 1270d.

4. Taxation ⇨348

In determining assessment values of possessory interests of lessees in housing projects constructed on air force base of United States government under the National Housing Act, though expenses might prove to be more costly and net income less than presently anticipated, such risks properly could be taken into account in selecting rate of capitalization. National Housing Act, §§ 801-809, 803, 807 as amended 12 U.S.C.A. §§ 1748-1748h, 1748b(b) (2), 1748f; Revenue and Taxation Code, §§ 110, 401, 5096-5099, 5103; 10 U.S.C.A. §§ 1270, 1270d.

Albert E. Weller, County Counsel, J. B. Lawrence, Deputy County Counsel, San Bernardino, Felix S. Wahrhaftig, Sacramento, Edmund G. Brown, Atty. Gen., E. G. Benard and James E. Sabine, Asst. Attys. Gen., for appellant.

Holbrook, Tarr, Carter & O'Neill, W. Summer Holbrook, Jr., Francis H. O'Neill, Los Angeles, and William J. Johnstone, Victorville, for respondents.

TRAYNOR, Justice.

Victor Valley Housing Corporation and Mesa Estates, Inc., California corporations, hereinafter called Victor Valley and Mesa, brought actions against the County of San Bernardino, Revenue & Taxation Code, § 5103, for recovery of taxes paid under protest that were levied against possessory interests in tax exempt land and improvements for the tax year 1953-1954. The actions were consolidated for trial, and the county appeals from judgments in favor of plaintiffs and orders remanding the proceedings to the county board of equalization.

Victor Valley and Mesa are housing projects of 400 and 250 units, respectively, for military and civilian personnel assigned to duty at George Air Force Base in San Bernardino County. The projects are located on land owned by the United States Government and leased to Victor Valley and Mesa for 75 years at annual rentals of \$100, were constructed by the lessees pursuant to the provisions of Title VIII of the National Housing Act, 12 U.S.C.A. §§

1748-1748h and section 1270 of Title 10 of the United States Code annotated, were financed by loans secured by mortgages insured by the Federal Housing Administration, and were subleased to persons designated as tenants by the commanding officer at rents regulated by the Federal Housing Administration and the Air Force. On completion, all improvements became the property of the federal government, and Victor Valley and Mesa manage the projects under leases that are essentially identical with the lease between De Luz Homes and the government, see, *De Luz Homes, Inc., v. County of San Diego*, Cal., 290 P.2d 544, and that provide, as in the case of De Luz, that the lessee shall pay "all taxes, assessments, and similar charges which, at any time during the term of the lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises." 10 U.S.C.A. § 1270d; 12 U.S.C.A. § 1748f.

The assessor valued the possessory interests of Victor Valley and Mesa in land improvements for the tax year 1953-1954 at \$484,200 and \$344,000, respectively, and levied taxes thereon of \$25,226.82 and \$17,922.40.¹ Victor Valley and Mesa paid the levies under protest and filed applications with the county board of equalization for reduction of the valuations to zero. At the hearing of the application, the assessor testified that in valuing the leaseholds he estimated the fee value of the land, imputed an income thereto of 7.5%, deducted the annual rent paid to the government from such income, capitalized the difference between imputed income and rent at 7.5%, deducted 5% of the product "in recognition of the restrictive conditions of the lease," and deemed the resulting figure the present value of the possessory interest in land. The replacement cost of improvements, less deductions for depreciation and restrictions created by the lease, was deemed the value of the possessory interest in improvements, and the sum of the values of the possessory interests in land and improve-

ments was considered the present value of the leasehold.

As a check on the foregoing method, the assessor made an analysis of anticipated earning power by estimating future annual gross income, deducting therefrom operating expenses, payment into a replacement reserve required by the Federal Housing Administration, and rent paid to the government, and capitalizing the difference at a rate thought adequate to allow for risk, interest and taxes. He did not deduct payments of principal and interest on the lessees' mortgage debts or amortization of their investments in the leaseholds. Since he thought that the buildings would be greatly depreciated in 53 years, he limited his expectation of actual income to such period, and determined the present value of the remaining 20 years of the lease by imputing an income to the land, deducting therefrom rent to be paid to the government, and capitalizing the difference. The sum of the capitalized values of anticipated and imputed earnings was deemed the value of the leasehold. Since the figure obtained by the first method was lower than that obtained by the immediately foregoing method, he selected the former as the basis of his assessment, reduced it to 20% thereof to allow for the ratio of assessment value to market value, and entered it on the tax roll. Victor Valley and Mesa substantially agreed with the amount of gross income and operating expenses forecast by the assessor, but contended that in estimating net income, he should deduct allowances for deferred replacement of assets and payments of principal, interest, and insurance on their mortgage debts.

The board of equalization ordered that the present value of improvements that will revert to the government on termination of the leases be deducted from the value of the leaseholds and otherwise affirmed the method of valuation employed by the assessor. The amount of the valuation of Mesa was not affected by the board's order, and that of Victor Valley was reduced by

1. The assessor made initial assessments for the tax year 1953-1954 of \$398,000 against Victor Valley and \$356,660 against Mesa on the assumption that

the lessees owned the improvements in fee, but at his request the board of equalization ordered these assessments cancelled.

but \$1,000. Claims for refund were denied by the board of supervisors. Rev. & Tax Code, §§ 5096-5099. After receiving in evidence the documents and transcript of testimony introduced before the board of equalization, the court held the assessor's method of valuation improper and remanded the proceedings to the board with directions to take evidence on the amount of money invested in the leaseholds and the "reserve necessary for future but presently anticipable ordinary maintenance and repair." The board was directed to deduct rent to the government, operating expenses, amortization, a specified sum "for deferred maintenance reserve for replacement of household equipment," and a specified sum "for the future but presently anticipable ordinary maintenance and repair of the housing units" from anticipated annual gross income, to capitalize the difference for the remaining years of the lease at 7.5%, to reduce the amount so computed to 20% thereof to allow for the ratio of assessed value to market value, and to enter the net amount on the tax roll, provided that it enter an amount no less than \$3,900.

The method used by the assessor was held inappropriate for valuing leaseholds of the kind in question in *De Luz Homes, Inc., v. County of San Diego*, Cal., 290 P.2d 544, wherein it was stated that under the circumstances attending such leaseholds, the value of plaintiffs' possessory interests can best be estimated in terms of actual income rather than imputed income, and that in any event, an analysis of imputed income must make an adequate distinction between imputed gross income and imputed net income.

[1] The income analysis used by the assessor as a check against his imputed income estimate requires further discussion. In the assessor's income analysis, it is assumed that since the buildings will be greatly depreciated at the end of fifty-three years, actual income can be anticipated only for such time, and that to value the remaining twenty years of the lease, it is necessary to impute an income to the land alone. The assessor's exhibits make clear, however, that in fifty-three years it is not expected either that the buildings will have come to the end

of their economic life or that the receipt of income will cease, but it is expected that the cost of the buildings will be largely amortized. Limitation of anticipated earnings to the period of cost amortization, however, makes value dependent on the income accounting of the present owner of property, and is contrary to the statutory standard of "full cash value." Rev. & Tax Code, §§ 401, 110; *De Luz Homes, Inc., v. County of San Diego*, Cal., 290 P.2d 544. In estimating the value of future earning power, it is necessary to take into account anticipated net earnings for the full period during which it is expected that income will be received. Since the terms of the lease and the statute under which it was drawn (see especially, 12 U.S.C.A., § 1748b(b) (2)) contemplate that the possessory interest will exist for the full period of the lease, the assessing authorities could properly limit expectations of future income to a period of time shorter than the term of the lease only if they believed that income in fact will be zero after such time.

[2-4] The order of the court was similar to the order of the trial court in *De Luz Homes, Inc., v. County of San Diego*, Cal., 290 P.2d 544, and must be disapproved as contrary to the statutory standard of "full cash value." Rev. & Tax Code, §§ 401, 110. Moreover, the deductions ordered for "deferred maintenance reserve for replacement of household equipment" and for "future but presently anticipable ordinary maintenance and repair of housing units" raise additional questions. In estimating future net earnings, it is proper to deduct expected maintenance expenditures from the anticipated gross income of the years in which such expenditures will be made or incurred, and anticipated net income accordingly is reduced for years in which large expenditures are anticipated. To make deductions, however, under accounts entitled "deferred maintenance," "future but presently anticipable ordinary maintenance and repair," or "depreciation," for amounts that do not reflect anticipated expenditures for the years in which they are deducted but that instead represent amortization of investment is to substitute a method of valuation dependent on the profitability of property

to its present owner for the statutory standard of "full cash value." Although expenses may prove to be more costly and net income less than presently anticipated, such risks properly may be taken into account in selecting the rate of capitalization. (See, 1 Bonbright, *The Valuation of Property*, pp. 259-262.)

The judgments and orders are reversed with directions to the trial court to remand the proceedings to the county board of equalization for action in accord with the opinions expressed above and in *De Luz Homes, Inc., v. County of San Diego, Cal.*, 290 P.2d 544. Each party shall bear its own costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



45 Cal.2d 586

EL TORO DEVELOPMENT CO., Inc., a corporation, Plaintiff and Appellant,

v.

COUNTY OF ORANGE, a Body Corporate and Politic, Defendant and Respondent.

L. A. 23769.

Supreme Court of California.

In Bank.

Nov. 25, 1955.

Rehearing Denied Dec. 21, 1955.

Taxpayer brought action against county to recover taxes paid under protest. The Superior Court of Orange County, John Shea, J., entered judgment adverse to the taxpayer, and taxpayer appealed. The Supreme Court, Traynor, J., held that where assessor, in determining assessment value of lessee taxpayer's possessory interests in housing project constructed at marine air base on land owned by the federal government, under the National Housing Act, made no distinction between imputed gross income and imputed net income, and valuation of leasehold could be more adequately

made by capitalizing anticipated earnings, assessor's valuation of possessory interests in land and improvements could not be sustained.

Judgment reversed with directions to remand proceedings to county board of equalization.

1. Taxation — 348

Where assessor, in determining assessment value of lessee's possessory interests in housing project constructed at marine air base on land owned by the federal government, under the National Housing Act, made no distinction between imputed gross income and imputed net income, and valuation of leasehold could be more adequately made by capitalizing anticipated earnings, assessor's valuation of possessory interests in land and improvements could not be sustained. National Housing Act, §§ 801-805, 807 as amended 12 U.S.C.A. §§ 1748-1748d, 1748f; 34 U.S.C.A. §§ 522a, 522e; Revenue and Taxation Code, §§ 102, 1601-1615, 4986, 5138.

2. Taxation — 348

Assessor, in determining assessment value of lessee's possessory interests in housing project constructed at marine air base on land owned by the federal government, under the National Housing Act, should not have assessed refrigerators, ranges, and garbage disposal units. National Housing Act, §§ 801-805, 807 as amended 12 U.S.C.A. §§ 1748-1748d, 1748f; 34 U.S.C.A. §§ 522a, 522e; Revenue and Taxation Code, §§ 102, 1601-1615, 4986, 5138.

Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., Francis H. O'Neill, Los Angeles, and Alexander W. Rutan, Santa Ana, for appellant.

Joel E. Ogle, County Counsel, George F. Holden and Stephen K. Tamura, Asst. County Counsel, Santa Ana, for respondent.

TRAYNOR, Justice.

El Toro Development Co., a California corporation, hereinafter called El Toro, brought an action against the County of

Orange, Revenue & Taxation Code, § 5138, to recover taxes paid under protest that were levied against personal property and possessory interests in tax-exempt land and improvements. Plaintiff appeals from a judgment that it recover nothing.

El Toro had a 571-unit housing project constructed at El Toro Marine Air Base in Orange County on land owned by the United States Government that was leased to El Toro for 75 years at an annual rental of \$100. The project was built pursuant to the provisions of Title VIII of the National Housing Act, 12 U.S.C.A., §§ 1748-1748d and section 522a of Title 34 of the United States Code Annotated. It was financed to the extent of 90% of its cost by a loan from the Bank of America and to the extent of 10% thereof by a loan from the contractors who built it, and was subleased to military and civilian personnel designated as tenants by the commanding officer at rents regulated by the Federal Housing Administration and the Marine Corps. The loan by the Bank of America is secured by a mortgage on the leasehold insured by the Federal Housing Administration and by a chattel mortgage on all ranges, refrigerators, and garbage disposal units in the project. The lease between El Toro and the government provides: "That the buildings and other improvements erected by the Lessee, constituting the aforesaid housing project, shall be and become, as completed, real estate and part of the leased premises, and property of the United States, leased to the Lessee to effectuate the purposes of Title VIII of the National Housing Act * * *. That upon the termination of the FHA period (as hereinafter defined),¹ all ranges, refrigerators, screens, shades, and other items required to be furnished in accordance with the detailed plans and specifications submitted by the Department, and approved by the Commissioner, shall remain on the leased premises and become the property of the Government without compensation;

provided, however, that where the Lessee replaces any such items, this Condition * * * shall apply only to the replacement."

Congress provided that the interest of the lessee is taxable, 34 U.S.C.A. § 522e, and the lease provides that the lessee must pay all "taxes, assessments and similar charges which, at any time during the term of the lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises." (See, 12 U.S.C.A. § 1748f.) The assessor placed an assessment of \$1,235,190 on El Toro's possessory interests in land and improvements and \$39,000 on the "personal property" consisting of ranges, refrigerators, and garbage disposal units, and levied taxes thereon of \$44,869.28. El Toro's application to the county board of equalization, Rev. & Tax.Code, §§ 1601-1615, 4986, for reduction of the valuation of its possessory interests in land and improvements and for cancellation of the assessment on personal property was denied.

The court found that the assessor valued the possessory interests in land by capitalizing imputed income, that he valued the possessory interests in buildings by deducting the present value of the government's reversion from the value of the fee and ascribing the difference to the lessee, and that he checked the values so obtained by analyzing anticipated income from the leasehold for forty-five years following construction of the project. These methods of valuation were used by the assessor in *Victor Valley Housing Corp. v. County of San Bernardino, Cal.*, 290 P.2d 565, and are described therein. Deeming the ranges, refrigerators, and garbage disposal units personal property owned by the lessee, he assessed them at their market value less 30% thereof to allow for the ratio of assessment value to market value. The court rejected El Toro's contentions that the ranges, refrigerators, and garbage disposal

1. Paragraph 26(b) of the lease states: "That as used herein, the term 'FHA period' means the period during which there is a mortgage insured or held by the Commissioner under the National

Housing Act covering the interest of the Lessee or the leasehold interest is owned and operated, or otherwise controlled by the Federal Housing Commissioner."

units were owned by the government and therefore were assessable only to the extent of El Toro's possessory interest in them, and that in estimating future earnings the assessing authorities should deduct either payments on the mortgage debts or amortization of the investment in the leasehold from anticipated gross income.

[1] Since the assessor's imputed income analysis made no distinction between imputed gross income and imputed net income, and since valuation of the leasehold may be more adequately made by capitalizing anticipated earnings, *De Luz Homes, Inc., v. County of San Diego, Cal.*, 290 P.2d 544, his valuation of the possessory interests in land and improvements cannot be sustained.

[2] His assessment of the refrigerators, ranges, and garbage disposal units must also be disapproved. Valuation by analysis of anticipated earnings assumes that the entire present value of a given piece of property is the capitalized sum of future net income from the property. (See, 1 Bonbright, *The Valuation of Property*, Ch. XI.) Since capitalized income represents the full value of the property, added amounts for separate parts of the property would be improper. In the present case, tenants rent dwelling-units equipped with screens, shades, ranges, refrigerators, and garbage disposal equipment and serviced by walks, roads, and other benefits, and their rentals therefore represent income from all of the property encompassed by the leasehold, and not merely the land and buildings. El Toro cannot charge additional rent for the ranges, refrigerators, and garbage disposal machinery, nor can it rent dwellings without such equipment. Anticipated sub-rentals, therefore, represent income from all of the property encompassed by the lease, and the present value of net sub-rentals represents the full value of the possessory interest. To tax that value and also the value of the ranges, refrigerators, and garbage disposal units, would be double taxation. (See, *Rev. & Tax.Code*, § 102.)

The judgment is reversed with directions to the trial court to remand the proceedings to the county board of equalization for ac-

tion in accord with the opinions expressed above and in *De Luz Homes, Inc., v. County of San Diego, Cal.*, 290 P.2d 544, and *Victor Valley Housing Corp. v. County of San Bernardino, Cal.*, 290 P.2d 565. Each party shall bear its own costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



137 Cal.Ap.2d 581

Mary MEGARRY and Letitia Megarry,
Plaintiffs and Appellants,

v.

James NORTON, Defendant and Respondent.
Civ. 8676.

District Court of Appeal. Third District.
California.

Dec. 6, 1955.

Action for libel. The defendant interposed a general and special demurrer. The Superior Court, Solano County, Greenwood, J., sustained a demurrer, the plaintiffs declined to amend the complaint and they appealed from the judgment. The District Court of Appeal, Van Dyke, P. J., held that in libel action against defendant who hung sign on parked automobile bearing inscription "Nuts To You-You Old Witch", complaint which alleged that plaintiffs were owners of business establishment in front of which automobile had been parked in alleged violation of ordinance, that plaintiffs had posted notice upon automobile calling attention of defendant to parking violation and advising him that if violations continued plaintiffs would call attention of traffic officers, and that defendant's sign was hung the following day, stated cause of action.

Reversed.

1. Libel and Slander ⇐19

In determining whether a publication is libelous it must be considered as a whole and must not be divided in segments and each portion treated as a separate unit. West's Ann.Civ.Code, § 45.

2. Libel and Slander ⇐19

In determining whether words are capable of defamatory meaning, courts will construe them according to fair and natural meaning that will be given them by reasonable persons of ordinary intelligence and will not consider what persons, setting themselves to work to deduce some unusual meaning, might extract from them. West's Ann.Civ.Code, § 45.

3. Libel and Slander ⇐97

In libel action against defendant who hung sign upon automobile bearing inscription "Nuts To You-You Old Witch", complaint was not subject to special demurrer on grounds that plaintiffs were not identified in the sign as being the object thereof, where such element was supplied by allegations as to ownership of property in front of which sign was displayed, coupled with allegations that persons to whom publication was made understood that plaintiffs were being thereby described. West's Ann.Civ.Code, § 45.

4. Libel and Slander ⇐97

In libel action against defendant who hung sign on automobile bearing inscription "Nuts To You-You Old Witch", complaint was not demurrable for failure to contain technical requirements of innuendo inducement and colloquium, if since plaintiffs were objects of publication as alleged publication was libelous on its face. West's Ann.Civ. Code, § 45a.

5. Libel and Slander ⇐84, 85

In libel action against defendant who hung sign upon automobile bearing inscription "Nuts To You-You Old Witch", complaint which alleged that plaintiffs were owners of business establishment in front of which automobile had been parked in alleged violation of ordinance, and that plaintiffs had posted on automobile a notice of violation and advised defendant that if violations continued owners would call attention of traffic officers, and that defendant's

sign was hung the following day stated cause of action. West's Ann.Civ.Code, § 45a.

O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, for appellants.

O'Hara, O'Hara & Healy, Vallejo, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered when appellants declined to amend their complaint after the trial court had sustained a demurrer thereto.

The complaint alleges that appellants are the owners of a business establishment located at 520 El Dorado Street in Vallejo and that they reside on property adjacent thereto; that for some time prior to February 13, 1952 the respondent, in violation of a city ordinance, continuously during the morning and evening hours parked his automobile at or about said establishment; that on February 13, 1952 the appellants caused to be posted upon respondent's automobile a notice which called his attention to his parking violations and advised him that if these violations continued the owners would call the attention of the traffic officers to the same; that on the next day the respondent "contriving to injure the plaintiffs, and each of them, in their reputation and to bring them into public contempt and ridicule" maliciously and wrongfully hung a sign upon a motor vehicle, parked at said location, in view of appellants' neighbors, the public, and the named traffic patrolman, which sign bore the inscription "Nuts To You-You Old Witch"; that appellants' neighbors, the public, and said officer, due to the location of said sign, reasonably understood the inscription thereon to refer to appellants and that as a result thereof appellants suffered distress of body and mind to their damage in the sum of \$5,000. They prayed for both general and exemplary damages.

It is apparent from the facts alleged that the sign placed in public view, as alleged, by respondent was intended to subject appellants to contempt and ridicule and its wording, its design and the place and manner of its publication made it apt for the

achievement of that purpose. Under the provisions of Section 45 of the Civil Code, therefore, the publication, if false, was libelous.

[1, 2] In determining whether a publication is libelous or not it must be considered as a whole and must not be divided into segments and each portion treated as a separate unit. *Washer v. Bank of America National Trust & Savings Association*, 87 Cal.App.2d 501, 197 P.2d 202; *Blake v. Hearst Publications Incorporated*, 75 Cal.App.2d 6, 170 P.2d 100; *Harris v. Curtis Publishing Co.*, 49 Cal.App.2d 340, 121 P.2d 761; *Rosenberg v. J. C. Penney Co.*, 30 Cal.App.2d 609, 86 P.2d 696. Treating the publication here complained of as a whole, the opening phrase "Nuts to You" discloses a purpose to expose the objects thereof to contempt and ridicule and the further and accompanying phrase "You Old Witch" was clearly used in a derogatory sense. In determining whether words are capable of defamatory meaning, the courts will construe them according to the fair and natural meaning that will be given them by reasonable persons of ordinary intelligence and will not consider what persons, setting themselves to work to deduce some unusual meaning, might extract from them. *Lorentz v. R.K.O. Radio Pictures, Inc.*, 9 Cir., 155 F.2d 84. The words used here are not fairly susceptible of an innocent interpretation, *Peabody v. Barham*, 52 Cal.App.2d 581, 584, 126 P.2d 668, for, assuming the truth of the charges that respondent acted under the circumstances alleged, then it is apparent that he intended to expose these women to contempt and ridicule and that he went about it effectively.

[3-5] Respondent interposed both a general and a special demurrer. He claims here that some of the specifications of special demurrer were good and that, therefore, since leave to amend was given and refused, the judgment appealed from must be affirmed. We do not agree. He says that the appellants were not identified in the publication as being the objects thereof. That element, however, is supplied by the allegations of the complaint as to the ownership of the property in front of which the sign was displayed, coupled with the al-

legations that the persons to whom the publication was made understood that the appellants were being thereby described. That is sufficient. He argues further that the alleged defamation is not libelous on its face and, therefore, in order to state a cause of action, the complaint must contain the technical requirements of innuendo, inducement and colloquium. But respondent's premise is not sound. The publication, once it is shown, as alleged, that appellants were the objects thereof, is libelous on its face as that phrase is used in Section 45a of the Civil Code. Hence, it was unnecessary to allege explanatory matters such as inducement, innuendo or other extrinsic facts. Appellants' complaint stated a cause of action and was not subject to the special demurrer pleaded.

The judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.



137 Cal.App.2d 689

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Samuel D. COLLINS, Defendant and
Appellant.

Cr. 5233.

District Court of Appeal, Second District,
Division 2, California.

Dec. 9, 1955.

Defendant was convicted of abortion and homicide growing out of an illegal operation and filed motion in nature of writ of coram nobis. The District Court of Appeal, Fox, J., held that defendant would not be heard to assert that it was unlawful to charge him with a prior conviction and that such charge operated to his prejudice.

Motion denied.

1. Criminal Law ¶997(4)

In proceeding on motion in nature of writ of *coram nobis*, defendant would not be heard to assert that it was unlawful to charge him with a prior conviction and that such charge in abortion and homicide prosecution operated to his prejudice.

2. Criminal Law ¶997(6)

Coram nobis is a remedy of narrow scope, and the writ is not intended to authorize any court to reverse and review its opinion, and will not lie to correct errors of law, but only enables court to recall some adjudication made while some fact existed which, if before court, would have prevented rendition of the judgment and which, without any fault or negligence of the party, was not presented to the court.

3. Criminal Law ¶997(2)

Defendant's motions for new trial and appeals from judgments of conviction for abortion and homicide growing out of an illegal operation were proper proceedings in which to present issue based upon asserted illegality of inclusion of his prior conviction in the several counts of the informations.

4. Criminal Law ¶997(6)

Coram nobis will not lie for purpose of obtaining a belated review of a question of law.

Samuel D. Collins, in pro. per.

William Bronsten, Los Angeles, court appointed counsel.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

This is a motion, filed by defendant in propria persona,¹ which is in the nature of a writ of *coram nobis*. *People v. Smith*, 120 Cal.App.2d 531, 534, 261 P.2d 306. Defendant seeks to vacate sentences pronounced against him following his convictions in 1946 of abortion and homicide growing out of an illegal operation. As a part of each count it was charged that de-

fendant had suffered a prior conviction for abortion. This allegation was true. See *People v. Collins*, 4 Cal.App.2d 86, 40 P.2d 542. Defendant appealed from the 1946 judgments and orders denying his motions for new trial. See *People v. Emery*, 79 Cal.App.2d 226, 179 P.2d 843, and *People v. Collins*, 80 Cal.App.2d 526, 132 P.2d 585. They were each affirmed and a hearing was denied by the Supreme Court in each case.

[1] Defendant bases his motion on the theory that it was unlawful to charge the prior conviction and that it operated to his prejudice by increasing his minimum sentence from 9 to 15 years. His motion can not be granted.

[2] As this court recently pointed out in a related proceeding, *People v. Collins*, 136 Cal.App.2d 756, 289 P.2d 302, "*coram nobis* is a remedy of narrow scope." *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13, 15; *People v. Sica*, 116 Cal.App.2d 59, 62, 253 P.2d 75. The writ "is not intended to authorize any court to revise and review its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court." (Emphasis added.) *People v. Gilbert*, 25 Cal.2d 422, 442, 154 P.2d 657, 667; *People v. McCoy*, 115 Cal.App.2d 565, 567, 252 P.2d 371; *People v. Smith*, supra. As said in *People v. Tuthill*, 32 Cal.2d 819, 822, 198 P.2d 505, 506, "the writ does not lie to correct errors of law." *People v. Cook*, 97 Cal.App.2d 284, 285, 217 P.2d 498; *People v. Martinez*, 88 Cal.App.2d 767, 771, 199 P.2d 375.

[3,4] Defendant had an opportunity to raise the asserted illegality of the inclusion of his prior conviction in the several counts of the informations on his motions for a new trial and on his appeals. Those were the proper proceedings in which to present that issue. *People v. McVicker*, 37 Cal.App.2d 470, 473, 99 P.2d 1110; *People v. Reid*, 195 Cal. 249, 253, 232 P. 457, 36 A.L.R. 1435. By the present motion defendant is seeking a belated review of a ques-

1. This court appointed counsel to represent him in this proceeding.

tion of law. *Coram nobis* does not lie for that purpose under the authorities cited above.

The motion is denied.

MOORE, P. J., and ASHBURN, J. pro tem., concur.



137 Cal.App.2d 630

Alton D. HURLEY, Plaintiff and Respondent,

v.

Ralph B. SMITH, doing business as Ralph B. Smith Processing Plant, Defendant and Appellant.

Civ. 8623.

District Court of Appeal, Third District, California.

Dec. 8, 1955.

Action by employee for wages and out of pocket expenses. The Superior Court, Merced County, R. R. Sischo, J., entered judgment for employee and employer appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding that employer had orally agreed to hire employee at a salary of \$750 per month plus out of pocket expenses.

Affirmed.

1. Appeal and Error ⇨931(1)

Upon review of a judgment for plaintiff, appellate court must view the record in the light most favorable to him.

2. Master and Servant ⇨80(10)

In employee's action for wages, evidence sustained finding that employer had orally agreed to hire employee at a salary of \$750 per month plus out of pocket expenses.

3. Evidence ⇨588

Before evidence can be disregarded as inherently improbable, there must exist a

physical impossibility of the evidence being true, or its falsity must be apparent without resort to inference or deductions.

4. Appeal and Error ⇨1011(1)

Mere substantial conflicts in evidence are wholly insufficient to warrant a reviewing court in substituting its opinion for that of the trial court.

V. P. DiGiorgio and Thomas R. Davis, Bakersfield, for appellant.

Chas. M. Stark and Paul W. McComish, San Francisco, for respondent.

PEEK, Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of \$3,296.67, for salary and out-of-pocket expenses found by the court to be due under the terms of an oral contract of employment.

Plaintiff's complaint alleged three separate causes of action. The first alleged, and the court found, that on August 8, 1952, plaintiff and defendant entered into an oral contract under the terms of which defendant employed plaintiff as superintendent of a turkey processing plant to be operated by defendant; that defendant promised to pay plaintiff a salary at the rate of \$750 a month; and that plaintiff rendered services in accordance with said agreement between August 8, 1952, and January 15, 1953. The second cause of action alleged, and the court found, that defendant agreed to pay plaintiff his out-of-pocket expenses. The third cause of action alleged defendant to be indebted to plaintiff for services previously rendered at defendant's request, upon which count the court found against plaintiff. Defendant's appeal is directed solely to the court's finding and judgment as predicated upon plaintiff's first cause of action.

[1,2] Viewing the record as we must, in the light most favorable to plaintiff, it appears that plaintiff and defendant had been engaged in one branch or another of the poultry business for many years prior to this proceeding. Some time during the early part of 1952, the parties discussed the possibility of establishing a turkey

eviscerating plant in connection with freezing and storage facilities to be operated in Merced County. Following their original conversation numerous meetings and conversations were had and many letters passed between the parties, eventually resulting in defendant undertaking the establishment of a plant as contemplated and plaintiff acting as his employee in the establishment thereof. No reason would appear to summarize at length the discussions and letters between the parties. Suffice it to say that this portion of the record is decidedly conflicting. However there is testimony by plaintiff that during their preliminary negotiations, and at the time the oral agreement was found by the court to have been entered into, the defendant agreed to employ him at a salary of \$750 a month; that during the Fall of that year defendant told plaintiff, in relation to salary which plaintiff stated was then due, that defendant would catch up with that as soon as he got the plant into operation and a few cars of turkeys rolling. Plaintiff further testified that in December defendant authorized a check in the sum of \$750, being the amount of one month's salary. Such evidence was sufficient if believed by the court, and obviously it was, to sustain a finding in plaintiff's favor.

"As had so often been said, questions as to the weight and sufficiency of the

evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses commensurate with their conduct and manner of testifying, and the determination of conflicts and inconsistencies in their testimony are matters for the trial court to resolve." *Thompson v. City of Long Beach*, 41 Cal.2d 235, 246, 259 P.2d 649, 655.

[3,4] The defendant additionally contends that the testimony of the plaintiff is inherently improbable and inconsistent with his written statements and memoranda to defendant. "'(4) Before evidence can be disregarded as inherently improbable there must exist a physical impossibility of the evidence being true, or its falsity must be apparent without resort to inferences or deductions.'" *Howard v. Howard*, 128 Cal.App.2d 180, 184, 275 P.2d 88, 91. At most the evidence referred to by defendant merely discloses a substantial conflict in the testimony. But conflicts, whether substantial or otherwise, are wholly insufficient to warrant a reviewing court in substituting its opinion for that of the trial court.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

137 Cal.App.2d 656

UNION BANK AND TRUST COMPANY OF LOS ANGELES, as Executor of the Estate of Mary M. Kelly, Deceased, Plaintiff and Appellant,

v.

Lydia FABIANO, Anthony Bonaccorsi, et al.,
Defendants and Respondents.

Civ. 5215.

District Court of Appeal, Fourth District,
California.

Dec. 8, 1955.

Action to recover from alleged partnership and others an amount allegedly due plaintiff's decedent. The Superior Court, Riverside County, O. K. Morton, J., rendered summary judgment for plaintiff, and defendants appealed. The District Court of Appeal, Barnard, J., held that pleadings and affidavits raised substantial fact issues, including issue whether partnership ever existed, precluding summary judgment.

Judgment reversed.

1. Judgment ⇨186

On motion for summary judgment, duty of court is to determine whether a triable issue is presented, and not to determine the issue itself.

2. Judgment ⇨181(4), 185.1(4), 185.2(6, 7)

Summary judgment must be used with caution and any doubt must be resolved against applicant, and affidavits of applicant should be strictly construed, while those of his opponent should be liberally construed and facts alleged therein must be accepted as true and need not be composed wholly of evidentiary facts. West's Ann. Code Civ.Proc. § 437c.

3. Judgment ⇨185.3(1)

In action to recover from alleged partnership amount allegedly received for use and benefit of plaintiff's decedent, pleadings and affidavits raised substantial fact issues, including issue whether partnership ever existed, precluding summary judgment. West's Ann.Code Civ.Proc. §§ 437c, 462.

S. V. O. Prichard, Beverly Hills, John M. Dvorin, Robert P. Schifferman, Los Angeles, for appellant.

Sherman & Weissman, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a summary judgment granted under the provisions of Section 437c of the Code of Civil Procedure.

On March 23, 1954, James F. Kelly as executor of the Estate of Mary M. Kelly, Deceased, filed this action against Lydia Fabiano and Anthony Bonaccorsi, personally and as copartners, two corporations being also named as defendants. The complaint alleged that Fabiano and Bonaccorsi were copartners doing business under the name of "Desert House of Lydia" or "House of Lydia"; that the defendants and each of them became indebted to the decedent in the sum of \$18,054.70 for money had and received for her use and benefit; that the whole amount is still due and unpaid; and that demand for payment had been refused. The defendant Bonaccorsi filed an answer admitting that he is a copartner in the business being conducted in the name of "House of Lydia", and denying each and every other allegation of the complaint. His prayer was that the defendant take nothing by reason of the complaint. Fabiano filed an answer admitting that she was a partner in the business being conducted under the name of "House of Lydia", and denying each and every other allegation of the complaint. As a separate defense "and by way of plea in abatement" she alleged that on October 28, 1953, she and Mary M. Kelly entered into a written copartnership agreement for the operation of a business known as "Desert House of Lydia"; and that this agreement provided that in the event of any dispute between the partners the matter should be submitted to arbitration before any suit was filed. Her prayer was that the action be abated pending compliance with the arbitration agreement, and that plaintiff take nothing by reason of the complaint.

On July 8, 1954, an order was entered reciting that James F. Kelly had died and

substituting The Union Bank & Trust Co., as executor of the estates of Mary M. Kelly and of James F. Kelly, as plaintiff in the action.

On December 24, 1954, the defendants gave notice of a motion for a summary judgment stating that it would be based upon the record in the action and the affidavit of Lydia Fabiano, which was filed therewith. Her affidavit alleged that on October 28, 1953, affiant and Mary M. Kelly and Bonaccorsi entered into a written partnership agreement to conduct a business known as "Desert House of Lydia"; that from time to time Mrs. Kelly paid sums of money into the partnership for its use; that affiant and Bonaccorsi conducted the partnership business up to and after the death of Mrs. Kelly, and the money sued for represents money paid by the decedent to operate the business; that no dispute arose during Mrs. Kelly's lifetime; and that no action for dissolution of the partnership or an accounting has been filed. A copy of the claimed agreement was attached to the affidavit, which purported to be signed by Mrs. Kelly, Fabiano and Bonaccorsi.

Counteraffidavits were filed by the attorney for the estate and the trust officer of the executor bank. The first of these alleged that affiant, acting as attorney for the estate, had become convinced that Mrs. Kelly had been deprived of sums of money by means of fraud and deceit practiced upon her by the defendants; that the depositions of Fabiano, of Bonaccorsi, and of their attorney were then taken, which disclosed that Bonaccorsi had never signed the partnership agreement; that the claimed partnership agreement was never executed; that the fact that no partnership ever existed was recognized by the defendants; that no partnership with Mrs. Kelly as a member ever existed, and she never invested any funds therein; that Mrs. Kelly's investment was treated as a loan and not as a partnership contribution, as evidenced by the tender of promissory notes; and that the defendants obtained money from Mrs. Kelly at a time when she was under the influence of alcohol and not able to realize the nature of their actions.

The affidavit of the trust officer, made on information and belief as permitted by Section 437c, alleged that on October 28, 1953, after a discussion between Mrs. Kelly, Fabiano and the attorney, the parties abandoned the idea of going forward with the partnership, and decided to form a corporation; that Mrs. Kelly delivered a check for \$10,000 to Fabiano on October 28, 1953; that Mrs. Kelly died on November 28, 1953; that on December 21, 1953, the directors of a corporation known as "Desert House of Lydia" adopted a resolution stating that Mrs. Kelly had loaned the corporation \$9500 and ratifying the act of its secretary in executing a note for that amount; that the note referred to is dated December 1, 1953, is in favor of Mrs. Kelly and/or her estate, and provides for payment in ten years with interest at 4%; that Mrs. Kelly was never consulted about and never agreed to the terms of the note; that this note represents the \$10,000 advanced by Mrs. Kelly on October 28, less the cost of incorporation; that the note was sent by mail to the former executor, who declined to accept it and returned it; that at the taking of the depositions four other checks issued by Mrs. Kelly were produced, totalling \$8,054.73, payable to House of Lydia or to Fabiano; and that no consideration for those checks ever passed from any of the defendants to Kelly.

At the time of the hearing three other affidavits were filed by the defendants, which merely add to the conflict, with denials and contrary allegations with respect to a number of disputed matters. The court granted the motion for summary judgment and entered a judgment in favor of the defendants, from which the plaintiff has appealed.

The appellant contends, among other things, that issues of fact were presented which could not be tried by the court in ruling upon a motion for a summary judgment. The respondents contend that no triable issue of fact is disclosed by the record; that it appears without contradiction "that plaintiff and defendants were partners"; and that since a partnership relation existed only an action for dissolution and accounting would lie.

[1,2] On a motion for summary judgment under Section 437c, the duty of the court is to determine whether a triable issue is presented, and not to determine the issue itself. The remedy must be used with caution and any doubt must be resolved against the applicant. The affidavits of the moving party should be strictly construed, while those of his opponent should be liberally construed and the facts alleged therein must be accepted as true and need not be composed wholly of evidentiary facts. *Eagle Oil Refining Co. v. Prentice*, 19 Cal.2d 553, 122 P.2d 264; *Travelers Indemnity Co. v. McIntosh*, 112 Cal.App.2d 177, 245 P.2d 1065; *Werner v. Sargeant*, 121 Cal.App.2d 833, 264 P.2d 217.

[3] The complaint alleged that Fabiano and Bonaccorsi were partners in a certain business, that the defendants became indebted to Mrs. Kelly, and that this debt had not been paid. The answer of Bonaccorsi admitted that he is a partner in this business but denied that Fabiano is or was such a partner, while the answer of Fabiano admitted that she was a partner in this business but denied that Bonaccorsi is or was such a partner. Both answers denied that the defendants became indebted to Mrs. Kelly, and also denied that that debt had not been paid. The Fabiano answer further alleged that Mrs. Kelly and Fabiano were copartners in operating a business known as "House of Lydia", and that the partnership agreement provided that no suit could be filed until an arbitration was had. These new allegations were deemed denied. Sec. 462, Code Civ.Proc. Not only were issues of fact thus presented by the pleadings, but there were a large number of such issues raised by the affidavits filed. Among other things, triable issues of fact were thereby presented as to whether or not any partnership ever existed; whether or not Mrs. Kelly was a member of any such partnership; whether or not such a partnership was abandoned, or in any event terminated by her death; whether the \$10,000 admittedly received by the defendants was a loan; whether that money was obtained by fraud and deceit; whether or not Mrs.

Kelly had the mental capacity to enter into any such a contract; whether or not any of the monies sued for were received for the use of a partnership of which each of the individual defendants denied that the other was a member; and whether the allegation with respect to a partnership agreement was a valid defense to the claim for over \$18,000, or in any event applicable only to the \$10,000 mentioned in the written agreement relied on by the defendants which was admittedly not signed by one party until after Mrs. Kelly's death. It clearly appears that many issues of fact were presented which could not properly be determined on such a motion.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.



137 Cal.App.2d 584

Rex BIRCH, Plaintiff and Appellant,

v.

William J. MAHANEY and Irene R. Mahaney, Defendants and Respondents.

Civ. 16218.

District Court of Appeal, First District,
Division 1, California.

Dec. 8, 1955.

Action against owners and operators of a restaurant for injuries alleged to have been sustained by plaintiff in the restaurant by reason of negligence of a waitress. The jury returned a verdict for plaintiff in the sum of \$5,000. The Superior Court, San Mateo County, Murray Draper, J., granted defendant's motion for new trial upon ground of insufficiency of evidence to support the verdict, and the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that where evidence on the vital issue of negligence was conflicting, trial court's order granting new trial

on ground of insufficiency of evidence should be affirmed.

Order affirmed.

1. Appeal and Error ⇨901

Where trial court has specified insufficiency of evidence as basis for granting a new trial, to secure a reversal, the burden on the appellant is a heavy one.

2. Appeal and Error ⇨1015(3)

In passing upon a motion for new trial based upon alleged insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses, determine probative force of testimony, and weigh the evidence.

3. New Trial ⇨70

The trial court, in considering sufficiency of evidence on motion for new trial based on alleged insufficiency of evidence, to sustain verdict, may draw inferences opposed to those drawn at trial, and, where only conflicts consist of inferences deduced from uncontradicted probative facts, court may resolve such conflicts in determining whether case should be retried.

4. Appeal and Error ⇨1015(1)

An appellate court will reverse trial court's order granting a new trial for insufficiency of evidence to sustain verdict only where it can be said as matter of law that there is no substantial evidence to afford a contrary judgment.

5. Appeal and Error ⇨1015(2)

In action against restaurant owners for injuries claimed to have been sustained by plaintiff while a patron by reason of alleged negligence of waitress, where evidence was conflicting on vital issue of negligence, trial court's order granting a new trial on ground of insufficiency of evidence was affirmed.

6. Appeal and Error ⇨854(6)

A general order granting new trial will be affirmed if it can be sustained on any ground.

7. Appeal and Error ⇨933(4)

Where there was a valid ground upon which trial court could have acted in

granting new trial, District Court of Appeal would conclusively presume that trial court acted on that ground.

8. Appeal and Error ⇨706(3)

Where argument on motion for new trial was not transcribed and was not before appellate court, appellate court, on appeal from order granting new trial, could not determine what the trial court said, if anything.

9. Appeal and Error ⇨717

Remarks made by trial judge during trial or argument, or even an opinion filed by him, cannot be used to impeach a formal decision, order or judgment later made or entered.

10. Appeal and Error ⇨717

Though trial judge's opinion will aid appellate court in ascertaining the process by which a judgment has been reached, the opinion will not be considered on appeal from order granting new trial in determining whether verdict of jury or findings of court are supported by evidence.

11. Appeal and Error ⇨854(1)

A trial judge's order concludes the case and cannot be impeached by judge's opinion, and the question that concerns reviewing court is whether final decision, judgment or order is correct and not whether reasons expressed in the opinion are in harmony with the result reached or whether they sustain the decision.

Albert Picard, San Francisco, for appellant.

Boyd & Taylor, San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action against the owners and operators of a restaurant, claiming to have been injured therein by reason of the negligence of a waitress. Defendants denied the major allegations of the complaint, and pleaded contributory negligence as an affirmative defense. The cause proceeded to trial before a jury. The jury brought in a verdict for the plaintiff in the sum of \$5,000. The defend-

ants moved for a new trial on practically all of the statutory grounds. The trial court granted the motion "upon the insufficiency of the evidence to support the verdict." Plaintiff appeals.

[1-4] Where the trial court has specified insufficiency of the evidence as the basis for granting a new trial, to secure a reversal, the burden on the appellant is a heavy one, indeed. In *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689, 690, the Supreme Court described this burden as follows: "In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. [Citation.] In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial [Citation], and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried. [Citation.] It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." See also *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 170 P.2d 465; *Green v. Soule*, 145 Cal. 96, 78 P. 337; *Grover v. Sharp & Fellows etc. Co.*, 66 Cal.App.2d 736, 153 P.2d 83.

The facts of the present case indicate that the trial court acted within its powers in granting the motion.

On January 23, 1952, plaintiff, the manager of a life insurance agency, attended a sales meeting of the insurance company at The Chukker, a restaurant operated by defendants. Around noon the meeting adjourned to enable the restaurant employees to set the tables for lunch. Plaintiff testified that he joined a group of six or seven people near the end of the bar who were talking shop, and stood near the wall in the

back of the group about seven feet from the bar. This left an open passageway between where he was standing and the bar. The next thing plaintiff remembers is holding his head and feeling dizzy. This testimony was corroborated by two witnesses, who also testified that they saw a waitress strike the plaintiff in the back of the head at the base of his skull with a tray while plaintiff was standing straight up near the wall, and away from the bar.

The testimony as to the circumstances of the accident was sharply contradicted by the waitress involved. She testified that she was bringing a plastic tray 36 inches in diameter loaded with food,¹ from the kitchen to the cocktail lounge, carrying it with her left hand; that as she approached the bar the passageway was so crowded that she was forced to stop; that she then said: "Coming through please, hot";² that while she was stopped the plaintiff, who was leaning over the bar, suddenly straightened up and his head struck the tray; that she did not see plaintiff before the accident.

[5] It is quite apparent that plaintiff's evidence is ample to support the implied finding of the jury that the waitress was negligent and that such negligence was the proximate cause of the accident. But it is equally clear that the testimony of the waitress directly contradicts that of plaintiff and his witnesses. If the accident happened as the waitress said it did, the jury could have found that she was not negligent, or, even if she were, that plaintiff was guilty of contributory negligence. The evidence being conflicting on the vital issue of negligence, the trial court's order granting a new trial on the ground of insufficiency of the evidence, under the rules already stated, must be affirmed.

[6,7] Appellant seeks to evade the application of this rule by the contention that, although the order granting the new trial specified insufficiency of the evidence, on the argument on the motion for a new trial, the trial judge stated that in his

1. Plaintiff testified that the tray contained only empty dishes.

2. Two of plaintiff's witnesses testified that they did not hear the waitress say anything.

opinion the only question upon which he had any doubt was whether the medical evidence produced by plaintiff showed a causal connection between the blow and the claimed injuries. The appellant devotes the major portion of his brief to demonstrating that the uncontradicted medical evidence shows such a causal connection and contends that, in view of the remarks by the trial judge, the correctness of this conclusion is the only question now before this court. We agree with appellant that Dr. Parisi testified, without contradiction and without ambiguity, that the claimed injuries were caused by the blow. It is not necessary to review that testimony, however,³ because we are not limited on this appeal to the question urged by appellant. It is a well-settled rule that a general order granting a new trial will be affirmed if it can be sustained on any ground. *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 153 P.2d 338; *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 170 P.2d 465; *Stone v. Los Angeles County Flood Control Dist.*, 81 Cal.App.2d 902, 185 P.2d 396; *Smith v. Royer*, 181 Cal. 165, 183 P. 660. Here there was a valid ground upon which the court could have acted, and we must conclusively presume that the court acted on that ground.

[8] Moreover, appellant is in no legal position to urge the point under discussion. Apparently the argument on the motion for a new trial was not transcribed. At any rate, it is not before us. Therefore, there is no way we can determine what the trial court said, if anything, at this time.

[9-11] Another complete answer to this argument is that, even if the trial judge did make the statement in question, and even if there were a proper record so showing, such fact would not permit us to reverse the challenged ruling. It is settled

law that the remarks made by a trial judge during a trial or argument, or even an opinion filed by him, cannot be used to impeach a formal decision, order or judgment later made or entered. This well-settled rule was stated as follows in *Diaz v. Schultz*, 81 Cal.App.2d 328, 332, 183 P.2d 717, 719, quoting from *People v. Driggs*, 111 Cal.App. 42, 44, 295 P. 51: “* * * it is what the court did, and not what the judge of the court stated during the course of the trial, that determines the course of our inquiry upon this appeal, as there is a vital distinction between what the judge of a trial court may say and what the trial court actually does. In other words, it is the legitimate privilege of a trial court, at the conclusion of an argument upon motion for new trial, to state his views concerning the case, and then, upon fuller and maturer deliberation, come to the conclusion that a different order should be made, and then to enter the same. When the cause is brought to an appellate court, argument as to what the trial court may have thought, as given utterance by the words used before final action is taken, cannot be considered, unless directly in line with the subsequent orders made.” In other words, the deliberations of the courts are conclusively merged in their final orders, decisions and judgments, and oral opinions or statements of the courts may not be considered to reverse or impeach such orders, decisions or judgments. As was said in *Stone v. Los Angeles County Flood Control Dist.*, 81 Cal.App.2d 902, 907, 185 P.2d 396, 399: “While an opinion of the judge of the trial court will aid the appellate court in ascertaining the process by which a judgment has been reached it will not be considered in determining whether or not the verdict of the jury or the findings of the court are supported by the evidence. [Citations.] The order when made by the court concludes the case and it cannot be impeached by the judge’s opinion. The

3. Nor need we consider respondents’ contention that the new trial could have been granted on the theory that the evidence as to the amount of damage does not sustain the \$5,000 verdict. We agree with appellant that the uncontradicted evidence shows serious damage proxi-

mately caused by the blow, and that that same evidence would support the finding as to the amount of the damages. But, for reasons already stated, those issues are not before us in view of the conflict in the evidence on the issue of negligence.

question that concerns the reviewing court is whether or not the final decision, judgment or order is correct and not whether the reasons expressed in the opinion are in harmony with the result reached or whether they sustain the decision. [Citation.]" See also *Williams v. Kinsey*, 74 Cal.App.2d 583, 169 P.2d 487; *DeCou v. Howell*, 190 Cal. 741, 214 P. 444; *People v. Jefferson*, 84 Cal.App.2d 709, 191 P.2d 487; *Koon v. Sher*, 98 Cal.App.2d 530, 220 P.2d 784.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



137 Cal.App.2d 468

Chester WALLACE, doing business under the firm name and style of Wallace Roofing Co., Plaintiff and Respondent,

v.

CARPENTERS LOCAL UNION NO. 1040 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; and North Coast Counties District Council of Carpenters, Defendants and Appellants.

Roofers, Damp and Waterproof Workers Local Union No. 240 of the United State, Tile and Composition Workers Association, Defendant and Respondent.

Civ. 8007.

District Court of Appeal, Third District, California.

Dec. 2, 1955.

Rehearing Denied Dec. 28, 1955.

Employer's action to enjoin labor unions from engaging in work stoppage by reason of jurisdictional dispute. The Superior Court, Humboldt County, Delos A. Mace, J., entered order granting temporary injunction, and one of unions appealed. Same union also renewed its earlier motion for order directing Superior Court to dismiss action. The District Court of Appeal, Peek, J., held that where such union's

only contention was that trial court lacked jurisdiction because of failure of employer to exhaust his remedies by submission of dispute to arbitration pursuant to plan binding both employer and unions, issuance of temporary injunction was not abuse of discretion.

Order affirmed and motion denied.

1. Labor Relations ⇐844

State policy outlawing jurisdictional coercive activity in maintenance of peaceful industrial relations justifies injunctive as well as legal relief. West's Ann.Labor Code, §§ 1115-1120, 1115, 1116, 1118.

2. Appeal and Error ⇐954(1) Injunction ⇐135

Whether preliminary injunction should be granted rests largely in discretion of trial court, whose order will not be reversed on appeal unless there is manifest abuse of discretion.

3. Labor Relations ⇐368

In employer's action to enjoin labor unions from engaging in work stoppage by reason of jurisdictional dispute, wherein one of unions contended only that trial court lacked jurisdiction because of failure of employer to exhaust his remedy by submission of dispute to arbitration pursuant to plan binding both employer and unions, issuance of temporary injunction was no abuse of discretion. West's Ann.Labor Code, §§ 1115-1120, 1115, 1116, 1118.

4. Appeal and Error ⇐1175(7)

Where there was no motion to dismiss appeal in labor dispute and District Court of Appeal was asked only to dismiss action and dissolve injunction, function of appellate court was only to decide appeal or dismiss it, and it would not dismiss action or dissolve injunction under circumstances.

Todd & Todd, San Francisco, for defendants-appellants.

Falk & Falk, Eureka, for plaintiff-respondent Chester Wallace.

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for cross-complainant and respondents.

PEEK, Justice.

This is an appeal from an order granting a temporary injunction which enjoined the defendants, Carpenters Local Union No. 1040 and North Coast Counties District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as "Carpenters", from threatening or engaging in work stoppages and from advertising or publishing that plaintiff does not employ members of unions affiliated with the A. F. of L., and ordering that any jurisdictional disputes between the Carpenters and Roofers, Damp and Waterproof Workers Local Union No. 240 of the United Slate Tile and Composition Roofers Damp and Waterproof Workers Association, hereinafter referred to as "Roofers", be submitted for settlement by the party claiming to be aggrieved under the provisions of a certain agreement entitled "Plan for National Joint Board for Settlement of Jurisdictional Disputes" of the Building and Construction Trades Department of the A. F. of L., the Associated General Contractors of America and participating employer associations.

The record shows that Wallace, doing business under the name of Wallace Roofing Co., had agreed to be bound by said plan. He had contracted both with the Carpenters and the Roofers, the former contract antedating the latter. Both unions are craft unions affiliated with the A. F. of L., and as such are bound by the plan for settlement of jurisdictional disputes. Wallace entered into a subcontract to perform roofing work at a school in Arcata. The Carpenters demanded that he use them rather than roofers upon such work, and upon his refusal the Carpenters pulled the men employed by the general contractor from the work. Similar instances occurred thereafter. Plaintiff's attorney subsequently wired the chairman of the Joint Board, informing him of the situation and shortly thereafter received a copy of a telegram purported to have been sent by the chairman to the general vice president of the Carpenters, wherein the vice president was directed to remove that union's picket

line, to return their men to work and to process any work complaints in accordance with Joint Board procedures. The Carpenters continued their refusal to work for any general contractor who had contracted with Wallace for roofing, and this proceeding followed. Because the Roofers Union refused to join as plaintiff, it was named as a defendant. Thereafter the business agent of the Carpenters filed a like proceeding wherein he, as representative of the Carpenters, sought to specifically enforce the collective bargaining agreement between the Carpenters and plaintiff. Thereafter a complaint in intervention was filed on behalf of the Roofers, seeking similar relief for that union. The actions were consolidated for the purpose of determining whether or not an injunction should issue. Following their appeal to this court, the Carpenters moved this court for an order directing the trial court to dismiss the action and dissolve the injunction. No motion to dismiss the appeal was made, and it was announced at the time of oral argument that no dismissal was desired. We concluded that the function of this court was either to decide the appeal or to dismiss it, but not to dismiss the action or dissolve the injunction. *Wallace v. Carpenters Local Union No. 1040*, 133 Cal.App. 2d 321, 284 P.2d 102. Subsequent to the filing of that opinion, the Carpenters again filed a notice of motion for an order of this court directing the superior court to dismiss the action. The second motion was calendared for and heard at the same time as the appeal on the merits.

It is the Carpenters' first contention that the trial court lacks jurisdiction because of the failure of plaintiff to exhaust his remedies by submission of the dispute to arbitration as provided in the plan previously referred to. Such contention by the Carpenters completely ignores the California Jurisdictional Strike Act. St.1947, ch. 1388, adding sections 1115-1120 to the Labor Code. By the provisions of that Act, jurisdictional strikes as therein defined are declared to be against public policy of this state and unlawful. Section 1115. Any person injured or threatened with injury

from a violation of the Act is entitled to injunctive relief. Section 1116. Section 1118 defines a jurisdictional strike as being the concerted cessation of work or any other concerted interference with an employer's operation and business, and expressly includes disputes arising out of work assignments involving conflicting claims of two unions for jurisdiction over a particular type of work.

injunction." *Wallace v. Carpenters Local Union No. 1040*, supra, 133 Cal.App.2d at page 322, 284 P.2d 102.

The order is affirmed, and the motion is denied.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

[1-3] No question is raised, nor do the Carpenters challenge the finding that a jurisdictional question exists between them and the Roofers as to which union has the exclusive right to work assignments by Wallace. The Carpenters content themselves with the contention that merely by reason of the existence of the plan for settlement of disputes, the court lacked jurisdiction to issue the injunction. No argument is made nor authority cited as to why the Jurisdictional Strike Act and the cases interpreting the same are not wholly controlling in this case. "The state policy of outlawing jurisdictional coercive activity in the maintenance of peaceful industrial relations justifies the injunctive as well as legal relief." *Sommer v. Metal Trades Council*, 40 Cal.2d 392, 401, 254 P.2d 559, 565. Furthermore, "[w]hether a preliminary injunction shall be granted rests largely in the discretion of the trial court and will not be reversed on appeal unless there is a manifest abuse of discretion." *Isthmian S.S. Co. v. National Marine Beneficial Ass'n*, 40 Cal.2d 433, 435, 254 P.2d 578, 579. In the absence of any showing by the Carpenters except as noted, it cannot be said that the trial court abused its discretion in the issuance of the injunction they now attack.

[4] Turning to the Carpenters' motion for an order directing the trial court to dismiss the action and dissolve the injunction, it appears that since nothing to the contrary has been shown, we must conclude as we did on the previous motion that " * * the function and the jurisdiction of this court in the present state of the record is either to decide the appeal or dismiss it, but not to dismiss the action or dissolve the



137 Cal.App.2d 648

Joe R. RAMOS, Plaintiff and Respondent,

v.

Betty J. CYPHER, as Administratrix of the Estate of C. L. Cypher, Deceased, Peerless Casualty Company, a corporation, and City of Vacaville, a municipal corporation, Defendants,

Betty J. Cypher, as Administratrix of the Estate of C. L. Cypher, Deceased, Appellant.
Civ. 8718.

District Court of Appeal, Third District, California.

Dec. 8, 1955.

Declaratory judgment action, in which the administratrix of an estate was a defendant. The administratrix moved for change of venue to county in which her decedent's estate was being probated. The Superior Court, Solano County, Harlow V. Greenwood, J., denied the motion, and the administratrix appealed. The District Court of Appeal, Van Dyke, P. J., held that where person had contract with deceased for latter to construct certain street improvements on person's land, and city completed contract upon deceased's failure to do so, and claimed reimbursement from person, and person filed contingent claim against deceased's estate, and filed declaratory judgment action to determine rights and duties of parties, action was not against administratrix in her official capacity on a

claim for payment of money; and administratrix could not obtain a change of venue to county in which estate was being probated.

Order affirmed.

1. Executors and Administrators ⚡436

An action for declaratory judgment is not a suit against an administrator in his official capacity on a claim for payment of money, under statute prescribing that the venue of such an action against an administrator lies in the county which has jurisdiction of the estate. West's Ann. Code Civ.Proc. § 395.1.

2. Executors and Administrators ⚡436

Where person had contract with deceased for latter to construct certain street improvements on person's land, and city completed contract upon deceased's failure to do so, and claimed reimbursement from person, and person filed contingent claim against deceased's estate, and filed declaratory judgment action to determine rights and duties of parties, action was not against administratrix in her official capacity on claim for payment of money, and administratrix could not obtain change of venue to county in which estate was being probated. West's Ann.Code Civ.Proc. § 395.1.

King & Ghidella, Napa, for Peerless Casualty Co., and Betty J. Cypher.

Leo C. Dunnell, William H. Herbert, & Adey May Dunnell, Fairfield, for plaintiff-respondent Joe R. Ramos.

Sinclair M. Dobbins & Walter W. Weir, Jr., Vacaville, for City of Vacaville.

VAN DYKE, Presiding Justice.

Plaintiff, Joe R. Ramos, brought this action against the above named defendants asking for a declaration of his rights and duties and a determination of his obligations arising out of a series of transactions with C. L. Cypher, during his lifetime, his administratrix after his death, Peerless Casualty Company, and the City of Vacaville. The administratrix moved that the place of trial be changed to the County of

Napa, in which county the estate of her decedent was being probated, claiming that she was entitled to such order by virtue of the provisions of Section 395.1 of the Code of Civil Procedure. Her motion was denied, and from the order of denial she appeals.

The complaint sets forth the following matters: During the lifetime of Cypher, plaintiff contracted with him to construct certain street improvements in a subdivision owned by plaintiff and located in the City of Vacaville, County of Solano. Cypher failed to do the work in accordance with the ordinance requirements of the city and the city refused to accept the streets as so improved. Thereafter it was agreed between Cypher and the city that the city would conditionally approve and accept the streets, provided that Cypher would undertake a program of repair and completion estimated to cost \$6,000, and secure his performance thereof by a surety bond. Ramos agreed that if Cypher would enter into that undertaking he would release to him the moneys he had been holding back under the contract between himself and Cypher. Peerless Casualty Company bonded Cypher in the sum of \$6,000 to perform the rectifying work, naming Ramos as obligee. However, Cypher did not perform the work. Thereupon the city performed it at a cost of over \$8,000 and claimed a right to recover that sum from Ramos. Ramos had demanded, before the city performed the work, that the administratrix of the estate of Cypher perform the work of rectification which Cypher was bound to do and the administratrix refused. Ramos demanded the penalty of the bond of the bonding company and the company refused, claiming it was not liable. Ramos filed a claim contingent in character against the estate of Cypher for the amount which the city claimed a right to recover against him or for such portion of that sum for which Ramos might be held to be responsible by reason of the failure of Cypher to comply with the terms and conditions of the agreement for the rectification of the street work. By this action Ramos sought to have the

rights and obligations of the parties determined.

Section 395.1 of the Code of Civil Procedure provides:

"When a defendant is sued in his official capacity as executor, administrator, guardian or trustee, on a claim for the payment of money or for the recovery of personal property, the county which has jurisdiction of the estate which he represents shall be the proper county for the trial of the action."

At the outset it is necessary, in order that appellant prevail, that this be a suit on a claim for the payment of money of the estate or for the recovery of personal property therefrom. Admittedly it is not a suit for the recovery of personal property. Appellant contends that it is a suit based on a claim for the payment of money. But we think that this action is what it purports to be, a suit for declaratory relief and that any ultimate recovery that may be ordered against the estate, if it be determined that there is liability of the estate to the plaintiff in the action, is incidental only to the prime purpose of the action, which is to obtain a declaratory judgment.

[1] As indicating the wide variance between a suit for declaratory judgment and a suit "on a claim for the payment of money", the following may be considered: It was held in *Coruccini v. Lambert*, 113 Cal.App.2d 486, 248 P.2d 457, that where a plaintiff may be entitled to declaratory relief, even though the judgment may be unfavorable to him, the court should not dispose of the case on demurrer. It was also held in *C. Dudley De Velbiss Co. v. Kraitz*, 101 Cal.App.2d 612, 225 P.2d 969, that where the complaint alleges an existing actual controversy, the court should not sustain a demurrer thereto and dismiss the action, since it is not essential to entitle plaintiff to seek declaratory relief that he should establish his right to a favorable declaration, and that, even where the plain-

tiff is not entitled to a favorable declaration, yet the court should render judgment and should not merely dismiss the action. It was held in *Moss v. Moss*, 20 Cal.2d 640, 642, 128 P.2d 526, 141 A.L.R. 1422, that declaratory relief may be refused even where a cause of action for such relief is stated under the statute if it appears to the trial court, in the exercise of its discretion, that such determination is not necessary or proper at the time and under all the circumstances. The statute itself declares that the plaintiff in an action for a declaration of rights may ask such declaration either alone or with other relief and that the court may make a binding declaration of such rights or duties whether or not further relief is or could be claimed at the time. Indeed, a suit for declaratory relief may, by express provision of statute, be brought when no cause of action exists in the usual sense of that phrase. Enough has been said, we think, to indicate the wide difference between a proper petition for declaratory relief and an ordinary action for the payment of money.

[2] Returning to the complaint in the present case it is to be noted that neither in the claim which petitioner says he filed against the estate being administered by the appellant nor in his pleading for declaratory relief herein, does he affirmatively allege that he has any claim against the estate. It may turn out that for one reason or another the city has no valid claim for reimbursement against the petitioner. In that event petitioner admits he has no claim for recoupment from the estate. We are satisfied that this is a typical suit for declaratory relief and is not a suit against the administratrix in her official capacity on a claim for the payment of money from the funds in her hands as such. Therefore, the order of the trial court denying her petition for change of venue was correct.

The order appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

137 Cal.App.2d 570

Michael BROUSSEAU by **Donat Brousseau**,
his guardian ad litem, and **Donat Brousseau**,
Plaintiffs and Appellants,

v.

CARNATION CO., a corporation, and **Ray Ohman**,
Defendants and Respondents.

Civ. 8579.

District Court of Appeal. Third District,
California.

Dec. 6, 1955.

Action against driver of truck to which was attached a trailer from which cups of ice cream were thrown to people along parade route and against driver's employer for injuries sustained by minor child when run over by trailer. The Superior Court, Sacramento County, Malcolm Glenn, J., entered a judgment of dismissal upon defendant's motion for a nonsuit, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that the evidence was sufficient to take case to jury on question of whether defendant driver was negligent in failing to exercise the degree of care commensurate with the danger to be avoided.

Judgment reversed.

1. Trial ⇨139(1)

A nonsuit may be granted only when giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from such evidence favorable to plaintiff's case, and disregarding conflicting evidence, there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Automobiles ⇨162(1)

The presence of children is in itself a warning to driver of motor vehicle requiring the exercise of care for their safety.

3. Automobiles ⇨162(2)

If driver of motor vehicle had knowledge of presence of children, he may be held responsible for injury to child, though he did not see injured child in time to prevent injury.

4. Negligence ⇨10

If the realizable likelihood that third person may act in a particular manner is the hazard or one of the hazards which makes actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent actor from being liable for harm caused thereby.

5. Automobiles ⇨245(8)

In action against driver of truck to which was attached a trailer from which cups of ice cream were thrown to people along parade route and against driver's employer for injury sustained by minor child when run over by trailer, evidence was sufficient to take case to jury on question of whether driver of truck, knowing that small children were in the street, was negligent in failing to exercise the degree of care commensurate with the danger to be avoided, regardless of whether injured boy fell or was pushed by other children into street, since possibility of being pushed into street was not too remote to constitute one of the hazards connected with defendants' activity.

Anthony J. Scalora, Sacramento, for appellant.

Johnson, Davies & Greve, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment of dismissal entered in favor of defendants upon their motion for a nonsuit.

[1] Summarizing the evidence in light of the well-established rule that, "* * * a nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence favorable to plaintiff's case, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." *Dunn v. Pacific Gas & Elec. Co.*, 43 Cal.2d 265, 268, 272 P.2d 745, 746, *Hilyar v. Union Ice Co.*, 45 Cal.2d 30, 286 P.2d 21, it ap-

pears that defendant Ohman was employed by the defendant Carnation Company as a driver-salesman; that pursuant to instructions from the company's Sacramento branch manager, he drove a small panel truck to which was attached a flat two-wheel trailer in a Fourth of July parade; that on the trailer was an ice cream cabinet containing small paper cups of ice cream which were thrown out to people along the route of the parade by two girls employed by defendant company; that defendant Ohman saw numerous children along the parade route; that there were some ice cream cups which fell into the street; that he couldn't watch all of the time; that he observed people picking up the cups from where they had landed; that when the cups were thrown out Ohman observed that more than a normal amount of excitement was created among the children; that he could see to the rear through two eight-by-eight-inch windows in the rear of the truck; that at the time of the accident the truck and trailer were slightly to the right of the center of the street and moving at a speed of from two to four miles per hour. At the point near where the accident occurred Ohman had been compelled to stop because of a halt in the parade. There were automobiles parked along the street and people standing in the street and along the curb. Defendant had driven approximately 20 feet from his halted position when the accident occurred. He did not see the accident and was aware of it only when a bystander told him that a boy had been pushed or had fallen under the trailer. The injured boy was standing with his parents and two younger brothers in the front line of a crowd, including a large number of children. When a cup landed in the street approximately eight feet or so in the street from him, plaintiff Michael Brousseau saw the cup and ran for it, as did numerous other children. As he did so, he was pushed or fell down, and the left wheel of the trailer ran over the right side of his body. Analyzing this evidence in light of the rule approved in the Dunn and Hilyar cases previously mentioned, it is apparent that Ohman was aware that the young women in throwing out the ice cream cups caused great excite-

ment among the children along the parade route; that some of the cups fell in the street; that he paid no attention to what was happening from the time he started his truck until the accident occurred; that he looked to neither side nor through the back windows; that it could well be inferred by the jury that the young ladies' throwing was not as exact as it might have been, and that it could also be inferred that Ohman did not see the Brousseau child because he was not exercising the degree of care commensurate with the danger to be avoided, knowing that small children were in the street along the route of the parade and knowing that the actions of children under such circumstances would be highly unpredictable.

[2, 3] "The presence of children is in itself a warning requiring the exercise of care for their safety. [Citation.] Moreover if the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible although it appears that he did not see the injured child in time to prevent the injury." *Conroy v. Perez*, 64 Cal.App.2d 217, 224, 148 P.2d 680, 684 [quoted with approval in the recent *Hilyar* case].) It would therefore appear that the jury might well have concluded that Ohman's conduct was not of that degree of care required of one under such circumstances.

[4, 5] Defendants however contend that Ohman could not have been guilty of negligence since he had a right to assume that the young women would throw the cups as instructed; and that since the truck itself had passed Michael before he ran into the street and the mishap occurred by his being pushed by someone else into the rear wheel some 15 feet behind the driver, it cannot be said that he was negligent in any way. However, the court held in *Richardson v. Ham*, 44 Cal.2d 772, 777, 285 P.2d 269, 272, "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused

thereby.'” Here, the possibility of other children pushing the injured boy into the street as he ran for the ice cream cup was not so remote as not to constitute one of the hazards connected with defendants’ activity. Hence under the circumstances the question of Ohman’s negligence was one of fact for the jury.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.



137 Cal.App.2d 445

Carl WHITSON and Maude Whitson,
Plaintiffs and Appellants,

v.

Hector GOUDESEUNE and Mrs. Hector Gou-
deseune, Defendants and Respondents.

Civ. 20875.

District Court of Appeal, Second District,
Division 2, California.

Dec. 2, 1955.

Action for judgment that defendants as owners of lot 3 in a certain tract did not have a right of way easement along the rear of certain lots owned by plaintiffs, and for apportionment of expenses of maintaining easement. The Superior Court, Los Angeles County, Paul Nourse, J., refused relief and the plaintiffs appealed. The District Court of Appeal, Fox, J., held that an easement grant “to each and every other party hereto and to the present owners of said lot 3 and their and each of their successors in ownership of said lots or portions of lots” was a sufficient designation or description to identify the grantees and that the court had properly refused apportionment of maintenance expense where not all parties who were served by the easement were parties to the action.

Affirmed.

1. Easements ⇨12(2)

In easement deed “for the purpose of creating and establishing an easement for driveway purposes with right of ingress and egress over and across the strip of land here and after described for the common benefit of all the lots or portions above referred to and lot 3 of tract No. 13567”, language, including “hereby grant * * * to each and every other party hereto and to the present owners of said lot 3 and their and each of their successors in the ownership of said lots or portions of lots an easement for the purposes aforesaid over such strip of land to the end that said easement shall be used and enjoyed in common by said owners and their successors” was adequate to convey easement and disclosed intent to make same appurtenant to lot 3.

2. Easements ⇨21

Where easement deed was adequate to convey easement and disclosed intent to make easement appurtenant to lot 3, deed entitled owners of such lot to use and enjoyment thereof and easement followed ownership of such lot “into whomsoever hands the same might come.”

3. Easements ⇨12(3), 21

Easement deed wherein grant was “to each and every other party hereto and present owners of said lot 3 and their and each of their successors in the ownership of said lots or portion of lots” was sufficient designation or description of grantees and created valid easement as to such owners and their successors. West’s Ann. Civ.Code, § 3538.

4. Declaratory Judgment ⇨388

Where all parties served by easement were not before court in action for declaratory judgment, statute providing that court may refuse to exercise power to grant declaratory relief in any case where declaration or determination is not necessary or proper at the time under all the circumstances supported action of trial judge in refusing to apportion cost of maintaining easement between those who were parties to the action. West’s Ann.Code Civ.Proc. § 1061.

5. Declaratory Judgment $\Rightarrow$ 388

Where plaintiff had not applied to court for appointment of arbitrator in accordance with statute to apportion costs of easement maintenance and did not comply with other provisions of the statute he could not complain that court in his action for declaratory judgment refused to give him relief under such statute. West's Ann.Civ. Code, § 845.

Desmond & Desmond, Long Beach, for appellants.

Robert E. Krause, Long Beach, for respondents.

FOX, Justice.

By their amended complaint plaintiffs seek, inter alia, a declaration that defendants as the owners of Lot 3, Tract No. 13567, in the city of Long Beach, do not have a right of way easement along the rear of Lots 12 and 13 which are owned by plaintiffs. They also seek, in the event the easement is established, a determination of the proper proportion of the expense of maintaining it in good repair that should be borne by each of the parties.

The trial court found that a valid easement existed but declined to apportion the expenses of its upkeep. Plaintiffs appeal. We have concluded the decision of the trial court is correct on both aspects of the case.

Prior to 1949 there was an "easement for driveway purposes" running easterly from Loma Avenue along and over the rear portions of Lots 15, 14, 13 and 12. It also crossed Lot 3, where it ended. This easement had been used for years by Mrs. McQuestion who owned the latter lot. The easement, however, was only 10 feet wide. An easement five feet wider was desired. This extra width was proposed to be taken from Lots 1 and 2 lying to the north of the other lots. As a means of accomplishing this result, the owners of the old easement executed a deed to eliminate it. This instrument was signed by Mrs. McQuestion, who owned Lot 3, and the other owners. As a part of the same transaction the owners of Lots 1 and 2, and Lots 12 to 15, inclusive, executed an Easement Deed "for

the purpose of creating and establishing an easement for driveway purposes with right of ingress and egress over and across the strip of land hereinafter described for the common benefit of all of the lots or portions above referred to and lot 3 of Tract No. 13567 * * *" and "hereby grant * * * to each and every other party hereto and to the present owners of said lot 3 and their and each of their successors in the ownership of said lots or portions of lots an easement for the purposes aforesaid over said strip of land to the end that said easement shall be used and enjoyed in common by said owners and their successors."

[1,2] It is clear, of course, that the language of the deed is adequate to convey an easement and discloses an intention to make the easement appurtenant to Lot 3, thus entitling the owner of this lot to the use and enjoyment thereof. *Moots v. Kasten*, 90 Cal.App.2d 734, 736, 203 P.2d 537. Since the easement is appurtenant to Lot 3 it follows the ownership of this lot "into whomsoever hands the same may come." *Currier v. Howes*, 103 Cal. 431, 436, 37 P. 521, 523.

[3] Plaintiffs contend that defendants do not have a valid easement because the owner of Lot 3 was not named in the easement deed. Their position, however, is not well founded. In *Carlson v. Lindauer*, 119 Cal.App.2d 292, 306, 259 P.2d 925, 932, the court stated, "It is not necessary that a grantee in a deed be mentioned by name. If the designation or description is sufficient to identify the person or persons intended, the deed is effectual." *Schade v. Stewart*, 205 Cal. 658, 272 P. 567. "That is certain which can be made certain." Civ. Code, sec. 3538. In the *Carlson* case the caption of the deed recited that it was between Union Oil Co., First Party, and "Lucy Lindauer hereinafter referred to as 'Owner', whether one or more, Second Party." Union then proceeded to release and quitclaim "unto owner, its heirs, successors and assigns, all of its right, title and interest in and to" certain described land. At the time Union executed this indenture Lucy Lindauer had passed on. It

was held that "The designation of the grantee in the operative clause of the deed as 'Owner, its heirs, successors and assigns' was sufficient to pass title to the then owner of the estate in the surface, although Lucy was dead at the time." *Schade v. Stewart*, *supra*. The court further pointed out, 119 Cal.App.2d at page 308, 259 P.2d at page 933: "There is no doubt but that Union intended a conveyance, and that it had in mind some person or persons to whom title to the estate in the oil and gas should pass. * * * The deed conveyed the estate in the oil and gas to the then record owner of the estate in the surface." In the instant matter the deed granted an easement over the described property to the owners of Lot 3 and their successors. It is thus clear from the foregoing authorities that the deed in question conveyed an easement over the described property to the owners of Lot 3 and that defendants as the successors of such owners have the use and enjoyment thereof.

Plaintiffs rely on *Osterberg v. Osterberg*, 68 Cal.App.2d 254, 156 P.2d 46. That case is not inconsistent with our holding here. It simply says that a deed which does not contain the name of the grantee, i. e., the space for the designation of the grantee is blank, and there is "no sufficient identification of the party to whom the property is to be conveyed," is a nullity, 68 Cal.App.2d at page 264, 156 P.2d at page 51. Here there is "sufficient identification" of the persons to whom the easement is granted, viz., the owners of Lot 3 and their successors. The grant of the easement contained in the deed here in question is therefore effectual under the authorities previously cited.

[4] Plaintiffs' remaining complaint on appeal is that the trial court, having found that defendants held a valid easement over their property, should have apportioned the cost of maintaining the easement between the parties. The refusal to make the apportionment was based on the finding that "there are other parties served by the easement who are not before the court, particu-

larly the owners of Lot 2, who are also served by said easement." This is obviously an adequate reason for the court's position, for all those who enjoy the use of the right of way should share in its maintenance. But, of course, those who were not before the court would not be bound by any such order or judgment. Consequently any effort to fix the amount of each users' assessment would be abortive. Section 1061, Code of Civil Procedure, supports the action of the trial judge. It provides that "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not * * * proper at the time under all the circumstances." The absence of parties necessary to enable the court to make a complete determination of their respective obligations, and thus completely resolve the controversy, constituted a reasonable basis for the trial court's refusal to make the requested apportionment.

[5] Plaintiffs point to Civil Code section 845, which provides that in the absence of an agreement the cost of maintaining such an easement should be shared proportionately to the use made of it by each owner. Plaintiffs have failed, however, to follow the procedure prescribed therein for apportionment of such costs. It is to the effect that any owner may apply to the superior court for the appointment of an impartial arbitrator to apportion these costs. If the arbitration award is not accepted by all the owners, the court may determine their proportionate liability. The section further provides that if any owner of an easement fails, after demand in writing, to pay his proportion of the expense, action may be brought against him for contribution. None of these provisions of section 845 were complied with. Plaintiffs, therefore, cannot complain that they were not granted relief under that section.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J. pro tem., concur.

137 Cal.App.2d 491

SAVANNA SCHOOL DISTRICT of ORANGE COUNTY, California, a body politic of the State of California, Plaintiff and Respondent,

v.

Ethel McLEOD, Bernice Jolly, Vera Sparkes, Margaret R. Sullivan, Dorothy Dargatz, Dolores Myrick, and Lorraine Wade, Defendants and Appellants.

Civ. 5213.

District Court of Appeal, Fourth District, California.

Dec. 2, 1955.

Action by school district for declaratory relief and to quiet title to land. The Superior Court, Orange County, John Shea, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Mussell, J., held that where deed to school district provided that conveyance was for public school purposes only, and that land should revert to grantors upon failure of district to erect and maintain a public school building thereon, district's erection of buildings and use of them for school purposes for forty-five years constituted full performance of deed provision, and land did not revert upon abandonment of school.

Judgment affirmed.

1. Appeal and Error ⇨907(3)

On appeal on judgment roll, findings must receive such construction as will uphold rather than defeat judgment, and wherever, from facts found, other facts may be inferred which will support judgment, such inference will be deemed to have been made.

2. Appeal and Error ⇨544(2)

On appeal on judgment roll, reviewing court is limited to determination of whether judgment is supported by findings and whether error appears on face of record.

3. Deeds ⇨145, 153

A clause in deed imposing obligations or restrictions on grantee will be construed as a covenant rather than a condition subsequent when that can reasonably be done,

and such condition and restriction must be interpreted in light of deed as a whole in order to ascertain intention of parties.

4. Estates ⇨7

A condition involving a forfeiture must be strictly interpreted against party for whose benefit it is created. West's Ann. Civ.Code, § 1442.

5. Deeds ⇨155

Estates ⇨7

"Conditions subsequent" are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of condition, and they are not favored in law and a deed provision will not be construed as a condition subsequent if language will bear any other reasonable construction.

See publication Words and Phrases, for other judicial constructions and definitions of "Conditions Subsequent".

6. Schools and School Districts ⇨65

A grant of land to a school district with provision that title shall revert upon failure to maintain building for school purposes is to be interpreted in favor of district.

7. Schools and School Districts ⇨65

Where deed to school district provided that conveyance was for public school purposes only, and that land should revert to grantors upon failure of district to erect and maintain a public school building thereon, district's erection of buildings and use of them for school purposes for forty-five years constituted full performance of deed provision, and land did not revert upon abandonment of school.

Leroy P. Anderson, Costa Mesa, for appellants.

Joel E. Ogle, County Counsel, Orange County, George F. Holden and Stephen K. Tamura, Assts. County Counsel, Santa Ana, for respondent.

MUSSELL, Justice.

This is an action for declaratory relief and to quiet title to land in Orange county,

deeded to plaintiff for school purposes. On July 25, 1904, W. J. Cole and Emma Cole, husband and wife, deeded the land involved to the respondent school district. The deed contained the following language:

"That the parties of the first part do hereby grant unto the said party of the second part, subject to the terms, conditions and agreements hereinafter contained, and solely for the uses and purposes hereinafter stated, that certain lot, piece or parcel of land situate in the County of Orange, State of California, and described as follows: (Here follows description of the property.)

"Said land is hereby conveyed to said party of the second part for public school purposes only, and it is expressly understood and agreed that as a consideration for this conveyance said party of the second part shall build and maintain a public school building on said land, and that the title and ownership of said land shall revert to said parties of the first part upon a failure by said party of the second part to erect and maintain a building thereon to be used exclusively for public school purposes."

After the execution of this deed the school district took possession of the property and erected a frame building thereon which it continuously used and maintained for school purposes until 1931. In that year the district removed the frame building and in its place constructed a brick building which it continuously used and maintained exclusively for school purposes from 1931 to 1949. During the year 1949 the brick building was found to be unsafe for school purposes and the district then abandoned it and acquired a new site upon which it now conducts its school. Since 1949 the brick building has not been used for school purposes.

In 1953 plaintiff commenced this action against appellants, each of whom claim a fractional interest in the property as descendants of the grantors and as distributees of the estate of W. J. Cole, one of the grantors. Appellants claim title to the

property on the ground that the land reverted to them when the school district abandoned the school building in 1949 and ceased to use it for school purposes.

The trial court found the facts as stated and further found that plaintiff had performed all conditions to be performed by it as set forth in the grant deed; that the erection of a building on said property for public school purposes and the use of said building for said school purposes for a period of forty-five years constituted a full performance by plaintiff of all the terms and provisions of said deed; that plaintiff is now and for a period of forty-five years last past has been the owner of and in possession of the land involved; that the claims of defendants to said property are without any right whatsoever and that defendants have not, nor have any of them, any right, title or interest whatever in said land. Defendants appeal from the judgment decreeing that the school district is the owner of the property and that the defendants have no right, title or interest therein.

[1,2] This is an appeal on the judgment roll alone. Therefore, the findings are to receive such a construction as will uphold rather than defeat the judgment, and wherever, from the facts found, other facts may be inferred which will support the judgment, such inference will be deemed to have been made. *Goldberg v. List*, 11 Cal.2d 389, 394, 79 P.2d 1087, 116 A.L.R. 900. The findings should receive a liberal construction to uphold rather than to defeat the judgment and we are here limited to a determination of whether the judgment is supported by the findings and whether error appears upon the face of the record. *Montaldo v. Hires Bottling Co.*, 59 Cal.App.2d 642, 646, 139 P.2d 666.

[3-6] A clause in a deed imposing obligations or restrictions on the grantee will be construed as a covenant rather than a condition subsequent when that can reasonably be done and such condition and restriction must be interpreted in the light of the deed as a whole in order to ascertain the intention of the parties. *Rosecrans v. Pacific Elec. Ry. Co.*, 21 Cal.2d 602, 605-

606, 134 P.2d 245; Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 73 Cal.App.2d 917, 929, 167 P.2d 825. A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Civ.Code, § 1442. Conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated for the breach of the conditions. As is said in *Gramer v. City of Sacramento*, 2 Cal.2d 432, 437-438, 41 P.2d 543, 545:

"Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted, if the language of the provision will bear any other reasonable construction. * * * There must be language used which is so clear as to leave no doubt but that the grantor intended that an estate upon condition subsequent should be created—language which *ex proprio vigore* imports such a condition."

A grant of the character here involved is to be interpreted in favor of the grantee. *Streicher v. Heimburge*, 205 Cal. 675, 683, 272 P. 290. We are of the opinion that the law stated in *Hasman v. Elk Grove Union High School*, 76 Cal.App. 629, 245 P. 464, is controlling in the instant case. That case has been commented upon in such cases as *O. T. Johnson Corp. v. Pacific E. R. Co.*, 19 Cal.App.2d 306, 311, 65 P.2d 368; *Booth v. County of Los Angeles*, 124 Cal. App. 259, 261, 12 P.2d 72, and *Rosecrans v. Pacific Elec. Ry. Co.*, 21 Cal.2d 602, 606, 134 P.2d 245, *supra*, and apparently has not been overruled. In the *Hasman* case, the action was brought by the administratrix of the estate of Joseph Kerr for the recovery of certain real property conveyed by Kerr to the defendant school district in 1893. The property was conveyed to the school trustees "to have and to hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part and to their successors forever, provided the same shall be used for the purpose of maintaining thereon a high school, otherwise the above described property shall revert to and become the

property of the party of the first part, his heirs or assigns." Upon the execution of the deed the high school went into possession of the property, erected buildings thereon, and continuously thereafter maintained a high school upon the premises until September 29, 1922, and during that period of time no other property was used for high school purposes. In December, 1920, at an election, the electors voted in favor of changing the location of the school to a new site. Thereafter buildings were erected on the new site and the main activities of the high school were conducted thereon. The buildings on the old site were used for classes in agriculture and "during stormy weather, the athletic classes and work have been conducted thereon." The court there held that to maintain a school does not necessarily mean to keep it up perpetually; that the deed involved could be reasonably interpreted so as to avoid a forfeiture; that in compliance with the literal terms of the deed, the property was "used for the purpose of maintaining thereon a high school," and the deed did not provide for a reversion upon the discontinuance of such use, but only upon failure to so use it; that the condition of the deed was satisfied when the high school district in good faith, and without any intention at the time of changing the location of the school, erected buildings on the property and conducted a high school thereon for twenty-nine years, and until the interests of the school demanded a change of location; that such use of the property was a permanent use even though the use of the property for school purposes was subsequently abandoned.

In *Booth v. County of Los Angeles*, 124 Cal.App. 259, 12 P.2d 72, *supra*, one Harshman in 1884 conveyed certain real property to the County of Los Angeles. The deed contained the following clause: "This conveyance is made for the purpose of a road or highway, to revert to said J. J. Harshman, his heirs and assigns if not so used." Immediately subsequent to the execution of this deed the county of Los Angeles used the premises as a road and continued said use until 1888 when the city of Compton

was incorporated. The land, being within the corporate limits of the city, was used thereafter as a street and was continuously so used until about 1916. Since that year the county has been in possession of the premises, using the same continuously as a stock pile upon which to store decomposed granite and rock for the county road department. The court followed and affirmed the law stated in the opinion in the Hasman case, *supra*, and held that the entire object of the condition of the deed was accomplished when a road or public highway was established and accepted by the public and that "Had it been the intention of the grantor herein that the property should revert upon the discontinuance of its use for road purposes, it would have been so easy to have so stated in plain and simple language that it must be inferred from the terms actually employed that such was not the intention of the grantor."

In the Hasman and Booth cases, *supra*, the deeds provided for reversion to the grantors, "*his heirs and assigns*" and in the instant case the deed provides for a reversion to the grantors. The language used may be reasonably construed as meaning that the condition was intended by the grantors to be effective only during their lifetime. *Rowbotham v. Jackson*, 68 S.D. 566, 5 N.W.2d 36, 142 A.L.R. 193. In *Victoria Hospital Assoc. v. All Persons*, 169 Cal. 455, 147 P. 124, 125, the deed involved contained the following provisions: "This deed is made upon the express condition and for the consideration that the said real property hereby conveyed * * * shall be used by the said party of the second part for benevolent purposes." The court said, 169 Cal. at pages 462-463, 147 P. 124, at page 127:

"It is further to be noted that the grant is made 'for the consideration hereinafter stated,' and that the 'consideration' thus referred to is the matter relied upon as expressing a condition. The words 'upon the express condition' are followed by the words 'and for the consideration that the said real property * * * shall be used,' etc., indicating that the words 'condition' and 'consideration' were

used as expressing the same idea. If the words 'upon the express condition' be here given the technical effect claimed for them by appellant, they are inconsistent with the words 'for the consideration' which simply imply a promise or covenant on the part of the grantee to use the property in the way prescribed, rather than a mere condition having no promissory force."

[7] The findings of the trial court that the erection of buildings on the premises involved for school purposes and the use of said buildings for such purposes for forty-five years constituted a full performance by plaintiff of all the terms and provisions of the questioned deed are supported by the record.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



137 Cal.App.2d 739

Ruth F. HINMAN, also known as Ruth G. Cates, Plaintiff and Appellant,

v.

Joseph M. HINMAN, Defendant and Respondent.
Civ. 5222.

District Court of Appeal, Fourth District,
California.

Dec. 12, 1955.

Rehearing Denied Jan. 9, 1956.

Hearing Denied Feb. 8, 1956.

Proceeding on divorced wife's motion for increase in allowance for support of child. The Superior Court, Orange County, Robert Gardner, J., denied motion and denied wife's motion for attorney fees and costs on appeal, and wife appealed. The District Court of Appeal, Barnard, P. J., held that record on appeal upon clerk's transcript, without evidence, did not disclose that trial court had abused its dis-

cretion in refusing to modify support order.

Orders affirmed.

1. Divorce ⇨309

Where an award is made for support of a child in a divorce decree pursuant to agreement of parties as expressed in a property settlement agreement approved by court, amount may be later increased if child's welfare requires it, and ability of other party to make increased payments is an important consideration.

2. Appeal and Error ⇨907(3)

When an appeal is presented upon clerk's transcript without any record of evidence, it will be presumed that trial court received substantial evidence which supports its findings.

3. Divorce ⇨312.5

Record on appeal upon clerk's transcript, without evidence, in proceeding on divorced wife's motion for increase in allowance for support of child, did not disclose that trial court had abused its discretion in refusing to modify support order.

4. Divorce ⇨286

Where record on appeal from denial of divorced wife's motion for increase in allowance for support of child contained no evidence, so that it did not appear whether wife had sufficient funds to prosecute appeal or whether husband was able to furnish such funds, and support order was affirmed on appeal, it was presumed that trial court's order denying wife's motion for attorney fees and costs on appeal was supported by evidence.

Carter, Young, Zetterberg & Henrie, Pomona, for appellant.

Winthrop O. Gordon, Santa Ana, for respondent.

BARNARD, Presiding Justice.

Appeals from orders made in connection with a request for an increased allowance for the support of a minor.

In August, 1944, the plaintiff was granted a interlocutory decree of divorce which,

among other things, awarded her the custody of two minor children, a boy and a girl, subject to visitation rights in the defendant; ordered the defendant to pay \$25 per month for the support of each child in accordance with the terms of a property settlement agreement approved by the court and attached to the decree; and ordered him to keep in effect two insurance policies on his life, totalling \$9171, for the benefit of the children. A final decree was entered in August, 1945. Each of the parties married again and, by agreement of the parties, custody of the boy was later relinquished to the defendant.

On January 4, 1955, the plaintiff filed notice of motion for an increase in the allowance for the support of the daughter, for an order granting her visitation rights with respect to the boy, and for attorneys fees and costs. In support of the motion she filed an affidavit alleging that conditions had changed since the entry of the original order; that the daughter was now 14 years of age and the expense of maintaining and educating her had increased in that she was taking music lessons, desired to take dancing lessons, and was engaged in various school and social activities; that the defendant's income had increased and affiant was informed that he was now earning in excess of \$5,000 a year; that affiant's present husband was drawing a veteran's disability pension of \$237.50 per month, but was presently ill and unable to work; that affiant was then earning \$190 per month; that the welfare of the daughter required that these support payments be increased; and that the defendant had the ability to pay the same. On January 7, she filed a supplemental affidavit itemizing the expenses and needs of the daughter, which totaled \$203 per month. In arriving at this figure the daughter was charged with her pro rata share of maintaining affiant's household, including interest, taxes, insurance, public utilities, food, maintaining a family car, and purchasing household furniture and supplies; to which was added the cost of entertainment, trips, gifts to friends, and the premium on an insurance policy on the daughter's life. At the hearing of

this motion on January 14, the plaintiff and the defendant were sworn and testified, and an order was entered denying the motion except that the defendant was ordered to pay \$75 attorney fees, payable at \$10 per month.

On January 24, the plaintiff filed notice of a motion to vacate the order entered on January 14, and for a different order granting an increase in the support payments. In support thereof, the affidavit of one of plaintiff's counsel was filed alleging that at the hearing on January 14, the plaintiff and the defendant had testified to certain things and the judge had said certain things. It was stated that the plaintiff had then testified that her present husband was receiving a veteran's disability of \$237 per month, but was presently ill and unable to work; that she and her husband had two other children; that she was working with a regular take-home pay of \$192 to \$194 per month; and that she was also receiving \$20 per month for after-hours work. It was further stated that the defendant had then testified that he was employed by Orange County; that he was receiving \$464 per month less federal taxes withheld of \$54.60, and less retirement funds withheld of \$33.96; and that his necessary expenses totaled \$379 per month and that he had less important expenses amounting to \$73.49 per month. It was also stated that the judge had then remarked that \$25 per month was inadequate for the support of a minor child; that each of the parties, by remarrying, had acquired new responsibilities; that there was a total income in plaintiff's family of \$450; that the defendant's expenses were greater than his take-home pay of \$375 per month; and that he would therefore make no change in the support order.

This motion was heard on January 28, and the reporter's transcript of that hearing is the only one presented on this appeal. It appears therefrom that no evidence was then produced, and the proceeding consisted of arguments made by the attorneys and remarks made by the court. The attorney for the plaintiff argued that conditions had changed and the

defendant was earning more now than he was in 1944; that a father's duty of support still runs even though new associations are formed; that the retirement funds taken from the defendant's pay constitute a capital asset which should not be considered; that he thought the parties could arrive at an agreement with respect to visitation rights; and that the matter should be reconsidered, the prior order vacated, and a new order made increasing the award to \$100 per month. The judge asked counsel to show him how a larger award could be made in view of the evidence, pointed out that each of the parties was maintaining one child and the defendant was required by the divorce decree to keep two life insurance policies in effect, and reviewed from his memory of the evidence at the first hearing the figures as to the net income and expenses of the defendant and the family income of the plaintiff's family. He finally stated that he would take the matter under advisement, consider the matter as reopened, go over the record again on the basis of his recollection of the evidence, and that if he could find any way to give plaintiff relief he would do so.

On February 8, 1955, an order was entered denying the motion to increase the payments for support and for further costs and attorneys fees. On February 23, the plaintiff filed notice of appeal from the order entered on January 14, 1955, and from the order entered on February 8, 1955. The plaintiff then gave notice of a motion for costs and attorneys fees on appeal, to be made on March 11, in support thereof she filed an affidavit alleging that the facts showed that the defendant had increased his earning power; that the daughter required various things amounting to \$203 per month; that the court had erred in figuring defendant's take-home pay by allowing deductions used to build up his capital assets; that the court had erred in basing its holding on the theory that when the parents of a child remarried they acquired their own responsibilities; that affiant's only remedy is by appeal since no further change of

circumstances is anticipated; that \$165 for costs and \$500 for attorney fees are needed for the appeal; and that affiant is unable to pay these costs on an appeal which she has taken in good faith. On March 11, 1955, the court entered an order reciting that the defendant was sworn and testified at the hearing, and denying the motion. On March 21, 1955, the plaintiff filed another notice of appeal from this order.

The appellant contends that a mother should not bear the whole increased cost of supporting her minor daughter when the father's earning power has increased; that a mother's remarriage does not release the father from his duty to share in such increased costs; that the respondent should not be excused from assisting the mother in bearing the increased costs by attributing part of his earnings to capital producing assets; that the stepfather's disability payments should not be considered; and that the court abused its discretion in comparing the net income of the two families and in denying the plaintiff increased support for the minor daughter.

[1] Where an award is made for the support of a child in a divorce decree pursuant to the agreement of the parties as expressed in a property settlement agreement approved by the court, the amount may be later increased "if the child's welfare requires it." *Puckett v. Puckett*, 21 Cal.2d 833, 136 P.2d 1, 6. The ability of the other party to make an increased payment is also an important consideration and one which may be controlling.

[2] While the record shows that oral testimony on both sides was received at the first hearing on January 14, 1955, there is no transcript of such testimony, and apparently no reporter was present. The reporter's transcript of the second hearing on January 28, discloses that no new evidence was produced. The incidental references therein to portions of the evidence received at the prior hearing disclose merely the interpretation placed thereon by the persons making the comments. When an appeal is presented upon a clerk's trans-

cript without any record of the evidence produced, it will be presumed that the trial court received substantial evidence which supports its findings. *Stevens v. Stevens*, 129 Cal.App.2d 19, 276 P.2d 139.

[3] The affidavit filed by appellant's attorney on January 24, in support of the motion to vacate the prior order, was intended for that purpose and not as evidence to be used on a rehearing, and the interpretation placed by the appellant's attorney on certain alleged testimony previously received furnishes no proper record of the evidence actually received, under any of the rules prescribing how such a record may be made and presented, and no further evidence was offered. Even if that affidavit were to be considered it would merely be a partial record, from that counsel's memory, of his interpretation of the effect of portions of conflicting evidence. A question of fact was presented for the court's decision upon conflicting evidence, and it does not certainly appear from the record that the child's welfare required the making of the order requested, or that the respondent was financially able to pay more. In view of the presumptions which apply, and on the record before us, it cannot be held that the court abused its discretion in refusing to modify the support order.

[4] On the appeal from the order denying costs and attorneys fees on appeal the appellant relies on *Sorrels v. Sorrels*, 105 Cal.App.2d 465, 234 P.2d 103. In that case, where the order appealed from was reversed, an order denying a motion for attorneys fees and costs on appeal was also reversed. It was there held that it was an abuse of discretion to deny such an order in a case where the appeal was meritorious, and where the evidence showed that the plaintiff did not have sufficient funds to prosecute an appeal and that the defendant was able to furnish such funds. There is no record here to show the existence of such facts. It appears that the defendant testified at the hearing on this motion, but we have no way of knowing what evidence was produced. It

must be presumed, in support of the court's order, that the evidence supported the court's action.

The meager record before us indicates that the question originally raised with respect to visitation rights was withdrawn during the proceedings, and no point is raised in that connection on this appeal.

The orders appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur. }



137 Cal.App.2d 497

The PEOPLE of the State of California,
Respondent,
v.

George RHINEHART, Jr., Appellant.
Cr. 3154.

District Court of Appeal, First District,
Division 1, California.
Dec. 5, 1955.

Defendant was convicted of participating in automobile theft. The Superior Court, San Mateo County, Louis B. DeMatteis, J., entered judgment of conviction and order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Criminal Law Ⓒ1144(13)

Upon appeal from judgment of conviction and from order denying defendant's motion for new trial, evidence must be construed most favorably to prosecution.

2. Larceny Ⓒ55

Evidence was sufficient to sustain a conviction for participation in theft of automobile. Vehicle Code, § 503.

3. Automobiles Ⓒ339

Defendant, who is trying to start stolen automobile is in possession of such automobile under suspicious circumstances, and mere possession of stolen automobile under suspicious circumstances is sufficient to sustain conviction for taking vehicle without owner's consent. Vehicle Code, § 503.

4. Witnesses Ⓒ277(2)

Where, in prosecution for participation in theft of automobile, defendant, on direct examination, made a general denial that he had ever driven the stolen automobile or had taken or moved it or assisted anyone else in such activities and testified to his version of occurrences on night he was apprehended, permitting prosecution, on cross-examination, and over objection, to examine defendant as to his whereabouts on previous night when the automobile was stolen was proper. Vehicle Code, § 503; Pen.Code, § 1323.

5. Witnesses Ⓒ277(4)

Penal Code provision, which permits only cross-examination of defendant "as to all matters about which he was examined in chief", does not require that, where defendant has made a general denial, cross-examination is limited precisely to matters, dates or times mentioned in the direct examination. Pen.Code, § 1323.

William J. Scammon, Burlingame, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with having participated on April 4, 1955, in the theft of a Ford Sedan belonging to Pearl Brent in violation of Section 503 of the Vehicle Code. He waived a jury trial, and stipulated that the case could be tried upon the record of the preliminary hearing, plus his testimony given in the Superior Court. The trial court determined that, beyond a reasonable doubt, even if defendant was not the sole participant in the theft, he

participated and knowingly assisted in the theft, and that this violated the code section. From the judgment of conviction based on this holding, and from the order denying his motion for a new trial, defendant appeals.

The code section involved is Section 503 of the Vehicle Code. So far as pertinent here, the section reads: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, or any person who is a party or accessory to or an accomplice in any such driving or unauthorized taking or stealing is guilty of a felony * * *."

Tested by the rules applicable to appeals in criminal cases the evidence, and the reasonable inferences therefrom, sustain the conviction.

Miss Brent owned the Ford Sedan, license number 5B43966, that was stolen. At about 8:30 p. m. on April 4, 1955, she parked it in front of a residence in San Mateo, and when she returned to where she had parked the car at about 10 p. m. it was gone. She had given no one, in general, permission to use the car, and, in particular, had not given defendant such permission. She did not know the defendant.

On April 5, 1955, at about 9:30 p. m., Officer Ellison of the San Francisco Police Department, saw the Ford, under suspicious circumstances, in San Francisco. It was parked on a deserted street, and on the rear seat of the car were two wheels and tires and other accessories from a Chevrolet. The officer knew that a short time before, about six blocks away, a Chevrolet had been found that had been completely stripped. The officer also noted that there was a metal coil attached to the ignition that served to short out the ignition. The Ford bore the license plate 3G948. The officer left to call a tow car and returned to the scene about 10 p. m. He testified that as he approached the Ford he saw

defendant sitting in it and the starter was turning the motor over, but the engine was not running. There was no key in the ignition. The defendant was bleeding from several cuts on his head, but he did not appear intoxicated. Under questioning by the officer, the defendant stated that the car belonged to a friend named "Frank," and that "Frank" had told him to fill the Ford with gas and drive it "up the Navy Road." The officer took the defendant to "Frank's" supposed address "and no one was living there by that name. We questioned neighbors and they said no one lived there by the name of 'Frank.'"

Sergeant Otten of the San Mateo Police Department testified that on April 6, 1955, while questioning defendant, the defendant first stated that a person by the name of "Frank" had given him money to buy gas and instructed him to drive the car to Navy Road and leave it there. In a later conversation the same day the defendant said the other boy's name was "Roosevelt"; that on the night of April 4th, "Roosevelt," driving a Chevrolet, picked him up and they drove down to the Peninsula; that near the area from which the Ford was stolen "Roosevelt" stopped the Chevrolet, and told defendant that he, "Roosevelt," was going to pick up another car. The officer summarized what defendant then told him as follows: "At that time the Ford was taken and Rhinehart [the defendant] drove the Chevrolet back to San Francisco, where this other person stripped the Chevrolet." Sergeant Otten took defendant to San Francisco to try to locate where "Roosevelt" lived, but "he was not home."

The defendant testified on his own behalf. He denied that he had ever driven, taken, pushed or moved the Ford at any time, or that he had ever assisted any other person in such activities. Over his objection, on cross-examination, he stated that on the night of April 4th he and "Frank Roosevelt" had gone for a ride down the Peninsula in a Chevrolet; that "Frank" stopped the car and told defendant to drive it back to San Francisco; that he wondered how "Frank" was to get back to San Francisco,

but asked no questions; that he did not then see the stolen Ford; that he drove the Chevrolet back to San Francisco, parked it on Navy Road where he had been told to, and walked a mile home, because he had no carfare. On direct examination he testified that on April 5th he met "Frank," driving the Ford, in San Francisco; that "Frank" told him he was going to drive the Ford to the spot where it was subsequently found and that defendant, later in the day, should drive it to Navy Road where he had left the Chevrolet; that "Frank" gave him 50 cents for gasoline; that defendant then visited some friends, had something to drink, and got into a fight in which his head was cut; that he then visited some more friends; that upon leaving these friends he saw the Ford parked where "Frank" had stated he would leave it; that he sat in the Ford for a few minutes to clear his head; that he did not try to start the car as there were no keys; that while sitting there Officer Ellison came by and questioned him; that he and Officer Ellison went to look for "Frank," but could not find him; that he and Officer Otten, the next day, went looking for "Frank," but could not find him; but they did find the house in which he lived.

[1,2] If this evidence be construed most favorably to the prosecution, as this court must construe it, *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Daugherty*, 40 Cal.2d 876, 256 P.2d 911, it is sufficient to sustain the conviction. On two occasions the officers were unable to locate the "Frank Roosevelt," who defendant said had taken the Ford. Defendant admits to being with "Frank" in the general area from which the Ford was stolen. He told Officer Otten that the Ford was then stolen. Defendant was arrested behind the wheel of the stolen car while attempting to start it without keys. The ignition of the car had been shorted. The evidence shows that defendant knew, when "Frank" got out of the Chevrolet, that he was going to and did take the Ford, and it is a reasonable inference that defendant knew, or should have known, that

it was a stolen car. This evidence sustains the finding that defendant was a "person who is a party or accessory to or an accomplice in any such driving or unauthorized taking" of the car as set forth in Section 503 of the Vehicle Code.

[3] Mere possession of a stolen car, under suspicious circumstances, and certainly defendant while trying to start the car was in possession of it under such circumstances, is sufficient to sustain a conviction under the section. *People v. Holland*, 82 Cal.App.2d 310, 186 P.2d 58. In *People v. Ragone*, 84 Cal.App.2d 476, 191 P.2d 126, the court sustained a conviction under the section where the defendants were seen leaving a stolen car, the engine of which was left running, several hours after it was stolen. See also *People v. Valdez*, 14 Cal.App.2d 580, 58 P.2d 656.

Appellant predicates his claim of insufficiency of the evidence on the holdings in *People v. Flores*, 58 Cal.App.2d 764, 137 P.2d 767, and *People v. Lewis*, 81 Cal.App.2d 119, 183 P.2d 271. In the *Flores* case the only evidence connecting the defendant with the theft was his own admission that he had sat in the car and a fingerprint of his was found on the rear view mirror. There was no evidence, such as exists in the present case, of defendant's presence in the area where the car was stolen, or that the defendant was arrested while sitting in the driver's seat trying to start the car. In the *Lewis* case the court held that the evidence was insufficient where there was no evidence that defendant either assisted or aided anyone in taking the car, or had taken it himself, or no evidence that the defendant had ever driven the stolen car or been in the area from which it was stolen, the only evidence being that he had ridden in the car and was arrested while sitting in it as a passenger and not as driver. That is not this case.

Both sides to this appeal argue over whether the evidence shows that "Frank Roosevelt" ever existed. The evidence, and the inferences from the evidence, on this issue, are conflicting. But even if it

be assumed that "Frank Roosevelt" did exist, this would not aid appellant. The trial court found, assuming that "Frank Roosevelt" actually took the car, that the evidence, beyond a reasonable doubt, showed that defendant knowingly aided, abetted and participated in the theft. That finding finds substantial support in the record, and that finding supports the conviction.

[4, 5] Appellant next complains of the overruling of his objections to portions of his cross-examination. On direct examination defendant first made a complete and general denial—he denied that he had at any time or on any date driven Miss Brent's car, or that he had taken, pushed or moved it, or that he had assisted anyone else in such activities. Then he testified as to his version of the occurrences of April 5th. On cross-examination, the prosecution, over objection, was permitted to examine defendant as to his whereabouts on April 4th, the night the car was stolen. This was clearly proper. While Penal Code Section 1323 only permits cross-examination of the defendant "as to all matters about which he was examined in chief", this does not mean, where the defendant has made a general denial, that the cross-examination is limited precisely to the matters, dates or times mentioned in the direct examination. The Supreme Court, in interpreting this section in *People v. Zerillo*, 36 Cal.2d 222, 228, 223 P.2d 223, 227, stated: "This does not mean that the cross-examination must be confined to a mere categorical review of the matters, dates or times mentioned in the direct examination. [Citations.] It may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination. [Citations.] * * * If a defendant takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide. [Citations.] Moreover, as stated in *People v. Teshara*, 141 Cal. 633, 638, 75 P. 338, 340, 'A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution,

thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony-in-chief as well as with respect to facts which he expressly states.'" See also *People v. Smith*, 43 Cal.App.2d 110, 110 P.2d 472.

Tested by these standards the cross-examination was proper.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



137 Cal.App.2d 437

Milton M. VERNON, Plaintiff and Respondent,

v.

OWL TRUCK & CONSTRUCTION CO., a corporation and F. A. Porter, Defendants and Appellants.

Civ. 21163.

District Court of Appeal, Second District, Division 1, California.

Dec. 2, 1955.

Rehearing Denied Dec. 27, 1955.

Hearing Denied Jan. 25, 1956.

Shipper's employee's action for injuries sustained when he fell from bed of defendants' truck while it was standing motionless on shipper's premises. The Superior Court, Los Angeles County, Samuel R. Blake, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, White, P. J., held that evidence, with regard to whether it should have been apparent to plaintiff that truck driver was about to tighten, or intended to tighten, chain while plaintiff was in act of stepping over it, was insufficient to require giving of instruction as to qualification of

rule that negligence of another need not be anticipated.

Affirmed.

1. Appeal and Error Ⓒ928(4)

In determining whether trial court, in shipper's employee's action for injuries sustained when he fell from bed of defendants' truck, should have instructed that as to qualification of rule that another's negligence need not be anticipated, appellate court would look to evidence favorable to defendants and decide whether such evidence, regardless of contradictions and inconsistencies, would have justified jury's finding that it should have been apparent to plaintiff that defendant truck driver was about to tighten, or intended to tighten, chain while plaintiff was in act of stepping over it.

2. Automobiles Ⓒ246(58)

In shipper's employee's action for injuries sustained when he fell from bed of defendants' truck, evidence, on issue as to whether it should have been apparent to plaintiff that truck driver was about to tighten, or intended to tighten, chain while plaintiff was in act of stepping over it, was insufficient to require giving of instruction as to qualification of rule that another's negligence need not be anticipated.

3. Trial Ⓒ295(1)

Instructions must be considered in their entirety.

4. Trial Ⓒ295(6)

In shipper's employee's action for injuries sustained when he fell from bed of defendants' truck while it was standing motionless on shipper's premises, "dangerous place" instruction was not without ambiguity, but when read in conjunction with all other instructions given, could well be regarded as being intended, and understood by jury, to be statement of law that degree of care required remains constant even as to one who is employed in place of danger, but acts necessary to constitute such care may vary according to circumstances; and no prejudice ensued to defendant from instructions as a whole.

Moss, Lyon & Dunn, Sidney A. Moss, Henry F. Walker, Los Angeles, for appellant.

A. Joseph Sherwood, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Defendants have appealed from a judgment for plaintiff in his action for damages for injuries to his person when he fell from the bed of the truck owned by defendant Owl Truck & Construction Company while it was standing motionless on the premises of plaintiff's employer, Southwest Engineering Company.

The evidence is contradictory in almost all respects. The pertinent portions will be stated in connection with the issues to be determined. Appellants do not question the sufficiency of the evidence to support the verdict and judgment, but urge that two instructions given constitute prejudicial error requiring reversal of the judgment.

One of the instructions so cited as error reads as follows: "A person, who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such person to fail to anticipate injury which can come only from a violation of law or duty by another." Appellants' contention is that the two sentences of the above quoted instruction should have been followed by another sentence, as in B.A.J.I. 138, and that the instruction without that third sentence is an erroneous and incomplete statement of the applicable law. The omitted sentence is: "However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty." In support of this contention, appellants cite and rely upon the decisions next discussed.

In *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal.2d 157, 195 P.2d 416, it was held that to give the entire instruction was not error and that the instruction as a whole did not impose a duty upon one to antici-

pate negligence on the part of others. At page 165 of 32 Cal.2d, at page 422 of 195 P.2d, the court said: "It is but a statement as to that common type of negligence, the unreasonable failure to observe what is going on about one, including the negligence of others." Judgment for plaintiff growing out of an intersection collision of two automobiles was there affirmed.

The judgments in *Angier v. Bruck*, 56 Cal.App.2d 55, 131 P.2d 876, and *Carlson v. Shewalter*, 110 Cal.App.2d 655, 243 P.2d 549, 552, were reversed for the reason that, under the facts of those cases, an instruction substantially as given in the instant action and hereinbefore quoted should have been qualified by language substantially the same as the third sentence of B.A.J.I. 138, also hereinbefore quoted.

In *Angier v. Bruck*, supra, there was evidence from which the jury might have found that respondent saw appellant's automobile traveling toward the point of impact at a speed too great to be stopped before the impact, and that respondent could have avoided the collision.

In *Carlson v. Shewalter*, supra, the jury was instructed that "in making the left hand turn Carlson (appellant) had violated the law * * * that negligence of the respondent could not be predicated on his failure to anticipate that Carlson would make an unlawful movement on the highway" and there was evidence from which the jury could have found that the front end of Carlson's car had been turned across the highway awaiting an opportunity to complete the lefthand turn in plain view of respondent during the time it took him to drive almost a block. In that decision, 110 Cal.App.2d at page 659, 243 P.2d at page 552, it is said: "If the jury had been specifically instructed that respondent could not continue to rely on Carlson's obedience of the law after having the opportunity by the use of reasonable care to discover its violation, we cannot say that their verdict would not have been for appellant under the evidence."

In the instant action, the alleged negligence of appellants which was impliedly found by the jury to have caused plain-

tiff's injuries was not so obvious as either the excessive speed toward the intersection in *Angier v. Bruck*, supra, or the illegal lefthand turn into a driveway in *Carlson v. Shewalter*, supra. Those violations were, or should have been, observed by the other party in time for him to prevent the injury, and the exception should not have been omitted from the instruction as to one's right to rely upon obedience of the law by others. In the instant action, however, respondent contends that "The evidence was not such as to entitle defendants to have such exception included as part of this instruction."

The record on the instant appeal contains evidence showing, without conflict, that: Defendant Owl Truck & Construction Company's truck, driven by defendant Porter, called at the premises of plaintiff's employer, Southwest Engineering Company, for a load. Defendant Porter was directed to a certain loading bay where a heat exchanger, 26 inches in diameter, 192 inches long, weighing 9,300 pounds, and with projections from the generally cylindrical shape protected by wooden crating, was loaded onto the front portion or tractor of defendants' equipment. Porter was then directed to and did move the truck about 50 feet to a loading area near another crane where another heat exchanger, 36 inches in diameter, 192 inches long, weighing 19,900 pounds, and having 12 inch legs, was loaded onto the semi-trailer on 4 x 6's. Porter was then directed to and did drive ahead a few feet so that the loading area could be used by other trucks. Porter placed two chains with binders across each of the heat exchangers and attached the chains to both sides of the tractor and trailer beds. The front chain across each heat exchanger had its binder on the non-driver's side and the rear chain across each had its binder on the driver's side. Pulling down on the lever of any binder would tighten the chain to which that binder was attached. After the truck was stopped in this third location, plaintiff boarded it, taking with him four tags and a small stapling gun for the purpose of stapling a tag to each side of each of the heat exchangers. The tags could be stapled only

to the wooden crates protecting the projecting portions of the heat exchangers. After two tags had been placed on the rear heat exchanger and one on the driver's side of the front heat exchanger, and when plaintiff was within a few steps of the place on the non-driver's side where the fourth tag was to be stapled, he fell from the bed of the tractor to the cement loading area and was severely injured. Either plaintiff or Porter could have been seen by the other across the 26" heat exchanger.

[1,2] As to all other questions of fact, the evidence is in direct conflict. Contrary to respondent's contention, the instant appeal is not one where an appellate court looks only at the evidence most favorable to respondent. If the evidence favorable to defendant, regardless of contradictions and inconsistencies, would have justified the jury's finding that it was or should have been apparent to plaintiff that defendant Porter was about to tighten, or intended to tighten, the chain while he was in the act of stepping over it, then the qualifying instruction as in B.A.J.I. 138 would have been applicable. We therefore summarize both versions.

Plaintiff testified that he himself directed defendant Porter to the loading bay where the first unit was loaded and that he then told Porter he would have to board defendants' equipment after the heat exchangers had been loaded in order to tag them. Defendant Porter denied that it was plaintiff who directed him to the loading bay and testified that no one had told him that anyone would board the tractor or trailer for any purpose.

Plaintiff testified that when he boarded the tractor Porter was standing about 15 to 20 feet away on the driver's side of the equipment talking with a man, and that he climbed onto the truck on that side where he was in plain view of Porter. At that time the front chain and the two rear ones were tight and the rear chain over the front heat exchanger was lying flat on the bed of the tractor. Defendant testified that he had tightened the two chains over the unit on the tractor before moving it to load the second heat exchanger onto the

trailer, that both chains on the second unit were tightened before the equipment was moved to the place where plaintiff boarded the equipment and fell from the tractor bed; and that those chains were not loosened at any time after he first tightened them.

Plaintiff and several other witnesses testified that the bill of lading was not given to Porter until after the accident. Porter testified that he went to the office, stood in the door waiting for the bill of lading to be finished, saw plaintiff on the driver's side of the tractor while he was waiting in the office door, that he was given the bill of lading, walked from the office door to the cab of the tractor, put the bill of lading in the seat, took a red flag from under the seat, walked along the driver's side of the tractor and trailer and started to tie the red flag to the protruding rear end of the heat exchanger on the trailer, and then heard plaintiff cry out after he had fallen.

Plaintiff testified that as he proceeded forward on the non-driver's side of the tractor bed he was watching where he stepped; that as he approached and started to step over the chain there was no movement of the chain whatsoever; that, while his foot was raised to step over it, the chain hit his leg just under the knee and caused him to fall to the cement loading area and injure himself; that while he was on the ground he saw Porter's feet and legs on the driver's side below the tractor bed near the binder of the chain which had caused him to fall.

Two of plaintiff's co-employees testified that defendant Porter told them he was not sure just how plaintiff was hurt "but he must have tripped over the chain as he was tightening up the chain". Porter denied that he had made any such statement.

Accepting as true, as the jury apparently did, the testimony that the chain was lying flat on the bed of the tractor when plaintiff began to step over it, he had the right to expect that it would not be tightened at that instant so as to strike his leg and cause him to fall from the truck.

Whenever the chain was tightened across the load it was done by pulling down the lever of the binder. There is no evidence that any movement by Porter showing an intention to pull the lever would necessarily have been made before plaintiff's step over the chain was begun, in order that the chain would strike plaintiff's leg before his step was completed. Plaintiff had been on the truck long enough to step around the tightened chains and over the flat one on the driver's side, and twice around one of the tight chains on the non-driver's side. During that time, according to plaintiff, he had seen Porter talking with a man and making no movement toward or about the truck; and, according to Porter, during that time, he had waited some minutes in the office door, he had seen plaintiff on the truck, had walked from the office, put his bill of lading in the seat, removed a red flag from under the seat, and walked along the driver's side the full length of the equipment. There is no evidence in the record on the instant appeal to which the instruction limiting and qualifying plaintiff's right to assume that Porter would exercise ordinary care for his safety was applicable. The giving of the instruction without the limitation was not error in this case.

In the instant action, the record contains 53 pages of instructions given, both general and specific. It may be noted, also, that the following instruction was given as requested by defendant: "It was the duty of the plaintiff, Milton M. Vernon, to use his sense of sight as an ordinarily reasonable and prudent person would have used it under the circumstances as you find them to have existed at the time of the accident. If the plaintiff failed to so use his sense of sight, he was guilty of negligence, and if it contributed proximately to the occurrence of the accident in any degree, then your verdict must be in favor of the defendants."

Appellants requested that the following instructions be given as their 6th, 7th and 8th:

(6th) "Ordinary care is that care which persons of ordinary prudence exercise in

the management of their own affairs in order to avoid injury to themselves or to others."

(7th) "Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution involved in the exercise of ordinary care increases or decreases as does the danger that reasonably should be apprehended.

"Evidence as to whether or not a person conformed to a custom that had grown up in a given locality or business is relevant and ought to be considered, but is not necessarily controlling on the question whether or not he exercised ordinary care, for that question must be determined by the standard of care that I have stated to you."

(8th) "The law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection.

"He is not in the exercise of ordinary care unless, at each stage of his work, he makes an effective use of his bodily and mental faculties, and observes as attentively as is reasonably possible under the circumstances the conditions of the instrumentalities by which his safety may be affected, and the results of their operation by himself or others, in so far as that operation may tend to subject him to danger."

Instructions 6th and 7th were given as requested, but, in lieu of 8th above quoted, the court of its own motion instructed as follows:

"When a person's lawful employment requires that he work in a dangerous location or a place that involves unusual possibilities of injury or requires that, in the line of his duty, he take risks which ordinarily a reasonably prudent person would avoid, the necessities of such a situation, in so far as they limit the caution that he may take

for his own safety, lessen the amount of caution required of him by law in the exercise of ordinary care."

It is the instruction last above quoted that appellants cite as prejudicial error.

About 20 decisions are cited by appellants as authorities requiring reversal because of the giving of that instruction. They include Gleason v. Fire Protection Engineering Co., 127 Cal.App. 754, 16 P.2d 750, and Weddle v. Heath, 211 Cal. 445, 295 P. 832. As stated by Mr. Justice Moore, speaking for the court, in Hechler v. McDonnell, 42 Cal.App.2d 515, 518, 109 P.2d 426, 428, these cases cited by appellant "are authority for rejecting the demands of one who, being familiar with a building and its patent defects, was negligent as a result of which he received his injuries".

More nearly analogous is the case of Wallace v. King, 27 Cal.App.2d 174, 80 P.2d 523, where a workman who was coming down a rope on the side of a 25-foot excavation signaled the operator of a bulldozer at the bottom to stop, the bulldozer was stopped about three feet from the bottom of the rope with its blade motionless in the air, the workman then dropped from the rope and was badly injured by the blade's being dropped on him just as he landed on the loose dirt at the bottom.

In Wallace v. King, supra, 27 Cal.App.2d at page 180, 80 P.2d at page 526, this court said: "Undoubtedly it is the rule that one who is employed in a place where he is exposed to danger must exercise his faculties for his own protection; and if he approaches a place which he knows or ought to know is one of danger, he must take reasonable precautions to avoid being injured (Gleason v. Fire Protection Engineering Co., 127 Cal.App. 754, 757, 16 P.2d 750 * * *); but while the degree of care required remains constant, the acts necessary to constitute such care may vary according to circumstances. (Hen-

derson v. Los Angeles Traction Co., 150 Cal. 689, 89 P. 976.) Therefore, the question presented is whether a reasonably prudent man, situated as respondent, was, seeing what he saw, and knowing what he knew, would have acted as respondent acted, and whether such conduct constituted care in proportion to the danger. If any act or omission on the part of respondent amounted to a want of ordinary care and was a proximate contributing cause of his injury, he cannot recover." (Emphasis added.)

[3,4] While the instruction last complained of by appellant in the instant action is not without ambiguity, nevertheless no citation of authority is necessary for the statement that instructions must be considered in their entirety. When viewed in their entirety, they correctly expound the law applicable to the issues framed by the pleadings and raised by the evidence. We are satisfied that the challenged instructions cannot be said to have misled or confused the jury and certainly no prejudice ensued to appellant therefrom. The instruction in question, when read in conjunction with all the other instructions given, may well be regarded as being intended and understood by the jury to be a statement of the law that, as to one who is employed in a place of danger, "while the degree of care required remains constant, the acts necessary to constitute such care may vary according to the circumstances".

A consideration of the entire record in this case does not admit of the conclusion that without the claimed error in the instructions the verdict would have been different from the verdict actually rendered by the jury.

The judgment is affirmed.

DORAN, J., and NOURSE, Justice pro tem., concur.

137 Cal.App.2d 512

Eleanor E. SMITH, Plaintiff and
Appellant,
v.

Thomas H. SMITH, Defendant and
Respondent.
Civ. 20871.

District Court of Appeal, Second District,
Division 3, California.
Dec. 5, 1955.

Proceeding on application by father for modification of final divorce decree to obtain custody of minor son from mother. The Superior Court, Los Angeles County, Allen T. Lynch, J., awarded custody of minor son to father and mother appealed. The District Court of Appeal held that evidence was sufficient to warrant change of custody.

Affirmed.

1. Parent and Child $\S$ 2(4)

An application to change the custody of a child from one parent to the other is addressed to the sound discretion of the trial judge and his order will not be reversed except on a clear showing of an abuse of that discretion.

2. Divorce $\S$ 303(3)

In proceeding on application by father for modification of final divorce decree by changing custody of minor son from mother to father, if a showing of change in circumstances was necessary to warrant the change in custody, evidence was sufficient to show such a change.

3. Divorce $\S$ 312.6(3)

In proceeding on application by father for modification of final divorce decree by changing custody of minor son from mother to father, wherein trial judge interviewed child in chambers without making statement for record of what child said in interview, but no request was made for such statement, it must be assumed that information received by trial judge at interview together with other evidence was sufficient to support the change in custody granted by the trial judge.

4. Appeal and Error $\S$ 203(3)

Allowing nine year old boy to testify without being sworn could not be objected to on appeal where adverse party at no time made any objection to his unsworn testimony, where adverse party cross-examined him, and in addition, at close of hearing, relied on the unsworn testimony. West's Ann.Code Civ.Proc. $\S$ 1846.

5. Divorce $\S$ 303(3)

In proceeding on application by father for modification of final divorce decree which awarded custody of minor son to mother, whispered conversation between boy and commissioner during trial, allegedly in violation of section of statute providing that a witness can testify and be heard only in presence of all parties subject to their examination, must be assumed to have been consented to by the wife, where no objection was made thereto and no request was made for statement of conversation for record. West's Ann.Code Civ.Proc. $\S$ 1846.

6. Divorce $\S$ 312.2

Objection could not be raised for first time on appeal that there was a whispered off the record conversation between commissioner and boy whose divorced father was seeking a change of custody. West's Ann.Code Civ.Proc. $\S$ 1846.

John K. Ford, Los Angeles, for appellant.

James L. Potts, Inglewood, for respondent.

PER CURIAM.

Appeal by plaintiff mother from a minute order modifying the final decree of divorce by changing custody of the minor son of the parties from the mother to defendant father. She urges that the trial court's action in changing custody was an abuse of discretion.

On August 4, 1947 plaintiff was granted an interlocutory judgment of divorce from defendant. The judgment awarded custody of Craig, minor son of the parties, to plaintiff. On August 17, 1948 final judgment was entered, including therein the custody provisions of the interlocutory judgment.

On June 10, 1953 defendant applied for an order changing custody of Craig from plaintiff to himself subject to a right of reasonable visitation in plaintiff, based on the facts that he had remarried and had two children by his second marriage, that Craig was then 9 years of age, and that Craig had frequently expressed a desire to live with him and be raised in his home. Plaintiff opposed the application. The matter was heard by a commissioner who made a report to the court and recommended that custody of Craig be awarded to defendant. Plaintiff filed exceptions to the report and recommendation. At the hearing on the exceptions the court read the record before the commissioner and pursuant to a stipulation interviewed Craig privately in chambers. An order was then made approving the commissioner's recommendation awarding custody of Craig to defendant but modifying his recommendations as to visitation. Plaintiff appeals.

[1] An application to change the custody of a child from one parent to the other is addressed to the sound discretion of the trial judge and his order will not be reversed except on a clear showing of an abuse of that discretion. *Holsinger v. Holsinger*, 44 Cal.2d 132, 135, 279 P.2d 961.

[2] Plaintiff's first point is that there was no showing of a change of circumstances. Assuming, without deciding, that a showing of a change of circumstances is necessary, there appears to have been a sufficient showing. At the time of the interlocutory decree Craig was only three years and five months old. At the time of the hearing he was nine and a half years old. He is now eleven and a half years old. Since the divorce defendant has remarried and has two children by his new wife. He has visited Craig at all times in accordance with his visitation rights. He has built a room onto his home and furnished it for Craig. Craig told the commissioner he preferred to live at his father's home. During the summer of 1953 while he was living with his father, Craig, on his own, enrolled in a summer school and attended from 8 a. m. to 3 p. m. Plaintiff made it difficult for defendant to visit Craig while the child was in her custody. See *Bernstein v. Bernstein*, 80 Cal.App.2d 921, 183 P.2d 43; also,

Cornwall v. Cornwall, 108 Cal.App.2d 95, 238 P.2d 8.

[3] As we have mentioned, on stipulation of the parties the trial judge talked to Craig in chambers. The trial judge did not state for the record what the conversation had been. We disapprove of the practice of a judge interviewing a child in chambers without thereafter making a statement for the record of what the child has said in the interview. In *Jenkins v. Jenkins*, 125 Cal.App.2d 109, 269 P.2d 908, we said that it would be the part of wisdom for the court to make a record of such interviews with children in custody cases in order to protect itself against any suspicion of unfairness on the part of the parent against whom the decision is rendered. However, no request was made for such a statement in the case at bar. Accordingly we must assume that what Craig told the judge, together with the other evidence, was sufficient to warrant a change of custody. *Smith v. Smith*, 135 Cal.App.2d 100, 286 P.2d 1009.

[4] At the time of the hearing before the commissioner Craig was nine years of age. The following took place when he was called to testify on behalf of defendant:

"Mr. Bronsten [plaintiff's attorney]: I will stipulate he may be sworn.

"The Court: We won't—it isn't necessary to swear the boy in as a witness at his age." Defendant then examined Craig without his having been sworn and plaintiff cross-examined him. Plaintiff asserts the court erred in taking the testimony of Craig without administering an oath to him as required by section 1846 of the Code of Civil Procedure. Obviously Craig should have been sworn. However, plaintiff cannot complain. She at no time made any objection to his testifying without being sworn. She cross-examined him. In her argument at the close of the hearing she relied on the unsworn testimony. She does so in her opening brief here. It is too late to raise the point.

[5, 6] When Craig completed his testimony before the commissioner, the commissioner asked: "Counsel, may I ask the boy one question that he can answer off the record." Counsel did not reply, and no objection to the commissioner doing so

was made. A whispered conversation was then had between the boy and the commissioner. The commissioner did not state for the record what the conversation had been, and no request was made for such a statement. Plaintiff contends the procedure was contrary to section 1846 of the Code of Civil Procedure. The conversation should have been stated for the record. It must be assumed that plaintiff consented to the conversation with Craig "off the record." *Morris v. Morris*, 121 Cal.App.2d 707, 709, 264 P.2d 106; *Barr v. Barr*, 119 Cal.App.2d 588, 591, 259 P.2d 957. The objection cannot be raised for the first time on appeal.

Finally, plaintiff contends defendant has repeatedly attempted to modify the custody order on the same facts. We have examined the record and find no merit in this contention.

There is no showing that the court abused its discretion in making the order appealed from.

Affirmed.



137 Cal.App.2d 651

Rena S. PHILLIPS, Plaintiff and Appellant,

v.

Mildred C. PHILLIPS, Defendant and Respondent.

Civ. 5232.

District Court of Appeal, Fourth District, California.

Dec. 8, 1955.

Action by ex-wife against ex-husband's subsequent wife, to whom ex-husband had allegedly fraudulently conveyed certain property to evade ex-wife's levy of execution thereon in her attempt to enforce support provisions of her divorce decree, and who had thereupon brought action to quiet title to such property, purportedly served summons upon ex-wife by publication, and

obtained judgment, wherein ex-wife sought equitable relief setting aside such judgment, creating and declaring constructive trust and granting declaratory relief. The Superior Court of Riverside County, John G. Gabbert, J., sustained subsequent wife's general and special demurrer without leave to amend and thereupon entered judgment in favor of subsequent wife, and ex-wife appealed. The District Court of Appeal, Mussell, J., held that complaint seeking, inter alia, to set aside judgment in quiet title action and alleging that ex-wife was at all times resident of two specified counties of state and that she did not know of quiet title action, proceedings therein or judgment rendered until fourteen months after filing of such action, could have been amended to state cause of action for equitable relief from extrinsic fraud, and demurrer should not have been sustained without leave to amend.

Judgment reversed with directions.

1. Pleading ⚡225(2)

General rule is that it is abuse of discretion to sustain without leave to amend demurrer to original complaint unless complaint shows on its face that it is incapable of amendment, and this rule applies irrespective of whether leave to amend is requested or not. *West's Ann.Code Civ.Proc.* § 472c.

2. Judgment ⚡443(1)

Judgment may be reopened or vacated in equitable action for extrinsic fraud.

3. Judgment ⚡469(11)

Complaint seeking, inter alia, to set aside judgment based on purported service by publication in quiet title action and alleging that plaintiff was at all times resident of two specified counties of state and that she did not know of quiet title action, proceedings therein or judgment rendered until fourteen months after filing of such action, could have been amended to state cause of action for equitable relief from extrinsic fraud, and demurrer should not have been sustained without leave to amend.

4. Pleading ⚡193(5)

Where complaint could have been amended to state cause of action, demurrer thereto was properly overruled.

5. Judgment ⚡407(2)

Fact that defendant in action to quiet title had filed motion for relief from judgment and that motion was conditionally granted did not preclude such defendant from bringing subsequent suit in equity to vacate such judgment for same cause. West's Ann.Code Civ.Proc. § 473.

William G. Junge, Los Angeles, Lance D. Smith, Willard P. Netzley, Puente, and Thomas L. Roquemore, Los Angeles, for appellant.

L. Donald St. Clair, Riverside, for respondent.

MUSSELL, Justice.

This is an action for equitable relief in which plaintiff seeks to set aside a judgment; to create and declare a constructive trust and for declaratory relief. Defendant Mildred C. Phillips demurred to the complaint and her demurrer, which is both general and special, was sustained by the trial court without leave to amend. Plaintiff appeals from the judgment thereupon entered in favor of the defendant Mildred C. Phillips.

[1, 2] The sole question here involved is whether the trial court abused its discretion in sustaining the demurrer without leave to amend. The general rule is that it is an abuse of discretion to sustain without leave to amend a demurrer to an original complaint unless the complaint shows on its face that it is incapable of amendment. *Temescal Water Co. v. Department of Public Works*, 44 Cal.2d 90, 107, 280 P.2d 1; *King v. Mortimer*, 83 Cal.App.2d 153, 158, 188 P.2d 502; *C. Dudley De Velbiss Co. v. Krintz*, 101 Cal.App.2d 612, 617, 225 P.2d 969. This rule applies irrespective of whether leave to amend is requested or not. *MacIsaac v. Pozzo*, 26 Cal.2d 809, 816, 161 P.2d 449; *King v. Mortimer*, 83 Cal.App.2d 153, 158, 188 P.2d 502, *supra*; *Code Civ. Proc.*, Sec. 472c. It is also the rule that a

judgment may be reopened or vacated in an equitable action for extrinsic fraud. *Giavocchini v. Bank of America Nat. Trust and Savings Ass'n*, 39 Cal.App.2d 444, 447, 103 P.2d 603; *Baker v. Baker*, 217 Cal. 216, 18 P.2d 61. In *Metzger v. Vestal*, 2 Cal.2d 517, 524, 42 P.2d 67, 70, the court said:

"As types of extrinsic fraud, the courts of appellate jurisdiction of this state have adopted the classic definition, found in *United States v. Throckmorton*, 98 U.S. 61, 65, 25 L.Ed. 93, in which the Supreme Court of the United States said: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or *where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff*; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." * * * The gravamen of the rule thus expressed lies in the fact that "the unsuccessful party has been prevented from exhibiting fully his case." *Bacon v. Bacon*, 150 Cal. 477 [89 P. 317, 322]." (Italics ours.)

It is alleged in the complaint herein, *inter alia*, that at all times mentioned therein plaintiff has been a resident of the counties of Los Angeles and San Bernardino; that for many years last past defendant Harold B. Phillips owned certain real property therein described; that on February 5,

1946, plaintiff obtained a final decree of divorce from Harold B. Phillips under the terms of which he was required to pay plaintiff certain sums as support and maintenance for herself and two minor children; that on or about May 16, 1952, plaintiff notified defendant Harold Phillips to make the payments specified in said final decree; that on or about May 27, 1952, Harold Phillips conveyed the property involved to his then wife, Mildred C. Phillips; that plaintiff is informed and believes and therefore alleges that said conveyance was made without consideration and for the sole purpose of defrauding her; that plaintiff on or about January 26, 1953, obtained an execution in said action and levied upon the property; that on or about May 10, 1953, Mildred Phillips filed an action against plaintiff and Harold Phillips in Riverside County, being action number 56611; that said action was brought to quiet title to the property involved; that the summons therein was purportedly served upon plaintiff Rena S. Phillips by publication, although the said Mildred Phillips, plaintiff in said Riverside action, at all times knew that said Rena S. Phillips could be found; that on or about December 15, 1953, the decree "removing cloud of levy of execution" and quieting title in said action number 56611 became final, unknown to Rena S. Phillips; that she at no time had any notice, directly or indirectly, as to the filing of said action or as to any proceedings taken therein until on or about July 19, 1954, at which time her attorney was notified of the restraining order and judgment therein; that immediately thereafter she filed a motion in said action to set aside the judgment and said motion was granted by the court on condition that she deposit a bond in the sum of \$5,000; that she is without means or funds to post said bond; that the conveyance by Harold Phillips to his wife was executed with the intent to hinder, delay and defraud Rena Phillips; that by reason of the facts alleged, said Rena Phillips has been prevented from asserting her defenses to the Riverside action, number 56611, and has been prevented from levying execution. In the second cause of action plaintiff Rena Phillips alleged that the sum of \$5,900, with

interest, is due her under the Los Angeles decree and in a third cause of action she alleges that Mildred Phillips is holding the property involved in trust for the benefit of Harold Phillips; that a controversy exists between plaintiff and defendants, and that the court should make a declaration with the respective interests of the property.

[3] It does not appear that the complaint could not have been amended to state a cause of action for the equitable relief sought. It is evident from the record that plaintiff Rena Phillips was not personally served with summons in the action brought by Mildred C. Phillips. The affidavit for publication of summons shows that Rena S. Phillips could possibly be reached at a Los Angeles address. It is alleged in the complaint that Rena Phillips was at all times a resident of Los Angeles and San Bernardino counties and that she did not know that a judgment had been entered against her until July 19, 1954. These and other facts alleged indicate that a cause of action might be stated under the rules announced in the foregoing decisions and under the definition of extrinsic fraud quoted in *Metzger v. Vestal*, 2 Cal.2d 525, 42 P.2d 70, 71, *supra*.

[4] No abuse of discretion is shown in the trial court's ruling on the demurrer as to counts two and three of the complaint. The demurrer should have been overruled since the complaint could be amended to state a cause of action. *Shook v. Pearson*, 99 Cal.App.2d 348, 351, 221 P.2d 757.

[5] Defendant Mildred Phillips argues that the demurrer was properly sustained on the grounds that there was another action pending for the same cause. This argument is based on the allegations in the complaint that Rena Phillips filed a motion under section 473 of the Code of Civil Procedure and that her motion was conditionally granted. However, it is held in *Baker v. Baker*, 217 Cal. 216, 218, 18 P.2d 61, *supra*, that section 473 of the Code of Civil Procedure has never been considered as an exclusive method for the exercise of the equity jurisdiction nor as an adequate substitute for the right to proceed by action;

that it is a cumulative remedy, and does not displace the remedy in equity; and that an adverse decision on such a motion does not necessarily bar a subsequent suit to vacate the judgment for the same cause.

The judgment is reversed with directions to give plaintiff a reasonable time within which to amend her complaint.

BARNARD, P. J., and GRIFFIN, J., concur.



137 Cal.App.2d 472

Martha Rachel STILES, as Administratrix of the Estate of Laurel Ann Stiles, Deceased, and Martha Rachel Stiles, Individually, Plaintiffs and Respondents,

v.

AMERICAN TRUST COMPANY, a Corporation, as Administrator of the Estate of Dave Holder, Deceased, Defendant and Appellant.

William Laverne DUNN, Plaintiff and Respondent and Appellant,

v.

AMERICAN TRUST COMPANY, a Corporation, as Administrator of the Estate of Dave Holder, Deceased, Defendant and Appellant and Respondent.

Civ. 8646.

District Court of Appeal, Third District,
Division Sacramento, California.

Dec. 2, 1955.

Consolidated actions for injuries arising out of airplane crash. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgments from which appeals were taken. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that where a pilot promised a motorist a ride in his airplane in consideration for motorist's driving pilot about on business and while they were driving to airport, they came upon a friend of motorist and pilot acquiesced in

motorist's suggestion that her friend also be taken up but neither such friend nor anyone on his behalf gave any consideration to pilot for ride, motorist's friend was a "guest" in airplane and, under statute, he could not maintain action for injuries based upon pilot's negligence.

Judgment from which a plaintiff appealed affirmed, defendant's appeal from other judgment dismissed.

1. Negligence $\S$ 221/2

Where a pilot promised a motorist a ride in his airplane in consideration for motorist's driving pilot about on business and while they were driving to airport, they came upon a friend of motorist whom pilot did not know, and pilot acquiesced in motorist's suggestion that her friend also be taken up but neither such friend nor any one on his behalf gave any consideration to pilot for ride, motorist's friend was a "guest" in airplane and, under statute, he could not maintain action for injuries based upon pilot's negligence. Public Utilities Code, $\S$ 21406.

2. Appeal and Error $\S$ 133

Where motion ordering judgment in accordance with motion for directed verdict after erroneous denial of motion is granted and judgment entered accordingly, appeal is to be taken from judgment and not from order granting motion. West's Ann.Code Civ.Proc. $\S\S$ 630, 963.

3. Judgment $\S$ 197

Where motion for judgment in accordance with motion for directed verdict after erroneous denial of such motion for directed verdict is denied, there is no judgment which can be entered and case may be reset for trial. West's Ann.Code Civ.Proc., $\S\S$ 630, 963.

4. Appeal and Error $\S$ 85

Appealable judgments and orders are fixed by statute. West's Ann.Code Civ.Proc. $\S\S$ 630, 963.

5. Appeal and Error $\S$ 133

Statute defining appealable judgments and orders from superior court grants no appeal from order denying motion made

pursuant to statute providing for ordering judgment in accordance with motion for directed verdict after erroneous denial of motion, where no verdict has been returned. West's Ann.Code Civ.Proc. §§ 630, 963.

Burke & Rawles, Ukiah, for respondents.

Rowland R. King and David B. Lombardi, San Francisco, for respondent and appellant Dunn.

Forrest A. Betts of Betts, Ely & Loomis, Los Angeles, Mannon, Brazier & Bell, Ukiah, James A. Williams, Los Angeles, of counsel, for appellant American Trust Co.

VAN DYKE, Presiding Justice.

These are appeals in consolidated actions for damages arising out of an airplane accident in which the respondents Stiles and Dunn suffered serious personal injuries and the infant daughter of Mrs. Stiles was instantly killed. Dave Holder, deceased, was the owner and pilot of the plane in which respondents were riding when it fell shortly after taking off at the Willits Airport.

Respondent Stiles and her baby lived with her mother in Willits. The deceased, Mr. Holder, was a friend of the family. He lived in San Mateo but owned a ranch near Willits, upon which one of the respondent Stiles' married sisters and her husband lived. This sister testified that when Holder came to Willits it was customary for her to use her mother's car to drive him around but that he never paid, nor was expected to pay, for such service. On the day of the accident Holder flew from Belmont to Willits. Upon arrival he telephoned respondent Stiles and asked if her sister was there. Respondent Stiles testified: "I told him no. And then I asked if I could help him, or what he wanted? And he said that he wanted my sister to come up and take him around town some. And I asked him if he wanted me to, if he needed me to come and do it? And he said yes. And he told me if I would that he would take me in the airplane, take me for a ride in the airplane afterwards. And so I told him I would be there in a few minutes." Respondent Stiles then took her small baby and drove her mother's car down

town to meet Holder, who then drove to the residence of Mr. Stansberry, whom he wished to see about trading some horses. Respondent Stiles and the baby accompanied him. Mr. Stansberry was not at home, and after a few minutes' conversation with his wife, Holder returned to the car where respondent Stiles and the baby were waiting. He then started to drive to the airport. En route they overtook respondent Dunn who was on foot. He had been out to call upon respondent Stiles, but, of course, had not found her at home. Holder stopped the car and picked up respondent Dunn whom he had never met. The two were introduced by respondent Stiles and they all proceeded to the airport, where respondent Stiles testified Holder asked her to go up with him. Respondent Stiles then asked Holder "if there was enough air" to also take respondent Dunn, and Holder replied that there was. After this conversation, Holder and the respondents boarded the plane. Respondent Stiles held the baby. Holder started the motor, taxied down the runway, and took off. Shortly after leveling off at an altitude of about 75 feet, the plane fell to the earth and crashed into a tree. Holder and the baby were killed and the respondents were injured.

Each of the respondents brought an action for damages against the appellant American Trust Company as the administrator of the estate of Dave Holder, deceased, based upon the alleged negligence, wilful misconduct, and intoxication of Holder. The two actions were consolidated for trial before a jury. The trial court directed verdicts in favor of the defendant on the causes of action predicated on intoxication and on respondent Dunn's cause of action founded on negligence. On other counts the jury disagreed and a mistrial was declared. However, the parties stipulated that it be deemed that the jury had performed its duty and returned directed verdicts. Accordingly, judgment was entered in favor of appellant American Trust Company on the causes of action based on intoxication and on respondent Dunn's cause of action based on negligence. It is conceded on this appeal that the trial court properly directed verdicts on the causes of action based on

intoxication, but respondent Dunn has appealed from that portion of the judgment in favor of appellant American Trust Company on his cause of action based on negligence. We will first consider this appeal.

Dunn contends that the trial court erred in holding, as a matter of law, that he was a guest and therefore barred from maintaining an action based on negligence, by virtue of Section 15 of the State Aeronautics Commission Act (now Section 21406 of the Public Utilities Code), which provides:

"No guest riding in or upon any aircraft without giving compensation for such ride shall have, nor shall any other person have, any right of action for civil damages against the airman flying such aircraft or against any other person otherwise legally liable for the conduct of such airman on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said airman."

[1] There was no evidence from which it could be reasonably found that respondent Dunn, or any one on his behalf, gave "compensation" to the deceased Dave Holder for respondent Dunn's ride. As noted above, they met for the first time that morning when respondent Stiles introduced them. Respondent Stiles' furnishing Holder with the use of her mother's car could not constitute "compensation" for the ride for respondent Dunn. At the time that Holder, according to Stiles, promised to give respondent Stiles a ride if she would drive him around, none of the parties contemplated that, unforeseeably, respondent Dunn would accompany them. There was no evidence from which it could be inferred that the use of the car was conditioned upon Holder giving a ride to respondent Dunn or any one other than respondent Stiles. There is no evidence that respondent Dunn expected to suffer detriment from, or to confer any benefit upon, Holder. The arrangement between Holder and respondent Stiles for the use of the car was in no way connected with respondent Dunn. It was

merely by chance that he joined them. Holder did no more than acquiesce in respondent Stiles' suggestion that respondent Dunn also be taken up. The trial court correctly held that, as a matter of law, respondent Dunn was a guest. Therefore, it correctly directed a verdict on respondent Dunn's cause of action based on negligence.

As already noted, the jury disagreed and a mistrial was declared. After the jury's discharge, appellant American Trust Company made a motion for judgment pursuant to Section 630 of the Code of Civil Procedure, which provides:

"When a motion for a directed verdict, which should have been granted, has been denied or for any reason not granted, and the jury for any reason, has been discharged without having rendered a verdict, then within 10 days after the discharge of the jury, the court on its own motion, or, after said 10-day period, upon motion, notice of which was given within said 10-day period, may order judgment to be entered in accordance with the motion for a directed verdict. * * *

[2-5] Appellant American Trust Company appeals from the "Judgment and Order" denying said motion as to the causes of action based on wilful misconduct and as to respondent Stiles' causes of action based on negligence. In this case there was not, and could not be, a judgment from which an appeal would lie. If the motion had been granted, then judgment would have been entered accordingly. In such case, the appeal would have to be taken from the judgment and not from the order granting the motion. *Costa v. Regents of Univ. of California*, 103 Cal.App.2d 491, 495, 229 P.2d 867. However, if the motion is denied, there is no judgment which can be entered and the case may be reset for trial. Herein, the motion was denied by minute order. Although, under Section 963 of the Code of Civil Procedure, an appeal may be taken from an order denying a motion for judgment notwithstanding the verdict, no such provision is made in respect to an order denying a motion for judgment where no verdict is returned. Appealable judgments

and orders are fixed by statute. Here the statute defining appealable judgments and orders grants no appeal from an order denying a motion made pursuant to the provisions of Section 630 of the Code of Civil Procedure.

The judgment appealed from by appellant Dunn, dated January 19, 1954, decreeing said appellant take nothing by the first cause of action alleged in his amended complaint is affirmed. The appeals of American Trust Company, a corporation, are dismissed.

PEEK and SCHOTTKY, JJ., concur.



137 Cal.App.2d 450

Jacob (Jay) PALEY, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Bank of America National Trust and Savings Association, Executor of the Estate of Lillian Paley, Deceased, Real Party in Interest.

Civ. 21272.

District Court of Appeal, Second District,
Division 3, California.

Dec. 2, 1955.

Hearing Denied Jan. 25, 1956.

Proceeding on petition for alternative writ of mandate to require Superior Court to direct petitioner's deceased wife's attorney to answer certain questions upon deposition. The District Court of Appeal, Ashburn, J. pro tem., held that husband who, under succession statute communitizing property brought into California from common law state, could get one-half of deceased's wife's property, within class described by statute, and could be required to give to wife's estate one-half of his separate property, was in privity with estate

which would absorb or release half of such property, and therefore attorney-client privilege would not prevail in husband's action against wife's executor for declaratory relief and wife's attorney could be compelled to answer upon deposition questions as to communications (made by testatrix in connection with preparation and execution of her will) which would tend to support husband's claim that there had been an oral agreement transmuting property within statute into separate property.

Order accordingly.

1. Mandamus ⇨40

Mandamus is appropriate remedy to compel trial court to require witness to testify.

2. Husband and Wife ⇨266

Where wife left will disposing of all of property which she was entitled to dispose of by will, whether such property were her separate property or community property of her husband and herself, and husband, claiming that there had been an oral agreement transmuting community property into separate property, brought action against wife's executor for declaratory relief, evidence with regard to such alleged oral agreement was material and admissible.

3. Witnesses ⇨199(4)

Attorney-client privilege does not survive client's death when matter of his conversations or instructions arises in will contests, petitions to determine heirship, petitions to construe an ambiguous will, or any other type of controversy involving only heirs or next of kin and legatees or devisees of client.

4. Courts ⇨92

Language not necessary to ruling, but responsive to argument presented by counsel and probably intended for guidance of court and attorneys upon new trial, could not be put aside as mere dictum.

5. Witnesses ⇨198(1)

Mere fact that both parties claim under deceased client does not render communications made by client to his attorney

admissible. West's Ann.Code Civ.Proc. § 1881.

6. Depositions ⇨1

The purpose of a deposition proceeding is to develop facts bearing upon existing or potential issues, and question as to constitutionality of Probate Code section did not arise upon such proceeding. Probate Code, § 201.5; West's Ann.Code Civ. Proc. § 2021, subd. 6.

7. Husband and Wife ⇨247

Probate Code section communitizing property brought into California from a common-law state is strictly a succession statute and does not convert into community property, or otherwise reclassify during lifetime of spouses, property falling within its description, but upon death of either spouse it effects an automatic reclassification to community property for purpose of succession. Probate Code, § 201.5.

8. Witnesses ⇨202

Husband who, under succession statute communitizing property brought into California from common-law state, could get one-half of deceased wife's property within class described by statute and could be required to give to wife's estate one-half of his separate property, was in privity with wife's estate, and therefore attorney-client privilege would not prevail in husband's action against wife's executor for declaratory relief, and wife's attorney could be compelled to answer questions as to communications made by testatrix in connection with preparation and execution of her will which would tend to support husband's claim that there had been an oral agreement transmuting community property and property within statute into separate property. Probate Code, § 201.5; West's Ann. Code Civ.Proc. § 2021, subd. 6.

9. Discovery ⇨28

Policy of California is one of liberality in matter of discovery.

10. Witnesses ⇨198(1)

The attorney-client privilege is grounded on public policy, and is to be strictly construed, since it suppresses relevant facts that may be necessary for just decision.

11. Witnesses ⇨183½

Testimony as to oral agreement with deceased person is subject to closest scrutiny.

Wright, Wright, Green & Wright, S. Earl Wright, Loeb and Loeb, Herman F. Selvin, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Fox, Goldman & Kagon, Stanley E. Fox, Beverly Hills, Brady, Nossaman & Walker, Walter L. Nossaman, Joseph L. Wyatt, Jr., Los Angeles, for real party in interest.

ASHBURN, Justice pro tem.

[1] This case involves certain aspects of the problem of the extent of survival after death of a testator's privilege against disclosure by his attorney of confidential communications made by the testator in connection with the preparation and execution of his will. Petitioner Jacob Paley seeks a writ of mandate directing the superior court to require his deceased wife's attorney, Stanley E. Fox, Esq., to answer certain questions upon deposition which the trial court held objectionable as calling for privileged matter, for that reason sustaining objections to said questions. If petitioner's ultimate position is sound mandamus is an appropriate remedy. *Brown v. Superior Court*, 34 Cal.2d 559, 561, 212 P.2d 878; *Carnation Co. v. Superior Court*, 96 Cal. App.2d 138, 141, 214 P.2d 552; *Ahern v. Superior Court*, 112 Cal.App.2d 27, 30, 245 P.2d 568.

It appears that petitioner and his wife, Lillian Paley, were married in 1906 and resided together in the State of Pennsylvania until 1936 when they moved to California, living in this state until the wife's death on January 2, 1954. She left a will dated December 5, 1952 which bears the signatures of Mr. Fox, his secretary and another employee of his firm as attesting witnesses. This will was admitted to probate and Bank of America National Trust and Savings Association was duly appointed and has qualified and is acting as executor thereof. The will makes various spe-

cific bequests and leaves the residue of the estate to certain specified beneficiaries, to the exclusion of petitioner. The instrument contains this language: "*Third: It is my intention, hereby, to dispose of all property, real or personal, which I am entitled to dispose of by Will, whether said property be my separate property or the community property of my husband and myself.*"

On or about October 15, 1954 Mr. Paley brought an action against the executor in the superior court seeking declaratory relief. The complaint in paragraph V alleges the marriage and residences as above stated. Further that Mrs. Paley left a substantial amount of personalty which was at all times her separate property, standing in her own name; that it was acquired during marriage in Pennsylvania or with the proceeds of such acquisitions. Defendant's answer alleges that all real and personal property left by decedent was acquired during marriage by gift, bequest, devise or descent, or the rents, issues or profits thereof. Paragraph VI of the complaint alleges that Mr. Paley was at the time of his wife's death and now is the owner of considerable personal property which is his separate estate standing in his own name; that same was acquired partly before and partly after marriage while domiciled in Pennsylvania; that plaintiff has no personal property otherwise acquired. The answer avers that plaintiff acquired a substantial amount of personal property after marriage while domiciled outside the State of California, "which would not have been the separate property of plaintiff if acquired while domiciled in this state," the extent thereof being unknown to defendant.¹ The quoted language uncovers the major controversy between the parties. It points to section 201.5 Probate Code, which says: "Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which

would not have been the separate property of either if acquired while domiciled in this State, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code."² Paragraph VII of the complaint alleges an oral agreement between the spouses, made in California while resident here, to the effect that all property acquired by either of them or standing in his or her name was and should be separate property of the one acquiring the same or in whose name it might stand. This allegation is denied by defendant. The complaint then defines in paragraph IX the existing controversy and defendant by answer and cross-complaint gives a slightly different version of it. As appears from the pleadings and the briefs herein these are the questions in dispute. 1. Was there any community property of this marriage? 2. If so, was there an agreement transmuting it and any quasi-community property into separate property as alleged by plaintiff? 3. Was the personalty standing in Jacob Paley's name at time of Lillian's death quasi-community and, if so, did she have the right to make testamentary disposition of one-half of same under section 201.5 Probate Code? 4. Was the personal property standing in the wife's name at her death quasi-community, and, if so, does plaintiff succeed to one-half thereof under said section 201.5, notwithstanding her leaving same to others in her will?

In June 1955 plaintiff commenced the taking of the deposition of Mr. Fox under section 2021, subdivision 6, Code of Civil Procedure, upon the ground that he is the only witness who can establish certain facts material to the issue. Upon advice of counsel he relied upon an asserted privilege with respect to any conversations with Mrs. Paley concerning the preparation of her will and other professional matters. There

1. Counsel appropriately assume that Pennsylvania does not have any community property system. 41 C.J.S., Husband and Wife, § 462c, p. 987.

2. We will for convenience designate such holdings as quasi-community property.

have been two proceedings before the superior court seeking to compel answers. As a result of the first one the witness was ordered to answer certain questions and objection was sustained to one other. The deposition was resumed and Mr. Fox then testified that he acted for Mrs. Paley throughout the whole process of preparation and drafting of her will; that within a period of two years prior to execution of her will he had conversations with his client about the disposition of property by her will; that no third person was present at any of those conversations; that during the same period he had many conversations with her about other matters of a confidential nature; that they had conversations about the nature, extent, description or identification of property which she claimed to own or over which she had or claimed the right of testamentary disposition. Mr. Fox refused to answer the question to which objection had been sustained, namely: "Q. Will you please state the dates involved, the places at which they were held, the persons present and the substance of what was said at any conversation or discussion you may ever have had with Mrs. Paley as to the nature, extent or testamentary disposition of her property?" The witness having been asked and having refused to answer certain additional questions, the matter was presented the second time to the court. That series of questions is typified by the following.

"Q. Did Mrs. Paley ever say to you, or in your presence and hearing at any time, in substance or effect, that there was no community property of the marriage between herself and Mr. Paley?

"Q. Did Mrs. Paley at any time ever say to you, or in your presence, or hearing, that all of the property which Mr. Paley had was his own separate property, in substance or effect?

"Q. Did Mrs. Paley ever say to you, or in your presence and hearing, in substance or effect, that she and Mr. Paley had years before had an understanding or agreement to the effect that his property would be his separate property and her property would be her separate property? * * *

"Q. Will you state, Mr. Fox, the substance of the conversations or discussions that you had with Mrs. Paley relating to the nature, extent, identification or disposition or proposed disposition of any property by her?"

The objections to all questions were sustained upon the grounds (1) that the will is not ambiguous and hence oral evidence not admissible or material and (2) that petitioner is a stranger to the will and the subject matter of the conversations is privileged as to him. Petitioner herein challenges both of these conclusions; respondent and the real party in interest stoutly assert that they reflect sound law.

The will on its face is not ambiguous. It declares an intention to dispose of all property over which testatrix has testamentary control. "It is my intention, hereby, to dispose of all property, real or personal, which I am entitled to dispose of by Will"; the addition of the phrase "whether said property be my separate property or the community property of my husband and myself" merely operates by way of description; it does not on its face narrow the scope of the declared and all-inclusive intention. But it is necessary to apply every will to the subject matter upon which it is to operate. To that end extrinsic evidence is always necessary. 57 Am.Jur. section 1041, page 676: "A moment's reflection will show that in giving effect to any will, even the simplest and clearest, some extrinsic evidence must be admitted to identify the persons and property referred to in the will and to enable the court to apply the words of the will to the matters to which it relates, and this necessity is expressly or impliedly recognized in many decisions." Wigmore on Evidence, section 2470, page 227 says: "The truth had finally to be recognized that words *always* need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document. 'Words *must* be translated into things and facts.' Instead of the

fallacious notion that 'there should be interpretation only when it is needed', the fact is that there must always be interpretation. Perhaps the range of search need not be extensive, and perhaps the application of the document will be apparent at the first view; but there must always be a traveling out of the document, a comparison of its words with people and things. The deed must be applied 'physically to the ground.'

* * * Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore *all the circumstances must be considered which go to make clear the sense of the words*,—that is, their associations with things." See also annotation in 94 A.L.R. at page 52.

[2] The existence of each type of property—separate, community and quasi-community—is in issue; likewise the question of conversion into separate property by oral agreement. The will furnishes no clue to solution of the questions thus arising. Extrinsic evidence is indispensable to administration of the estate, for the court must ascertain what property is subject to its jurisdiction. The issue of what property was subject to decedent's power of testamentary disposition is the heart of the case. It follows that any questions put to the witness bearing upon the status of any property claimed by decedent or her executor go to the basic issue. And, of course, those questions search for evidence upon a material issue. If perchance the eliciting of such evidence raises a latent ambiguity in the will it can be removed by parol evidence. This is well settled. 26 Cal.Jur. § 208, p. 892; 18 Cal.Jur.2d § 282, p. 774; In re Estate of Wolf, 128 Cal.App. 305, 310, 17 P.2d 1052; In re Estate of Donnellan, 164 Cal. 14, 19, 127 P. 166; In re Estate of Greenwald, 19 Cal.App.2d 291, 296, 65 P.2d 70. But the existence of an ambiguity, latent or patent, is not important at bar, because of the necessity of determining the identity and quality of estate property (au-

thorities supra) as a basis for going ahead with administration on the probate side of the court. The evidence sought by the questions under consideration is material.

[3] The subject of privilege presents a more difficult problem. The rule is well established in this state, as elsewhere, that the privilege does not survive the testator's death when the matter of his conversations or instructions arises in will contests, petitions to determine heirship, petitions to construe an ambiguous will, or any other type of controversy involving only the heirs or next of kin and the legatees or devisees of the testator. Generally to this effect are In re Estate of Dominici, 151 Cal. 181, 90 P. 448; In re Wax's Estate, 106 Cal. 343, 348, 39 P. 624; In re Estate of Nelson, 132 Cal. 182, 188, 64 P. 294; In re Mullin's Estate, 110 Cal. 252, 42 P. 645; 58 Am.Jur. § 505, p. 283; 70 C.J. § 587, p. 438; 64 A.L.R. 185 annotation; 2 A.L.R.2d 659 and 661, annotation. Though varying explanations of the reason for this rule have been given, it is a court made principle based upon considerations of public policy, In re Estate of Dominici, supra, 151 Cal. at page 186, 90 P. 448; City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 25 A.L.R.2d 1418, and is limited to controversies between persons in privity with the testator's estate. Between persons claiming under testator and others who are not in privity with his estate the privilege survives. This is a generally accepted proposition. 64 A.L.R. 191, annotation; 2 A.L.R.2d 664, annotation. The rule is usually stated in terms of application to "strangers" or persons claiming adversely to the estate. But the question of who fall within this category is involved in some obscurity, especially in California. Whether one who claims under contract with or conveyance from the testator is a "stranger" within the rule has met with diverse answers in the courts. The following cases³ hold that such a person is not a stranger: Phillips v. Chase, 201 Mass. 444, 87 N.E. 755; Eicholtz v. Grunewald, 313 Mich. 666, 21 N.W.2d 914; Warner v. Kerr, 216 Mich. 139, 184 N.W.

3. This list is by no means complete, merely illustrative.

425; *In re Estate of Brzowsky*, 267 Wis. 510, 66 N.W.2d 145, 67 N.W.2d 384; *Hayes v. Pennock*, Tex.Civ.App., 192 S.W.2d 169; *Middletown Trust Co. v. Crowell*, 89 Conn. 290, 93 A. 785; *Johnson v. Antry*, Mo., 5 S.W.2d 405; *Boyd v. Kilmer*, 285 Pa. 533, 132 A. 709; *Cummings v. Sherman*, 16 Wash.2d 88, 132 P.2d 998. The leading case on this subject is *Russell v. Jackson* (1851), 9 Hare 387; 68 Eng.Reports 558. The contrary result was reached in *In re Smith's Estate*, 263 Wis. 441, 57 N.W.2d 727; *Emerson v. Scott*, 39 Tex.Civ.App. 65, 87 S.W. 369; *Flack v. Brewster*, 107 Kan. 63, 190 P. 616. Numerous other authorities supporting both sides of the proposition are cited in the annotations in 64 A.L.R. and 2 A.L.R.2d, above cited, and in supplemental citations.

In California the first case on the subject appears to be *In re Bauer's Estate*, 79 Cal. 304, 312, 21 P. 759. That was a contest over final distribution, decedent's son claiming as sole devisee and the widow under a homestead declaration upon alleged community property. It was held error to exclude testimony of the attorney who prepared the declaration of homestead. At page 312 of 79 Cal., at page 761 of 21 P. the court said: "One other point remains to be considered. The attorney at law who drew the declaration of homestead, and was at the time apparently acting for the deceased and his wife in the matter, was interrogated, on behalf of contestant, as to whether the recital in the declaration of homestead was explained to Mrs. Bauer, if she understood it, what explanation was given, and what she knew about the matter. This was objected to on the ground that it called for a privileged communication between attorney and client, and was sustained, and excepted to. The objection should have been overruled. When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations." In effect the holding was that the son stood in the position of the deceased father with respect to

the matter of privilege. Concerning this case the court said in *Smith v. Smith*, 173 Cal. 725, 733, 161 P. 495, 498: "It will be remembered that in the *Bauer Case* the contest was between a son asserting title to property as an heir and his mother claiming under a homestead, and it was held that the statements of his father and mother, made to the attorney who prepared the declaration of homestead, were not privileged."

Smith v. Smith, supra, was an action to quiet title, etc., brought by the sons of Uriah Smith, deceased, against their step-mother Ella R. Dooley Smith. Plaintiffs claimed under two deeds which their father had placed in escrow to be delivered to them upon his death. Later he conveyed the same properties and others to Ella R. Dooley who thereupon married him. One of the issues was that of knowledge on her part of the escrowed deeds at the time she received her conveyance. Attorney Russell, who drew her deed, testified to a conversation with her and Uriah in which the fact of the existence of those escrowed deeds was mentioned. It was claimed that this was error as the conversation was privileged. The court said, 173 Cal. at page 732, 161 P. at page 497: "It is asserted also that Mr. Russell was attorney and common agent for both grantor and grantee named in the deed which he prepared, and that therefore the communications made to him when they were present were privileged so far as plaintiffs were concerned. There was no proof that Mr. Russell was acting for Mrs. Dooley. He was employed by Mr. Smith and acted under his orders. Nevertheless appellant contends that the statements of Mr. Russell come within the rule of privilege applying where, for example, an attorney acts for a husband and wife in preparing a declaration of homestead. *In re Bauer's Estate*, 79 Cal. 304-312, 21 P. 759. But that rule only operates against strangers. The sons claiming title under the deeds which had been placed in escrow were not within that category. 'It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client.' 40 Cyc. p. 2380. Among the citations supporting

this text are *Kern v. Kern*, 154 Ind. 29, 55 N.E. 1004, *Phillips v. Chase*, 201 Mass. 444-448, 87 N.E. 755, 131 Am.St.Rep. 406, and *Glover v. Patten*, 165 U.S. 394-406, 17 S.Ct. 411, 41 L.Ed. 760." Then follows the observation about the *Bauer* case which we have quoted. This ruling seems to rest upon the theory that the sons, claiming under the deeds, were not strangers but were in privity with decedent and his estate.

[4, 5] *Collette v. Sarrasin*, 184 Cal. 283, 193 P. 571, throws considerable doubt upon this conclusion however. It was an action brought by the sole heir of a decedent to have his grant deed to defendant declared to be a mortgage. The attorney who drew the deed was precluded by court rulings from giving any testimony as to the transaction, and defendant's attorney was prevented from making any offer of proof or any statement of what he expected to prove by the witness. The court, in reversing, held that the record as made did not disclose whether the relationship of attorney and client existed in fact or whether there was any confidential communication; that the rulings were reversible error. The court then added: "The mere fact that both parties claim under the deceased does not, in our opinion, make the communication admissible, for under our Code (section 1881, Code Civ.Proc.) the privileged communication cannot be received unless that privilege is directly or inferentially waived by the client." 184 Cal. at page 289, 193 P. at page 573. Though *Smith v. Smith* is not mentioned this seems to be directed toward the argument presented by respondent in his petition for hearing in Supreme Court, which sought to explain away the *Smith* decision. The quoted language clearly was not necessary to the ruling, but, as it was responsive to an argument presented by counsel and probably intended for guidance of court and attorneys upon a new trial, it probably cannot be put aside as mere dictum. Cf. *People's Lumber Co. v. Gillard*, 5 Cal.App. 435, 439, 90 P. 556; *Chamberlain Co. v. Allis-Chalmers Mfg. Co.*, 74 Cal.App.2d 941, 943, 170 P.2d 85; 13 Cal.Jur.2d § 135, p. 666; *People v. Bateman*, 57 Cal.App.2d 585, 587, 135 P.2d 192.

Counsel have cited no later cases on this point and we have found none. Neither the *Smith* case nor *Collette* dealt with the administration of a decedent's estate; the *Bauer* decision did pass upon that very problem. But in all three instances the effect of death upon the privilege was expressly or impliedly presented. And we must assume that the *Collette* decision represents presently prevailing law of this state. It merely abolishes the concept that the privity of estate created by an inter vivos transaction is enough to do away with the privilege of attorney and client and leaves unimpaired the principle that in probate matters privity with the decedent's estate under administration is enough to render the privilege inoperative. As applied to the facts at bar it will appear that the necessary privity exists in at least one aspect of the litigation.

[6] The dispute over the existence and ultimate ownership of quasi-community property appears to be the major one in this case; and it extends to property standing in the name of each of the spouses. Counsel for petitioner contend that section 201.5 is unconstitutional when applied to separate property brought by the surviving husband from the State of Pennsylvania. But we apprehend that that question does not arise upon a deposition proceeding, the purpose of which is to develop facts bearing upon existing or potential issues. Moreover, one of the issues in this case is the existence of quasi-community property in the name of decedent and petitioner's succession to one-half of same; and no claim of unconstitutionality of section 201.5 is made with relation to that particular property.

[7, 8] It is established law that section 201.5 does not convert into community property or otherwise reclassify during lifetime of the two spouses property falling within its description and brought here from a common-law state. It is strictly a succession statute and has been upheld on that basis. In *re Miller*, 31 Cal.2d 191, 196, 187 P.2d 722; In *re Estate of Perkins*, 21 Cal.2d 561, 570, 134 P.2d 231; *Logan v.*

Forster, 114 Cal.App.2d 587, 597, 250 P.2d 730; 16 Cal.Jur.2d § 52, p. 101. Separate property of either spouse brought here from Pennsylvania remained during their joint lives the separate property of each, but upon death of either spouse (assuming constitutionality of application of 201.5 to the survivor's separate property) it was automatically reclassified as community property (if fitting the description of 201.5) for purpose of succession. The spouse who takes one-half under this section regardless of the will does so by succession or inheritance and irrespective of whether that half goes through the probate court. If Mr. Paley gets one-half of the wife's property within this class, or if her estate takes one-half of his separate property so reclassified for purpose of succession, it would be quite illogical to hold that he, Mr. Paley, is not in privity with the estate which absorbs or releases half of such property. He is in no different situation from one who takes as heir or legatee. And the rationale of the decisions which hold that the privilege does not prevail in a controversy between persons claiming under the decedent or through his or her estate is fully applicable here.

This issue of quasi-community property having opened the privilege it is opened fully as to conversations about the preparation of the will or the property upon which it is to operate. As Professor Wigmore says in 8 Wigmore on Evidence (3d Ed.) section 2314, page 613: "The confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will"; indeed, the privilege covering conversations about preparation or execution of the will or its subject property is not apportionable at all. The inquiry upon deposition as to the existence and extent of quasi-community property naturally leads to the question of the existence of property strictly community and the alleged oral agreement between the spouses transmuting into separate property of each spouse the assets standing in his or her name. Not only should questions concerning the existence and extent of

quasi-community property be answered but also those which relate to community property and the claimed oral agreement of transmutation. Certain additional considerations emphasize the soundness of this conclusion.

[9-11] The policy of this state is one of liberality in the matter of discovery, *Union Trust Co. of San Diego v. Superior Court*, 11 Cal.2d 449, 459-460, 81 P.2d 150, 118 A.L.R. 259, a policy which has been implemented by the deposition statutes which in turn are to be liberally construed. *Ahern v. Superior Court*, 112 Cal.App.2d 27, 30, 245 P.2d 568. Since the attorney-client privilege is grounded on public policy, it "is strictly construed, since it suppresses relevant facts that may be necessary for a just decision." *City & County of San Francisco v. Superior Court*, supra, 37 Cal. 2d 227, 234, 231 P.2d 26, 30, 25 A.L.R.2d 1418. Petitioner's claim of an agreement embraces only an oral one. Normally the evidence of such an understanding is within the keeping of the two spouses. While it may be established circumstantially, *In re Estate of Raphael*, 91 Cal.App.2d 931, 939, 206 P.2d 391, the primary evidence would naturally come from Mr. Paley in this case. But such testimony of an oral agreement with a deceased person is subject to the closest scrutiny. *In re Estate of Henderson*, 128 Cal.App. 397, 400-401, 17 P.2d 786; *Turman v. Ellison*, 37 Cal.App. 204, 209-210, 174 P. 396; 10 Cal.Jur.2d § 59, p. 734. If perchance the deceased wife made admissions supporting the husband's claim such as the questions propounded to Mr. Fox imply, his case would be immeasurably strengthened by the attorney's testimony to that effect. If petitioner has a legitimate claim of oral agreement justice demands that he not be denied the benefit of the supporting evidence. See *In re Estate of Smead*, 219 Cal. 572, 575, 28 P.2d 348. If Mr. Fox' testimony proves to be unfavorable to plaintiff's contentions the cause of the defendant will undoubtedly be promoted thereby.

Specific objection is made to certain questions upon the ground that they are too

broad as to time covered and are not confined to conversations relating to the will. An exemplar is this one. "Q. Did Mrs. Paley ever say to you, or in your presence and hearing, in substance or effect, that she and Mr. Paley had years before had an understanding or agreement to the effect that his property would be his separate property and her property would be her separate property?" There is an intimation in the record that any such conversation may have been had in preparation for a divorce action or otherwise unrelated to the will. This question and all others set forth on page 10 of the petition herein, also the first two on page 11, are too broad; and they are objectionable in that their leading nature might elicit forbidden matter if answered affirmatively. For instance an affirmative answer to the quoted interrogatory might afford evidence which in fact remains privileged because a part of a divorce situation and not preparation of the will. But if plaintiff's counsel were able to get a "yes" answer to the question he would have valuable evidence the effect of which might not be eradicable. The witness should not be required to answer the question in that form. But it would be a simple matter upon resumption of the deposition for men of good will and much learning, such as counsel on both sides of this case, to narrow the matter to proper compass and elicit only that which is permissible under the principles herein stated.

We hold that the witness Fox should be by the superior court ordered to answer the questions set forth in footnote 4; that he should not be required to answer those which are copied in footnote 5, but should answer, and if necessary be required by court order to answer, properly formed

4. "Q. What was said at that time with respect to the disposition or proposed disposition of any property by Mrs. Paley?

"Q. Was this particular conversation had with reference to the execution or proposed execution of the will which has now been admitted to probate?

"Q. Are you able at this time to state the gist or substance of the conversations which you had with Mrs. Paley relating to the disposition or proposed disposition of any property whatever?

"Q. Was there any conversation or discussion which you had with Mrs. Paley relating in any way to the nature, extent or disposition of her property, or to the nature, extent or disposition of property over which she claimed any right, at which there were present anyone other than yourself and Mrs. Paley?

"Q. Will you state, Mr. Fox, the substance of the conversations or discussions that you had with Mrs. Paley relating to the nature, extent, identification or disposition or proposed disposition of any property by her?"

5. "Q. Did Mrs. Paley ever say to you, or in your presence and hearing at any time, in substance or effect, that there was no community property of the marriage between herself and Mr. Paley?

"Q. Did Mrs. Paley at any time ever say to you, or in your presence or hearing, that all of the property which Mr. Paley had was his own separate prop-

erty, in substance or effect?

"Q. Did Mrs. Paley ever say to you, or in your presence and hearing, in substance or effect, that she and Mr. Paley had years before had an understanding or agreement to the effect that his property would be his separate property and her property would be her separate property?

"Q. Did Mrs. Paley at any time communicate to you orally any statement or declaration in substance or effect that there was no community property of the marriage between herself and Mr. Paley?

"Q. Did Mrs. Paley ever communicate to you otherwise than orally any statement or declaration to the effect that Mr. Paley's property was his own separate property?

"Q. Did Mrs. Paley ever communicate to you in any way any statement or declaration in substance or effect, that she had no interest or right of any kind in to any of Mr. Paley's property?

"Q. Do you know of any statement or communication by Mrs. Paley on any occasion, or to any person, in substance or effect of the kind to which I have just referred?

"Q. Will you please state the dates involved, the places at which they were held, the persons present and the substance of what was said at any conversation or discussion you may ever have had with Mrs. Paley as to the nature, extent or testamentary disposition of her property?"

questions designed to elicit the subject matter of such last mentioned inquiries without violation of the limitations of the right of interrogation as herein stated.

Let the writ issue accordingly.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.

Hearing denied; SHENK, J., dissenting.



137 Cal.App.2d 710

Adolph WEISS, Plaintiff and Appellant,

v.

Robert Jay BRANDT and Frank Arrousez,
Defendants and Respondents.

Civ. 20990.

District Court of Appeal, Second District,
Division 1, California.

Dec. 12, 1955.

Rehearing Denied Jan. 10, 1956.

Hearing Denied Feb. 8, 1956.

Financier's action against merchant for money had and received, wherein merchant interposed defense, and a treble damages counterclaim, predicated upon alleged usuriousness of transactions. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment for the merchant on his cross-complaint for the difference between the amount which the merchant was entitled to under findings on his cross-complaint and the amount which the financier was entitled to on his complaint, and the financier appealed. The District Court of Appeal, Nourse, J. pro tem., held, inter alia, that evidence would not sustain finding that there had been sixty-five separate transactions and established to contrary that financier's advances, which admittedly exceeded total amount repaid him, had all been made in accordance with single oral agreement.

Take-nothing judgment against financier and judgment in favor of merchant reversed.

1. Usury ⇨115

Standing alone, letter form of contracts between financier and merchant could have been interpreted as establishing either sale or loan, and therefore parol evidence should have been admitted, in financier's action for money had and received (wherein defense, and treble damages counterclaim, predicated upon alleged usurious nature of transaction were interposed), to establish real nature of contracts.

2. Usury ⇨113

Where contracts between financier and merchant were subject to two interpretations, under one of which contracts would be legal and under other of which they would be usurious, financier was entitled to presumption that contracts were legal.

3. Evidence ⇨443(1)

There being nothing in contracts between merchant and financier relative to allocation of payments, that matter was proper subject of separate and supplemental oral agreement and financier was entitled to prove, in his action against merchant for money had and received, such an agreement. West's Ann.Civ.Code, § 1479, subd. 1.

4. Usury ⇨137

Until a debtor has made payments of interest in excess of that permitted by usury statute, he cannot maintain an action against creditor under that statute. West's Ann.Civ.Code, § 1479, subd. 1.

5. Payment ⇨42

Payments made upon indebtedness will be applied to reduction of principal unless there is an express agreement to apply them to interest or such an application by creditor.

6. Usury ⇨117, 142(4)

In financier's action against merchant for money had and received, wherein merchant interposed defense, and treble damages counterclaim, predicated upon alleged usuriousness of transactions, evidence, on issue as to whether any portion of payments made to financier should be considered interest, would not sustain find-

ing that there had been sixty-five separate transactions and established to contrary that financier's advances, which admittedly exceeded total amount repaid him, had all been made in accordance with single oral agreement. West's Ann.Civ.Code, § 1479, subd. 1.

7. Payment 42

Transaction between financier and merchant being a single one, although made up of separate advances, all payments received by financier and totaling less than total amount of advances would have to be allocated to principal rather than to interest.

David Welts, Los Angeles, for appellant.

George M. Wiener, Los Angeles, for respondents.

NOURSE, Justice pro tem.

The plaintiff and cross-defendant (hereinafter called Weiss) appeals from the judgment of the lower court in favor of the cross-complainant (hereinafter called Brandt) and against the cross-defendant upon the cross-complaint.

The complaint in this action is in the form of a common count for money had and received. By it Weiss alleged that Brandt and the defendant Arrousez were engaged as associates in the manufacturing, selling and renting of certain equipment and that they had agreed to share the profits of that business and that within two years last past the defendants and each of them became indebted to plaintiff in the sum of \$3,877.75, for an account of money had and received by the defendants for the benefit of the plaintiff.

By their answer the defendants denied all of the allegations of the complaint and as a separate defense alleged that Weiss had undertaken and agreed to, and had, loaned to Brandt sums not to exceed 90% of the face amounts of a series of promissory notes executed by Brandt and that by the terms of the agreements and said promissory notes that it was agreed that Weiss should reserve and secure to himself in-

terest upon the loans of said money in excess of that permitted by law and that Weiss had received \$5,727.15, in excess of the amount which Weiss is entitled to receive by law.

By his cross-complaint Brandt alleged that on or about the 12th of October, 1951, he and Weiss entered into an oral contract whereby Brandt borrowed certain sums of money from Weiss and as security therefor covenanted and agreed that he would assign, transfer and set over to Weiss all his right, title and interest in certain purchase orders between Brandt and various of his customers, and that Brandt further agreed to set over and assign to Weiss all his right, title and interest in and to all monies and accounts receivable from said customers. It was further alleged that in addition to the assignment of said contracts and the payments due thereunder, Brandt agreed to execute written contracts guarantying the repayment of each of said loans and to further execute a promissory note in connection with each and every loan as additional evidence of the obligation; that Brandt had performed all that was required of him under the contract and had executed the required assignments, contracts of guaranty and promissory notes and that Weiss had collected from the customers of Brandt and from Brandt various sums of money, and that by reason of said payments to Weiss he had received \$4,224.20, in excess of the amount to which he was entitled to by law; that said sum of \$4,224.20 was received by Weiss within one year from the date of the cross-complaint and that Weiss was therefore indebted to Brandt in treble that amount.

The second cause of action alleges the receipt by Weiss of usurious payments in the sum of \$1,502.95, received by him more than one year prior to the filing of the cross-complaint and alleges that Weiss is therefore indebted to Brandt in said amount.

Attached to the cross-complaint, and made a part thereof, is Exhibit A which is a schedule purporting to show the date and amount and date of repayment of sixty-five alleged loan transactions, together with the alleged interest involved in each.

By his answer to the cross-complaint, Weiss denied all of the allegations thereof as to loans and alleged that all of the transactions were transactions involving the sale of Brandt's contracts with his customers at a discount. The answer further alleged that the transactions were of a continuing nature and covered a period from October 12, 1951, to on or about April 7, 1953, and that Weiss had paid to Brandt on said transaction \$3,877.75 in excess of the amounts that he had collected and received back on said transaction. There are other allegations of the answer by which Weiss attempts to plead facts estopping Brandt from asserting usury, but it is unnecessary to state those facts here.

The findings of fact made by the trial court may be summarized as follows:

The trial court found that the defendants were not associated in business, but that the defendant Arrousez was an employee of the defendant Brandt and his disclosed agent; that on or about October 12, 1951, Brandt and Weiss entered into an oral contract whereby Brandt borrowed certain sums of money from Weiss and as security therefor agreed that he would assign, transfer and set over unto Weiss all of his right, title and interest in certain contracts between himself and various customers, and all right, title and interest in and to all monies and accounts receivable from said customers, and that Weiss was authorized and instructed by the terms of said agreements to credit Brandt with the said sums borrowed by him when they were received by Weiss.

That in addition to the assignment of said contracts, Brandt had covenanted and agreed to execute written contracts guaranteeing repayment of each of said loans and further execute a promissory note as additional evidence of the obligation; that pursuant to the terms and provisions of the oral agreement, the parties entered into *sixty-five separate and distinct loan transactions*; that it was provided by said oral agreement that after Brandt had assigned his right, title and interest in and to the customer contracts and had executed the contracts and promissory notes as aforesaid, Weiss would loan to Brandt a sum

not to exceed 90% of the amount which Brandt guaranteed and contracted to repay to Weiss and which had been assigned to Weiss and evidenced by the contracts and promissory notes.

That Brandt had done and performed all that was required of him under the agreement and that Weiss had collected and received, either from Brandt or from the customers of Brandt, all of the sums advanced by Weiss plus interest, except the sum of \$3,552.02, and that amount remained due and owing from Brandt to Weiss, and that Weiss had waived any right to claim any further, different or additional offsets.

That during the one year immediately preceding the commencement of the action, Weiss had exacted and received from Brandt usurious interest in the sum of \$3,368.77, and that by reason thereof Brandt was entitled to recover treble that amount.

That during the year immediately preceding the twelve months prior to the commencement of the action, Weiss had exacted the sum of \$2,398.76 from Brandt, said sum being the amount of interest unlawfully paid during said period.

As conclusions of law from these facts, the court found that Brandt was entitled to judgment on his cross-complaint in the sum of \$8,953.05, that being the difference between the amount which Brandt was entitled to under the findings on his cross-complaint and the amount which Weiss was entitled to on his complaint.

The transactions between the parties as shown by the evidence were very involved, but the following outline of them will suffice for the purposes of this opinion. The facts we state are established by the evidence without conflict. Prior to October 12, 1951, the defendant Robert Jay Brandt had been engaged in business under the fictitious name and style of Hollywood Scene, Dock and Prop Shop, and prior to that date had financed a portion of his business through transactions with the brother of the plaintiff. On the date mentioned defendant Arrousez, who acted as manager for the defendant Brandt, told Weiss that Brandt had some purchase orders that he wanted to sell and exhibited an order from a cus-

tomers, whom we will hereinafter call Craig, for certain equipment, the purchase price of which totaled \$1,800. Arrousez stated that they would sell the order for \$1,500, and that the difference between the face amount of the order and that amount would be Weiss' profit. Weiss insisted upon some security that Brandt would manufacture and deliver the merchandise called for by the order. Weiss, at this time, agreed that he would invest in orders to the extent of about \$10,000. There was no mention made of any loan. The parties then executed a letter form of contract, the terms of which, in substance, are as follows:

The letter was addressed to Weiss by Brandt. By the letter Brandt acknowledged the receipt from Weiss of the sum of \$1,500, in payment for the assignment of the purchase order from Craig, which was then described, Brandt guarantying to deliver the merchandise called for by the order on or before December 31, 1951. Brandt agreed that in the event payment was made by Craig to him, he would turn the remittance over to Weiss properly endorsed. Brandt agreed that if Craig failed to make full payment on the order before January 30, 1952, that he, Brandt, would pay to Weiss any balance then due upon the order, it being agreed that Weiss was to receive \$1,800, on or before January 30, 1952, in event of default by Craig. By the final paragraph of the letter Brandt handed to Weiss his promissory note for \$1,800, "to evidence my guaranty above stated."

At the same time Brandt executed a promissory note in the sum of \$1,800, payable 110 days after date (October 12, 1951) without interest. Weiss paid to Brandt \$1,500.

After the consummation of this transaction, and prior to January 1, 1952, Brandt delivered to Weiss six other purchase orders on account of which Weiss paid to Brandt \$4,491.40. Each transaction was handled in the same manner as that outlined as to the Craig transaction, that is to say, a similar letter contract was executed and a similar promissory note, the promissory note in each case being in the face amount

of the purchase order delivered, and being payable on the date of payment specified in the purchase order. On account of these advances Weiss received in cash from the customers or directly from Brandt \$3,301.78, and Brandt, in addition, received from the customers, and retained, \$3,757.79, this amount being later credited upon a purchase order thereafter assigned to Weiss; that is, on May 8, 1952, Brandt assigned to Weiss purchase orders in the total face amount of \$4,865.61, at a stated price of \$4,379.05. On account of this purchase price Weiss was credited with the amounts which had theretofore been collected and retained by Brandt, and Weiss paid the difference, after certain other adjustments, to Brandt in cash.

No transactions were entered into between November 26, 1951, and March 8, 1952. On or about February 6, 1952, Weiss had a conversation with Arrousez in which he stated that he was then out-of-pocket over \$4,300, and that he did not care to continue doing business with Brandt, unless some arrangements were made to turn over certain monies that Brandt had collected on accounts assigned to Weiss and something done to make up a part of the \$4,300 plus, that he, Weiss, was out-of-pocket; that Arrousez agreed that Brandt would pay Weiss \$292.50, the amount Brandt had collected on certain assigned accounts.

It was further agreed that Weiss would, from that date forward, on his books, debit Brandt with all amounts advanced, commencing with a debit of \$4,300, the amount which Weiss was then out-of-pocket, and credit Brandt with all monies received, instead of allocating the monies received from a customer on one assignment to the amounts advanced on account of that assignment. From that time on Weiss' books were kept accordingly.

In 1952, between March 8 and the end of the year, there were forty-seven transactions entered into between the parties. On account of these Weiss advanced the further sum of \$23,165.68, and on these transactions received back in cash \$23,768.30. During the year 1953, there were

eleven transactions on account of which Weiss advanced \$4,388.25, and received in cash \$2,896.07. In addition to the cash he received, during 1952 and 1953, he received credits on the assignments of other purchase orders, the face amounts of which were evidenced by the promissory notes of Brandt, as in the other transactions, in the total amount of \$21,605.40, that being a part of the amount which Brandt had collected from the customers whose accounts had been assigned to Weiss.

The net result of the sixty-five transactions was that Weiss had paid to Brandt over \$3,800 more than he had received either from Brandt or from collections upon the purchase orders which had been assigned to him.

We are of the opinion that the trial court committed prejudicial error in its rulings as to admissibility of evidence and are further of the opinion that its findings that Weiss received for the use of his money sums in excess of that permitted by law is contrary to the evidence.

While undoubtedly the evidence received in the court below is sufficient to uphold a finding that the transaction is one involving the loan of money and not one of sale, it does not compel such a finding, and Weiss was entitled to prove all of the surrounding circumstances and any relevant facts bearing upon the true nature of the transaction or the intent of the parties. This, the rulings of the trial court prevented him from doing.

At the outset of the trial, the learned trial judge announced that he had read the pleadings and the letter form of contract between the parties and that this letter form of contract must be classed as a loan contract and not as a sales contract and that it was therefore vulnerable to the provisions of the Usury Statute. Apparently the trial court based this ruling upon the decision of the Supreme Court in *Milana v. Credit Discount Co.*, 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621. The facts in the *Milana* case are somewhat similar to those in the case at bar, but the Supreme Court did not there hold that they constituted a loan transaction as a matter of law, but only

held that they were subject to that interpretation and that therefore the trial court there erred in holding that they were not subject to that construction, but only to the construction that they were contracts of sale, and in granting the defendant's motion for a judgment of nonsuit.

[1] In our opinion the letter form of contracts between the parties do not, standing alone, establish that the transactions here were in fact ones for the loan and repayment of money, but are subject not only to that interpretation but to the interpretation that they constituted a contract for the sale of a purchase order, with a guarantee that Brandt would manufacture and deliver the merchandise called for by the order, and a guarantee of the soundness of the credit of the purchaser.

This being true, the question of what the real nature of the contract was, was to be determined from all of the facts and circumstances surrounding the transactions and each party was entitled to introduce parol evidence to establish those circumstances and what the true intent of the parties was. *Ewalt v. Mortgage Securities, Inc.*, 129 Cal.App. 559, 19 P.2d 60; *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 432-433, 292 P. 474; *Milana v. Credit Discount Co.*, supra, 27 Cal.2d 335, 341, 163 P.2d 869.

[2] The trial court, however, consistent with its ruling that the contracts were unambiguous and showed on their face a loan of money and not a sale, held that parol evidence was not admissible and that that which had been received without objection was of no importance whatsoever, but that the court would be controlled in its determination of the facts by the instruments alone. This was clearly error. The contracts being subject to two interpretations, under one of which the contracts would be legal, and under the other usurious, Weiss was entitled to the presumption that the contracts were ones of sale and not ones for the loan of money. *Moore v. Dealy*, 117 Cal.App.2d 89, 94, 254 P.2d 888; *Hersum v. Latham*, 120 Cal.App.2d 325, 328, 260 P.2d 988. He was not, however, required to merely stand upon the pre-

sumption, but was entitled to augment this indirect evidence by other evidence, either written or oral, to establish that the transaction was, in fact, one of sale.

The trial court was therefore obligated to give consideration not only to the written contracts, but to all of the facts and circumstances shown by the evidence or by the offers of proof to which we will hereafter refer; it is clear from the record that it did not do so.

At the conclusion of the taking of evidence, counsel for appellant advised the court that due to the court's ruling that the contracts introduced into evidence were usurious on their face and that those contracts were controlling, he desired to make certain offers of proof, rather than to attempt by devious means to circumvent the court's ruling that parol evidence was not admissible. He then made twelve offers of proof, to all of which respondents' objections were sustained. In certain of these rulings, we believe the court was in error, as the matters offered to be proved were relevant to the question of whether or not the transactions were ones of loan or ones of sale.

In substance, the first four offers of proof were to prove by the testimony of appellant and Arrousez that each of the sixty-five purchase orders assigned to appellant was offered for sale to him by Arrousez, and were in fact purchased by him. The objection to these offers of proof was that the evidence offered would violate the parol evidence rule. The sixth offer was to prove by Arrousez and by the books of Brandt that the transactions were set up on Brandt's books as transactions of sale and that the difference between the face value of the purchase orders sold and the price paid by Weiss was set up on Brandt's books as a discount. Each of the facts so sought to be proved by appellant were relevant to the question of intent of the parties and the nature of the transactions, and it was error to refuse to receive this evidence.

The ninth and tenth offers of proof were to prove by Adolph Weiss and his brother, Lewis Weiss, that on or about February 6, 1952, Weiss and Brandt entered into an

oral agreement that appellant would debit Brandt for all monies paid to Brandt on the purchase of purchase orders, and as payment on purchase orders assigned to Weiss were received by him, he would credit the same against the total debits and would wait for his discount or profit until the respondent Brandt was in better financial condition and could afford to pay. That after said oral agreement was entered into that the parties transacted their business in that manner; that Weiss had not yet recouped the amount of his advances and was out-of-pocket at the time of the commencement of the action the sum of \$3,877.75. To these offers of proof the objection that they violated the parol evidence rule was sustained. In these rulings the court clearly erred.

[3] There was nothing in the contracts which related to the allocation of payments. The contracts being silent as to the allocation of payments, that matter was the proper subject of a separate and supplemental oral agreement and Weiss was entitled to prove such an agreement. *American Ind. Sales Corp. v. Airscope, Inc.*, 44 Cal.2d 393, 397, 282 P.2d 504.

There can be no doubt that the ruling upon this offer of proof was prejudicial. If the appellant had been permitted to prove the facts stated in his ninth and tenth offers of proof, those facts would have constituted a valid oral agreement that all money received by Weiss was to be applied to the repayment of the sum advanced by him until all such advances had been fully repaid. Such an agreement being proved, the court would have been bound to apply the monies received by Weiss in accordance with it, and could not apply them to the payment of interest and principal on individual transactions, as it did, *Civ.Code*, § 1479, paragraph One. Yet, it is only by applying the money received by Weiss to individual transactions that a finding that Weiss received anything for the use of his money can be sustained.

[4, 5] Until a debtor has made payments of interest in excess of that permitted by the Usury Statute he cannot maintain an action against the creditor under that Stat-

utè, and payments made upon the indebtedness will be applied to the reduction of principal unless there is an express agreement to apply them to interest or such an actual application by the creditor. *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 179, 74 P.2d 252; *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 618, 254 P. 956, 255 P. 805, 53 A.L.R. 725; *Ames v. Occidental Life Ins. Co.*, 210 Cal. 271, 274, 291 P. 182; *Grall v. San Diego Bldg. & Loan Ass'n*, 127 Cal.App. 250, 257, 15 P.2d 797; *Smith v. G. Cavaglieri Mortgage Co.*, 111 Cal.App. 136, 144, 295 P. 366; *Courtney v. Tufeld*, 128 Cal.App. 504, 507, 17 P.2d 1035; *Connor v. Minier*, 109 Cal.App.Supp. 770, 777, 288 P. 23.

Here the contract contained no stipulation for the payment of interest as such, and it is admitted that Weiss' total advances exceeded by over \$3,500 the total amount repaid him, therefore, if the payments to Weiss were applied to the reduction of principal in accordance with the oral agreement which he offered to prove, a finding that he received interest could not be made and there could be no basis for the judgment rendered against him.

[6] The trial court found that there were sixty-five separate loan transactions; that Weiss collected upon these all amounts loaned except the sum of \$3,552.02; that Weiss exacted from Brandt during the year immediately preceding the commencement of the action, the sum of \$3,368.77 (which it trebled), and the further sum of \$2,398.76, during the preceding year. A careful examination of the record here convinces us that the finding that there were sixty-five separate transactions is contrary to the evidence and that on the other hand the evidence establishes that the advances made by Weiss were all made in accordance with his single oral agreement to advance to Brandt not to exceed \$10,000, on the security of the assigned purchase orders (we are assuming here that the transactions were as found by the trial court, one of loan, not of sale) and that therefore the further finding that Weiss received payments beyond the partial return of the principal he advanced cannot be sustained.

The trial court found as a fact that all assignments of purchase orders were made pursuant to an oral agreement between the parties entered into on October 12, 1951. The only evidence of an oral agreement between the parties prior to Weiss' first advance, is his testimony that he agreed to invest up to \$10,000, in purchase orders offered him by Brandt. In view of the other evidence offered, the trial court was entitled to find that this was an agreement to loan up to that amount, but the other evidence received does not justify the finding that each assignment of a purchase order was a separate loan transaction, but on the contrary only establishes each as a part performance by Weiss of his oral agreement to loan up to \$10,000.

Weiss advanced a total of \$33,545.33. He received assignments of purchase orders of the face amount of \$64,517.67, at a so-called purchase price of \$57,459.00. He received a credit of \$23,914.56, on this purchase price, this sum being a part of the amount which Brandt had collected on the purchase orders assigned to Weiss. Weiss was repaid a total of \$29,966.15.

The manner in which the parties conducted their transactions which resulted in the totals we have just given was substantially as follows. Weiss would discount a purchase order. The collections from the purchase order would be made in part by Weiss and in part by Brandt. The money Weiss collected he re-advanced so that the new capital he had invested or loaned never greatly exceeded \$10,000. The money collected by Brandt he, in most instances, retained, and in most of those instances he gave Weiss credit for the amount retained on the so-called purchase price of another purchase order—in other words, (assuming this to be a loan transaction) he gave Weiss another evidence of indebtedness and new security for the amounts collected by him.

Out of the sixty-five assignments made to Weiss, thirty-seven involved "charge backs" (so-called by the parties) such as we have described, thus all of the sixty-five advances and assignments were tied together and the end result was that Weiss

received in repayment of the monies advanced by him \$29,966.15, and held Brandt's promises to pay an additional amount (as nearly as we can determine from the record, approximately \$25,000), secured by purchase orders upon which Brandt had either collected the entire balance due, or had failed to deliver the goods called for by them, thus rendering them worthless.

Examples of what actually occurred will demonstrate how these alleged sixty-five transactions were bound together. On the second assignment (Plaintiff's Exhibit 2) the face amount of the purchase order was \$2,477.47. Upon this order Weiss advanced \$2,105.85. From the purchaser, Weiss collected \$389.31, and Brandt \$2,088.16. Brandt gave credit for this amount on the fourteenth assignment (Plaintiff's Exhibit 14), which was of a purchase order in the face amount of \$4,865.61, and Weiss advanced the further sum of \$2,574.27 in cash (Weiss had other similar credits which were applied to this assignment). On this purchase order, Weiss collected \$4,147.09, and Brandt \$718.52, for which he gave Weiss credit on assignment twenty-eight (Plaintiff's Exhibit 28), which was a purchase order in the face amount of \$1,227.60, which sum was collected by Weiss from the purchaser. There were three other assignments which were, in the manner we have described, tied into the one, which resulted in Weiss' collecting the entire amount of the purchase price on Order No. 28. Parenthetically, the record shows that as a result of the seven assignments which culminated in assignment No. 28 (Plaintiff's Exhibits 1, 2, 4, 5, 13, 14 and 28) Weiss advanced out-of-pocket \$300 more than he received back. Yet an inspection of defendants' Exhibit C¹ (upon which the trial court based its finding and judgment as to the interest received by Weiss), we find Weiss charged with the total of \$1,129.52, as interest, a portion of which was trebled in the judgment.

Another example of the manner in which these charge backs tied all advances into one loan transaction is shown by following through the transaction which commenced with the assignment of purchase order No. 19 (Plaintiff's Exhibit 19). Assignment No. 19 was made on May 19, 1952. This was a purchase order for \$214.62, on account of which Weiss advanced \$193.16. Brandt collected the full amount of the purchase order from the customer. He did not pay this amount over to Weiss, but gave him credit for that amount on the assignment to him on June 2nd of purchase order No. 22. On purchase order No. 22 Brandt again collected the entire amount from the customer but did not pay any portion of it to Weiss, but applied it to the credit of Weiss on succeeding assignments, winding up with the last assignment, No. 65, upon which Brandt collected and retained the entire payment.

Here again defendants' Exhibit C shows Weiss charged with interest which was trebled in the judgment, although he had in fact not received back a penny of his principal.

[7] The transaction, being, as we have held, a single one, although made up of separate advances, all payments received by Weiss were, as a matter of law, to be allocated to principal. *Ames v. Occidental Life Ins. Co.*, supra; *Connor v. Minier*, supra; *Wolf v. Aero Factors Corporation*, 2 Cir., 221 F.2d 291; 39 Cal.L.Rev. 604.

Brandt not having repaid an amount equal to the advances he received, and there being no stipulation for interest nor any payments of interest, there is no basis for the findings we have mentioned, or the judgment on the cross-complaint.

Appellant asserts that the trial court erred in not holding the defendant Arrousez liable on the complaint. We have carefully examined the record and find no merit in this claim of error.

1. Exhibit C was offered as a summary of Weiss' book of account and the documents which make up the sixty-five assignment transactions. It is not in fact a true summary of those documents, but an argumentative reconstruction of the trans-

actions in which payments are arbitrarily allocated to principal and interest in each individual transaction, and Weiss charged with receiving as interest amounts which were not in fact received by him, but received by Brandt.

The judgment in favor of defendant Arrousez is affirmed. The judgment that plaintiff take nothing upon his complaint as against the defendant Brandt, and the judgment upon the cross-complaint in favor of Brandt and against Weiss are, and each of them is, reversed; Weiss to recover his costs on appeal.

WHITE, P. J., and DORAN, J., concur.



137 Cal.App.2d 503

Paul C. SCHIRO, Plaintiff and Appellant,
v.

Lawton D. PARKER, Defendant and Respondent.
Civ. 16479.

District Court of Appeal, First District,
Division 2, California.
Dec. 5, 1955.

First real estate broker brought action against second broker to recover commission allegedly due first broker for allegedly procuring purchaser of ranch. The Superior Court, County of Santa Clara, Edwin J. Owens, J., entered judgment in favor of second broker, and first broker appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that first broker did not procure a purchaser ready, able, and willing to buy the ranch on terms acceptable to the vendors.

Judgment affirmed.

Brokers ⇨86(5)

In action by first real estate broker against second broker to recover commission allegedly due first broker for allegedly procuring purchaser of ranch, evidence sustained finding that first broker did not procure a purchaser ready, able, and willing to buy the ranch on terms acceptable to the vendors.

Machado & Machado, San Jose, for appellant.

Rich, Fuidge & Dawson, Marysville, for respondent.

DOOLING, Justice.

This is an appeal by plaintiff-appellant Schiro from a judgment of the superior court that he take nothing by reason of his complaint against defendant-respondent Parker. Appellant did recover the sum of \$6,000 with 7 percent interest per annum from June 1, 1951, from Parker's codefendant Kallam. Kallam originally appealed from this judgment but upon his request the appeal as to him has been dismissed.

All the parties involved in this action are licensed real estate brokers. Appellant Schiro brought this action seeking to recover a commission allegedly due him as a result of the sale of property known as the Cheim ranch located near Marysville to one Boccardo. Neither the seller nor the purchaser is a party to this action.

In November of 1950 Mr. Cheim discussed the selling of his property with respondent Parker. At that time he gave respondent Parker an oral listing to sell the property for \$366,000. Parker proceeded to show this property to prospective purchasers.

Appellant Schiro heard that the property was for sale. He inspected the property and a few days later he returned to Marysville in order to see Mr. Cheim, the owner. At that time appellant Schiro told Cheim that he had a party whom he thought he could interest in the property. Cheim replied that the listing was with respondent Parker and that appellant would have to see him. Appellant did see respondent Parker and discussed the possibility of working on the sale of the property with him. Respondent stated at that time that appellant could work with him on the sale. Sometime later, respondent Parker and appellant Schiro were in contact with Cheim and an authorization to sell the property was obtained from him. Respondent Parker testified that this authorization was given to him and that it gave him power to act on behalf of Cheim for himself (respondent).

ent) and for any other broker with whom he would wish to cooperate.

After respondent Parker had secured the written authorization to sell the property, he and appellant Schiro discussed the commission split in the event of such a sale by appellant Schiro. Respondent testified that he told appellant that he, respondent, would give appellant 60 percent of the commission providing appellant sold the property. Respondent then wrote a note to appellant to confirm this understanding to the effect:

"Dear Mr. Schiro:

"It is understood as per our verbal agreement that should your office procure a purchaser for the Cheim's property, you are to receive 60% of the commission collected on sale of same."

He testified that in using the term "procure a purchaser" in the note he meant "sell" the property as he had expressed in his oral understanding with appellant.

Mr. Boccardo, the purchaser, testified that he noted an advertisement placed in one of the San Jose papers by appellant Schiro relative to this property and that he called appellant about it. He discussed the property with appellant and authorized him to offer \$300,000 for it giving him a deposit of \$10,000 on this offer. Boccardo made this first offer on February 7, 1951. This \$300,000 offer was refused by the seller and Boccardo verbally increased his offer to \$320,000 through appellant Schiro. This offer was also refused. Boccardo at that time stated that this was his limit, and appellant told respondent that Boccardo would pay \$320,000 "and that this was his top." Thereafter appellant was informed that Cheim would sell for \$330,000 or \$335,000. He conveyed this information to Boccardo but could not get a better offer from him. Appellant did not communicate further with respondent.

Boccardo further testified that after the above negotiations Kallam, a real estate broker with whom he had had previous dealings, came into his office. This was a matter of weeks or months after Boccardo had dealt with appellant relative to this property. At this time Boccardo stated

that as far as he was concerned the deal on the Cheim property was off. Kallam described the Cheim property stating that he thought Boccardo might be interested in it. Boccardo stated that he had been introduced to this property through appellant Schiro but that the deal hadn't been consummated. Boccardo testified that he told Kallam he would deal with him on this matter "provided that Mr. Schiro was protected." It was his testimony that Kallam assured him that appellant "would be taken care of" and with this assurance he proceeded to deal with Kallam. The trial court interpreted this as a promise by Kallam to pay appellant Schiro a reasonable proportion of the commission which he himself might receive out of the transaction. The court found that appellant's reasonable share of the \$8,250 received by Kallam was \$6,000 and gave appellant judgment for this amount against Kallam. With the correctness of that judgment we are not here concerned. On April 23, 1951, Boccardo made a written offer of \$320,000 through Kallam for the property. This was not accepted. On April 25, 1951, he made another written offer through Kallam at a price of \$330,000 which was accepted by the seller.

After it was apparent that Kallam would be able to effect a sale of this property to Boccardo, respondent Parker made the suggestion that appellant "was entitled to something for what he had done." Respondent Parker and Kallam put \$1,000 each into escrow to be paid appellant. However, when appellant wrote the escrow company demanding that 60 percent of the commission be paid to him both respondent and Kallam revoked their orders for the payment of the sum deposited to appellant. Respondent and Kallam split the \$16,500 commission on the sale of the property evenly, \$8,250 each.

The trial court found "that plaintiff did not himself procure a purchaser to Lawton D. Parker or H. J. Cheim and Lea M. Cheim, his wife, ready, able and willing to buy said property upon terms acceptable to the sellers being prevented from doing so by the intrusion of defendant Kallam into the transaction."

This finding is supported by the evidence. The best offer which appellant produced was \$320,000 which the seller refused to accept. Appellant not only told respondent that this offer of \$320,000 was Boccardo's top, but after learning that the seller would accept \$330,000 or \$335,000 he did not communicate to respondent Boccardo's reaction, if any, to these figures. As a matter of fact Boccardo refused to give appellant a better offer. When Kallam brought the same property to Boccardo's attention Boccardo said that as far as he was concerned the deal was off. It was through Kallam's efforts, not appellant's, that the acceptable offer was finally made.

The court said in *Nelson v. Mayer*, 122 Cal.App.2d 438, 440, 445, 265 P.2d 52, 53, where the contract was to pay a commission "if you can effect a sale":

"In order for plaintiff to recover, the evidence must show that Nelson's efforts were the procuring cause of the sale and not merely one in a chain of causes. [Citation.] As was said in *Sessions v. Pacific Improvement Co.*, 57 Cal.App. 1, 17, 206 P. 653, 660:

"To constitute himself the *causa causans*, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events, which, without break in their continuity cause the buyer and seller to come to terms as the proximate result of his peculiar activities."

The court then quoted, 122 Cal.App.2d at page 446, 265 P.2d at page 56, from *Cone v. Keil*, 18 Cal.App. 675, 124 P. 548, 549, a case in which the contract called for the payment of a commission "in the event of his procuring a purchaser":

"Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and even though a broker opens negotia-

tions for the sale of the property, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms which the property was originally offered for sale." "

Since respondent did not give appellant an exclusive agency the court could reasonably conclude that after receiving an offer of \$320,000 which appellant said was Boccardo's top, and when appellant failed to communicate with respondent for several weeks after being informed that the seller would take \$330,000 or \$335,000, respondent was free to believe that appellant was unable to procure an acceptable offer from Boccardo. Indeed both Boccardo's and appellant's testimony show that this was the fact. Under the authorities above cited respondent was then free to deal with Kallam, who did produce a higher and acceptable offer from Boccardo.

The fact that respondent suggested that appellant should get some compensation for his efforts does not compel a contrary finding. The court was entitled to conclude that this was an act of grace and not of obligation.

Appellant cites cases dealing with agreements for compensation between brokers. They are not in point since in none of them were the facts comparable. In none of them did the plaintiff transmit an unacceptable offer which he stated was the highest that his prospect would make and thereafter fail for a considerable period to communicate with the employing broker after being given a figure which the seller was willing to accept.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Josephine PRIMM, Plaintiff and Appellant,
v.

Ernest J. PRIMM, Defendant and
Respondent.

Josephine PRIMM, Plaintiff and Respondent,
v.

Ernest J. PRIMM, Defendant and
Appellant.*

Civ. 20671, 20931.

District Court of Appeal, Second District,
Division 3, California.

Dec. 13, 1955.

Rehearings Granted Jan. 3, 1956.

Proceeding brought by former wife for modification of provisions of divorce decree so as to increase amount of child support which husband was obligated to pay. Superior Court of Los Angeles County, Kurtz Kauffman, J., entered order adverse to former wife and she appealed. After entry of such order, former wife made application for order requiring to pay attorney's fees and costs of appeal. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered order in favor of former wife, and former husband appealed. The District Court of Appeal, Nourse, J. pro tem., in disposing of both appeals, held that evidence compelled conclusion that during last calendar year prior to hearing, expenses incurred by former wife on account of children exceeded \$11,000 specified in decree by more than \$3,500, and that trial court's denial of increase in amount of child support was arbitrary and an abuse of discretion, and that inasmuch as children were real parties in interest to appeal, former husband was obligated to pay former wife's attorney's fees and costs, regardless of whether she had sufficient resources.

Order denying increased child support reversed. Order granting attorney's fees and costs affirmed.

1. Divorce ⇨309

Where order, in refusing increase in child support payable under divorce decree, exceeded bounds of reason because it was contrary to the evidence, it was an "abuse of discretion".

See publication Words and Phrases, for other judicial constructions and definitions of "Abuse of Discretion".

2. Evidence ⇨18

Court would take judicial notice that cost of living had increased more than 3.6 per cent between entry of interlocutory divorce decree in 1951 and hearing in 1954 on

application of former wife for increase of amount of child support payable.

3. Parent and Child ⇨3(1)

Duty of child support is primarily that of father.

4. Divorce ⇨306

That divorced mother has property or income is immaterial to question of child support so long as father has ample income to support children.

5. Divorce ⇨308

Divorced wife may properly indirectly benefit from allowance for child support, even though she is not entitled to alimony.

6. Parent and Child ⇨3(1)

Father's duty to support children does not end with furnishing mere necessities of life if he is able to afford more, and children are entitled to be supported in style and condition consonant with position in society of their parents.

7. Divorce ⇨309

In proceeding to modify provisions of interlocutory divorce decree so as to increase amount which former husband was obligated to pay for support of five minor children, evidence compelled conclusion that during last calendar year prior to hearing, expenses incurred by former wife on account of children exceed \$11,000 specified in decree by more than \$3,500, and that trial court's denial of increase in amount of child support was arbitrary and an abuse of discretion.

8. Divorce ⇨308

In determining amount of child support payable by husband, court should consider children's station in life, manner in which they have lived, and ability of husband to pay.

9. Divorce ⇨308

Order for child support must always look not only to present but to foreseeable future as well.

10. Divorce ⇨309

Former wife in post decretal proceeding for increase in child support did not appear in individual capacity, but in representative one on behalf of children who were real parties in interest.

11. Divorce ⇨312½

Where former wife maintained post decretal proceeding against former husband for increase in child support, and trial court denied her request, she was properly entitled to recover from husband costs of her appeal regardless of whether she had

* Opinion vacated 292 P.2d 240.

sufficient funds to enable her to prosecute appeal.

Willis Sargent, Syracuse, N. Y., and Sidney H. Wyse, Pasadena, for Josephine Primm.

Hanna & Morton, Los Angeles, for Ernest J. Primm.

NOURSE, Justice pro tem.

By the proceedings in the court below plaintiff sought to modify the provisions of the interlocutory decree of divorce between the parties so as to increase the amount which the defendant by the divorce decree was obligated to pay for the support of the five minor children of the parties. The trial court (Judge Kauffman, presiding, he also presided at the trial of the divorce action), entered its order denying plaintiff's application. No findings of fact were made. From this order plaintiff appeals.

After the entry of the aforementioned order plaintiff made application for an order requiring the defendant to pay her certain monies for attorney's fees and costs in order that she might prosecute her appeal. This application was granted (Judge Clarke presiding), and from the order requiring him to pay \$1,000 attorney's fees and not to exceed \$1,128 for plaintiff's costs on appeal, defendant appeals.

Each appeal is brought here on a separate record and briefs. Both appeals will be disposed of in this opinion.

Plaintiff's Appeal

The parties have five minor children, ranging in age (at the time of the order appealed from) from 11 to 16 years. The two youngest children, girls, are twins. In June of 1951, an interlocutory decree of divorce was entered, by the terms of which plaintiff was granted the custody of the minor children except for certain designated periods during each year, defendant being given custody during those periods, and defendant was ordered to pay plaintiff for the support of the minor children \$11,000 annually, payable in installments of \$1,000 on the first day of each month except the first day of July. On June 25, 1952, a final

decree of divorce was entered which by reference incorporated the provisions of the interlocutory decree as to child support. The defendant has remarried, the plaintiff has not.

Plaintiff asserts that the trial court abused its discretion in refusing to grant any increase in the amount which defendant is obligated to pay for the support of his children.

[1] We have concluded that the trial court's order, being contrary to the undisputed facts, exceeds the bounds of reason and therefore was an abuse of the court's discretion. *Kyne v. Kyne*, 70 Cal.App.2d 80, 160 P.2d 910; *Hall v. Hall*, 42 Cal.2d 435, 442, 267 P.2d 249; *Makzoume v. Makzoume*, 50 Cal.App.2d 229, 123 P.2d 72; *Berry v. Chaplin*, 74 Cal.App.2d 669, 169 P.2d 453. There is no question here of conflicting evidence but only of the reasonableness of the order as based upon the unconflicting evidence.

The provisions of the decree of divorce, modification of which was sought in this proceeding, reads in part:

"That the custody of the children of the parties hereto, said Plaintiff and Defendant (hereinafter referred to as 'the parties hereto' or as 'the parties to this action'), to wit: Joan M. Primm, Gary E. Primm, Judith L. Primm and Janet J. Primm, and Joyce P. Primm, is awarded to the Plaintiff until further order of this Court, for the entire period of each year, except for the following periods:

"(a) Six weeks of each year, commencing on the 15th day of June, 1951, and on the 1st day of July each year thereafter;

"(b) One-half of the Christmas vacation period;

"(c) One-half of the Easter vacation period; one-half of Christmas Day; and one-half of Easter Sunday;

"(d) The first week-end of each calendar month, from Friday afternoon to the following Sunday evening, commencing with the first week-end after the entry of this Interlocutory Judg-

ment; provided that if the first week-end of any calendar month should fall within the Easter vacation period, then the provisions with reference to such period, and with reference to Easter Sunday, shall prevail. * * *

"The custody of the said children is awarded to the Defendant for the following periods of each year:

"(a) Six weeks of each year, commencing on the 15th day of June, 1951, and on the 1st day of July each year thereafter;

"(b) One-half of the Christmas vacation period;

"(c) One-half of the Easter vacation period; One-half of Christmas Day; and One half of Easter Sunday;

"(d) The first week-end of each calendar month, from Friday afternoon to the following Sunday evening, commencing with the first week-end after the entry of this Interlocutory Judgment; provided that if the first week-end of any calendar month should fall within the Easter vacation period, then the provisions with reference to such period, and with reference to Easter Sunday, shall prevail. * * *

"The Defendant is ordered to pay directly to the Plaintiff the sum of \$1,000.00 per month except for the month of July each year for the support and maintenance of said children until further order of the Court.

"The first of said payments shall be made on the first day of August following the entry of this Interlocutory Decree; and subsequent monthly payments shall be made on the first day of each succeeding month hereafter except during the month of July of each year.

"Said payments shall be used to provide the necessities of life for said minor children including food, clothing, transportation, laundry, utilities, rent, taxes, recreation, music lessons; salaries of cooks, maids, gardeners and nurses, if any; and related household expenses, and other incidental expenses attendant upon the support, education

and maintenance of said minor children. * * *

"The defendant is ordered to pay, in the ordinary and usual course of business, all necessary dental and medical bills which may be contracted for the care or treatment of said minor children, or any of them, until further order of this Court. The term 'medical bills' is defined as including bills for the services of doctors of scientific medicine and bills for X-Ray or other laboratory work, or other supplemental facilities of such doctors, but does not include payment for services of Christian Science practitioners."

The evidence received in the court below we believe demonstrates beyond question that the trial court should have modified the interlocutory decree so as to increase the amount awarded thereby for child support. This evidence establishes either by stipulation or uncontradicted evidence these facts:

[2] The standard of living which the plaintiff has sought to maintain, and by this proceeding seeks to further maintain for the children is not above that which had been established prior to the divorce. This was the admission of defendant's counsel at the oral argument in this court. The defendant is financially able to pay any amount which the court might fix as reasonably necessary for the support of his children. He so stipulated and the evidence shows that his net income, after federal income taxes, exceeded \$50,000 in both the years 1953 and 1954. Since the entry of the interlocutory decree of divorce there has been an appreciable increase in the cost of living and this court will take judicial notice that that increase at the time of the hearing in the court below exceeded 3.6 per cent. Federal Reserve Board Bulletin, Vol. 41, No. 9, Sept. 1955. The evidence as to the needs of the children and the amounts expended by her for their support was given by the plaintiff and substantiated by abstracts made by her accountant from her books of account (Plaintiff's Exhibits 1A and 1B).

The defendant offered no evidence to contradict the evidence offered by the plain-

tiff, either as to the needs of the children or the amounts expended by the plaintiff. His testimony was limited to certain brief statements as to his own income and his criticism of certain additional expenditures which the plaintiff desired to make, some of which were in the nature of luxuries.

In substance, plaintiff testified that as the children were at the time of the hearing more than three years older than at the time of the decree, their needs and activities had increased. All were healthy, active and well-adjusted children.

Following the divorce of the parties plaintiff attempted to rent an unfurnished house in San Marino, that being the place where the parties had resided for a number of years, and found that the rents for an unfurnished house would run from \$300 to \$350 a month, and even at those rentals found nothing satisfactory. She then purchased, out of her own funds, a home for herself and children, but this did not contain sufficient room to house the children satisfactorily, as it was necessary to house her son in a room built on as an addition to the garage where it was difficult to supervise his homework and his sleeping hours. This home did not contain any servants' quarters. In the spring of 1953, the plaintiff located a home on Chaucer Road in San Marino, which contained five bedrooms, three baths and a small maid's room and bath. This home she purchased for the sum of \$40,000, utilizing her equity in the home first purchased and \$19,000 realized from a loan secured by her on collateral, as she could secure a lower interest rate on such a loan than one secured by a purchase price mortgage or trust deed. She spent an additional \$5,000 in improvements upon the house purchased. It has proved a satisfactory home for the family. She furnished the home with furniture which was her separate property. The payments of principal and interest on the collateral loan have been \$150 a month since the purchase of the Chaucer Road property.

The plaintiff owns an automobile which she uses to a great extent for chauffeuring the children here and there. This automobile was purchased by turning in one which

had been awarded to her by the interlocutory decree of divorce as her separate property, and she agreed to pay in addition, \$2,200. The plaintiff has a net income, after federal taxes, of about \$6,600 per year.

After the entry of the interlocutory decree the plaintiff opened a separate bank account which she entitled "Household Account." In this account she deposited all amounts received from the defendant, plus such additional amounts from her own income as were necessary to maintain the household of herself and children. From this account all the household expenses were paid but nothing was paid for the purely personal expenses of the plaintiff, such as beauty shop, clothing, jewelry and other personal items. The total expenditures from this account in the year 1953 amounted to \$16,831.50. Of this amount defendant contributed the sum of \$11,000 and plaintiff the balance. These expenditures are itemized in detail in plaintiff's exhibits and are summarized in plaintiff's brief, and as respondent makes no objection to that summary, we adopt it here. It is as follows:

Item No.

1	House Payments	\$1474.00
2	House Upkeep	1084.05
3	Pool Upkeep	353.50
4	Public Utilities	879.73
5	Gardener	679.99
6	Maid	984.65
7	Car Expense	1151.03
8	Miscellaneous	808.13
9	School Expense	393.17
10	Food, including Milk	2463.77
11	Clothes	2568.98
12	Clothes Upkeep	578.77
13	Bookkeeping	130.00
14	Life insurance	1025.87
15	Encyclopedia and TV payments	446.05
16	Other insurance	256.09
17	Tutoring	114.50
18	Taxes	648.36
19	Balboa Bay Club Dues	150.00
20	Dancing	106.00
21	Entertainment	57.60
22	Miscellany	268.93
23	Camping Equipment	223.26
24	Christmas Expense	85.16

Total expenditures through
household account, 1953

\$16,831.50

(We have supplied the item numbers.)

While defendant does not dispute the accuracy of this account or the necessity for or reasonableness of the expenditures, he insists that as many of the items which

go to make up the account include payments upon plaintiff's personal indebtedness, and others include expenditures for items which the plaintiff enjoyed as well as the children, without there being any allocation between the children and their mother, the evidence fails to establish the need of a further allowance for the support of the children.

Before examining respondent's contentions in detail, it seems to us proper to state certain principles that should have governed the trial court and must govern us in this matter.

[3-6] The duty of child support is primarily that of the father. *Metson v. Metson*, 56 Cal.App.2d 328, at page 333, 132 P.2d 513; *Fox v. Industrial Acc. Comm.*, 194 Cal. 173, at pages 180-181, 228 P. 38. The fact that the mother has property or income is immaterial so long as the father has ample income to support the children. *Dickens v. Dickens*, 82 Cal.App.2d 717, at page 722, 187 P.2d 91. The wife may indirectly benefit from the allowance for the support of the children, even though she is not entitled to alimony. *Bailey v. Superior Court*, 215 Cal. 548, at page 554, 11 P.2d 865; *Buchanan v. National Savings & Trust Co.*, 79 U.S.App.D.C. 278, 146 F.2d 13, at page 15. The father's duty to support the children does not end with furnishing the mere necessities of life if he is able to afford more. Children are entitled to be supported in a style and condition consonant with the position in society of their parents. *Bailey v. Superior Court*, supra; *Kyne v. Kyne*, supra, 70 Cal.App.2d 80, at page 83, 160 P.2d 910; *Berry v. Chaplin*, supra, 74 Cal.App.2d 669, 169 P.2d 453; *Wong v. Wong Hing Young*, 80 Cal.App. 2d 391, at page 395, 181 P.2d 741.

[7] With these principles in mind we will examine respondent's contentions in detail.

The first item of the account which defendant asserts shows an expenditure for the benefit of the plaintiff without any allocation of the amount between that which was for her benefit and that of the children is Item 7, Car Expense. This item, it is

true, is the installment payments made upon the automobile which the plaintiff uses principally for the transportation of her five children. It is true that in 1953 she used this in an attempt to augment her income by engaging in the real estate business. This work she had abandoned at the time of the hearing. It is further true, however, that the down payment upon this automobile had been made by plaintiff by turning in an automobile which had been awarded to her as her separate property at a value of \$1,500 by the interlocutory decree. (See Parcel 19, Finding 11.) It is further true that transportation was a necessary expense in the maintenance of the children according to their station in life, and is one of the specific items which the interlocutory decree provides should be borne by the plaintiff and which the court at that time took into consideration in fixing the amount which should be contributed by the defendant. There being no attack upon the reasonableness of the charges for transportation, the fact that the plaintiff used the amounts of the installment payments on the balance due on her car as the criterion for her charge can make no difference. What we have said also applies to the fact that plaintiff charged against the household account the insurance upon the automobile. If she was to have custody of the children and was obligated to care for them, including transporting them, she could not be expected to undertake that burden without the protection of insurance.

The next item under attack is Item 1, House Payments. Under the terms of the interlocutory decree the defendant was obligated for rent of the housing facilities which were to be furnished to the children. The plaintiff in her accounting did not claim anything for rent, as such, but charged against the household account the amounts which she was required to pay each month in reducing the personal loan that she had secured to pay the difference between the amount contributed by her in the purchase of the Chaucer Road property and the purchase price. This balance was less than the down payment on the purchase price, even though no consideration is given for

the amounts expended by her for the improvements of the property. The court would have to close its mind to actual facts to treat this item of the account as a payment for the personal benefit of the plaintiff, in view of the admitted facts that in her account she made no charge for the rent as such and that if she had rented adequate premises to house the children the amount she would have had to expend would have been more than twice the charge she made. This item must be considered a charge for rent and its reasonableness is self-evident. It need not be allocated between the plaintiff and the children for two reasons. In the first place, as she was charged with the care of the children it is to be expected that she would live on the same premises as they and the fact that she receives an indirect benefit is no reason for charging her with a share of the rent. In the second place, plaintiff had invested in the premises more than \$26,000 and for the use of this investment she made no charge but contributed it to the common fund. Certainly this is more than her fair portion of the rent.

What we have just said applies with equal force to Item 4, Public Utilities, and Item 5, Gardener.

The next item which defendant attacks is Item 10, Food, including Milk. The amount of this item for the year 1953 was \$2,463.77, certainly a most reasonable amount to buy food to sustain seven people (including a part time maid), but defendant says that the plaintiff has not segregated that portion of the sum mentioned which paid for the food she ate, and that portion which paid for the food and milk consumed by the five children and the maid the plaintiff employed to aid her in the care of five children.¹ The account rendered by the plaintiff is surprisingly detailed, and this court cannot ignore nor should the trial court have ignored this item in determining the amounts necessary for the support of these children because of the lack of allocation of it between the plaintiff and the

children. Certainly the trial court could have made a proper allocation, and it seems to us that that suggested by the plaintiff in her brief is a proper one, that is, one-sixth of the entire expenditure.

Defendant next attacks Item 13, Book-keeping. The present proceeding would seem to amply justify the plaintiff's need to employ a bookkeeper so that she might render to the father of the children a proper accounting for the moneys he has paid her.

Defendant also attacks Item 14, Life Insurance. This item, amounting to \$1,025.87, is for insurance which plaintiff took on her life for the protection of the children after their father had remarried. Plaintiff concedes that this charge did not fall within the purview of the order made for support of the children.

The last item attacked by the defendant includes, we presume, although it is difficult from his brief to be certain, portions of the amounts included in Item 8, Miscellaneous, and Item 22, Miscellany, as well as Item 19, Balboa Bay Club Dues. With the exception of the Balboa Bay Club Dues, these expenditures were for flowers, newspapers, toiletries, Easter candy, and birthday gifts from one child to the other, and one related to "Father's Day." Respondent fails to point out why any of these were not proper expenditures "attendant upon the support, education and maintenance of these five children" and on their face they are proper ones.

The record shows, without conflict, that all five children are interested and proficient in swimming and other water sports. It further shows that defendant has purchased for their use at Balboa two small boats. It does not seem unreasonable that during the nearly eleven months of the year that they are with their mother they should have recreation similar to that furnished by the defendant during the summer. This plaintiff provided them by the club membership. The cost of recreation was

1. It is well here to note that the defendant, during the period that he had the children in his custody during the sum-

mer vacation, expended an average of over \$2,000 for house rent alone.

one of the items specified in the interlocutory decree to be borne by the defendant.

The schedule of expenditures set forth above is for the year 1953, which was the last full year before the hearing in the court below. The record shows that the expenses for 1954, up to the date of hearing, were, as to certain items and particularly that of household help, greater than in 1953. It is unnecessary for the purposes of our decision here to go into those details. It suffices to say that excluding the items of life insurance, club dues, and charging the plaintiff with a full one-half of the cost of food, the remaining expense which was properly incurred on account of the children exceeded the amounts paid for that purpose by the defendant under the provisions of the divorce decree by more than \$3,500. This demonstrates to us that under the circumstances here the denial of any increase in the amount defendant is obligated to pay for the support of his minor children was arbitrary and an abuse of discretion. We do not mean to hold or direct that the order in question should be modified by increasing the amount of the child support by the sum of \$3,500. We only hold that the trial court abused its discretion in not allowing some increase and it is for that court to determine on a rehearing whether the amount of that increase should be more or less than the sum mentioned.

Respondent asserts that the trial court was not bound by the uncontradicted testimony of Josephine Primm which was corroborated by her accounts. He cites *Williams v. Williams*, 80 Cal.App.2d 28, 181 P.2d 110, and *Carson v. Vinding*, 130 Cal. App.2d 652, 279 P.2d 604. These cases are not controlling here. The appellant's testimony was neither evasive, contradictory, equivocating nor inherently improbable, nor does respondent attempt to point out anything in her testimony which was of such a character as to cast doubt upon her veracity and thus warrant the trial court in putting aside all of her testimony, including that which was corroborated by the entries in her books.

There being no evidence to dispute or contradict the evidence offered by the plaintiff, that evidence could not be arbitrarily disregarded. *Dobson v. Dobson*, 86 Cal.App.2d 13, at page 14, 193 P.2d 794; *Mantonya v. Bratlie*, 33 Cal.2d 120, at page 127, 199 P.2d 677; *Wirz v. Wirz*, 96 Cal. App.2d 171, at page 176, 214 P.2d 839, 15 A.L.R.2d 1129.

A great deal of evidence was received at the trial concerning and the arguments in the briefs are addressed to, the claims of the plaintiff that the defendant should furnish in the future the funds necessary to enable her to maintain (not build) a swimming pool upon the premises where she and the children are housed, give them swimming lessons, purchase a horse for their use, take them on trips in connection with their participation in school athletics, etc.

[8] It is unnecessary for us to discuss this evidence other than to say that the trial court should, in reconsidering this matter, determine whether or not expenditures of the character we have indicated are proper ones, considering the children's station in life, the manner in which they have lived, and the ability of the defendant to pay.

[9] Orders of this kind must always look not only to the present but to the foreseeable future. *Dimon v. Dimon*, 40 Cal.2d 516, at pages 524-525, 254 P.2d 528. They can always be conditioned so that the father is not required to make payments for future needs until such time as it is necessary or proper to incur them.

Inasmuch as this matter must be remanded to the trial court for further proceedings, the conclusions we have reached make it unnecessary to examine the question raised by plaintiff as to whether or not findings of fact are required in a proceeding such as this.

Defendant's Appeal

Defendant appeals from the order of the trial court made as heretofore stated ordering him to pay \$1,000 as attorney's fees on appeal; \$628 costs on appeal which in-

cludes the actual cost of the Clerk's and Reporter's Transcripts on appeal and the actual cost of any briefs not to exceed \$500.

Defendant does not question the reasonableness of the amounts fixed by the order of the trial court and raises no question as to his ability to pay them. His sole contention is that inasmuch as plaintiff had substantial resources of her own there was no necessity for the order in question. He relies on decisions which had to do with appeals in which decrees of divorce or grants of alimony were involved, and cites *Dietrich v. Dietrich*, 41 Cal.2d 497, 261 P.2d 269; *Loeb v. Loeb*, 84 Cal.App.2d 141, 190 P.2d 246, and *Fallon v. Fallon*, 86 Cal.App.2d 872, 195 P.2d 878. These cases are not in point here.

[10, 11] The plaintiff does not appear here in her individual capacity, but in a representative one on behalf of the children who are the real parties in interest. *Metson v. Metson*, supra, 56 Cal.App.2d 328, at page 331, 132 P.2d 513; *Dickens v. Dickens*, supra, 82 Cal.App.2d 717, at page 720, 187 P.2d 91. It is therefore immaterial whether the plaintiff had funds sufficient to enable her to prosecute the appeal. Defendant's obligation is not to the plaintiff but to his children and it is for their benefit that the appeal is prosecuted.

The order of the court awarding attorney's fees and costs is affirmed, plaintiff (respondent) to recover her costs on appeal. The order denying plaintiff's application for modification of the provisions of the interlocutory decree as to child support is reversed with directions to the trial court to determine, in accordance with the views hereinbefore expressed, such additional amounts as may be reasonably necessary for the support of the minor children of the parties and modify the interlocutory decree accordingly. Plaintiff (appellant) shall recover her costs on appeal, provided that any amounts received by her under the order made by the trial court as to the payment of those costs shall be applied *pro tanto* to the satisfaction of the judgment for costs, given herein.

SHINN, P. J., and VALLÉE, J., concur.

137 Cal.App.2d 686

The PEOPLE of the State of California,
Respondent,

v.

Robert Namura HAYASHIDA, Appellant.
Cr. 5420.

District Court of Appeal, Second District,
Division 1, California.

Dec. 9, 1953.

Hearing Denied Jan. 5, 1954.

Defendant was convicted of kidnapping and robbery. The Superior Court, Clement D. Nye, J., rendered judgment and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Doran, J., held that where defendant had denied prior felony conviction, it was proper to allow him to answer prosecutor's question of whether he had been convicted of burglary, without showing by prosecutor that conviction was for felony and not misdemeanor, since defendant, in admitting to conviction, could have shown it to be misdemeanor if it was, but where defendant did not so act, he could not on appeal successfully object to such questioning.

Judgment and order affirmed.

1. Criminal Law ⇨1170½(5)

Witnesses ⇨277(6)

In prosecution for robbery and kidnapping, cross-examination of defendant as to his bank account and certain checks was not beyond scope of direct examination of defendant who had then explained bank account and checks and was not prejudicial error.

2. Criminal Law ⇨1043(2)

Where defendant had denied prior felony conviction, it was proper to allow him to answer prosecutor's question of whether he had been convicted of burglary, without showing by prosecutor that conviction was for felony and not misdemeanor, since defendant, in admitting to conviction, could have shown it to be misdemeanor if it was, but where defendant did not so act, but merely made general objection, he could

not on appeal successfully object to such questioning.

Minsky & Garber, Albert C. Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant and two other defendants were charged with robbery in Count I and for kidnapping in Count II. The two other defendants pleaded guilty to Count I. The appellant was adjudged guilty by the jury of both counts. The appeal is from the judgment and order denying a motion for a new trial.

At the trial both of the co-defendants testified for the prosecution. Defendants' testimony in effect was a denial of any connection with the robbery.

As recited in appellant's brief:

"The trial court committed prejudicial and reversible error in

"(1) Permitting respondent to cross-examine defendant beyond the scope of the direct examination.

"(2) Permitting improper impeachment of appellant.

"(3) Permitting respondent's witnesses to testify as to conclusions of law.

"(4) Limiting appellant's cross-examination of respondent's witnesses.

"(5) Excluding competent and relevant evidence."

[1] Item 1 relates to defendant's bank account and certain checks. No prejudicial error resulted in connection with this examination. On the contrary, defendant explained the bank account and checks and the cross-examination was not "beyond the scope of the direct examination".

As to Item 2, the following occurred:

"Q. Have you ever been convicted of a felony?

"A. No, sir.

"Q. Isn't it a fact that on the 6th day of December, 1946, in the Superior

Court of Oakland, you pleaded guilty to burglary?

"Mr. Garber: Objected to, your Honor, being incompetent, irrelevant, immaterial.

"The Court: Objection will be overruled. You may answer the question. A. Yes, sir."

Appellant argues, "In the instant appeal, appellant denied that he was ever convicted of a felony. No record to the contrary was ever produced. Nevertheless, the court permitted the District Attorney, over appellant's objection, to question appellant about a specific offense, without producing any evidence that such offense was a felony. It is submitted that such action on the part of the District Attorney was contrary to the law and was highly prejudicial and constituted prejudicial and reversible error."

The record does not reveal whether the burglary referred to was a felony or misdemeanor. The above, as copied from the reporter's transcript, is the only reference to the subject.

[2] Obviously the court's ruling on the objection was correct. If the burglary referred to was in fact a misdemeanor it was defendant's privilege to reveal it, in which circumstances a motion to strike and a request that the court instruct the jury to disregard the incident would have been in order. In the circumstances appellant is in no position to complain.

The other three contentions are highly technical. There is no merit to number 3, and as to number 4 the rules of cross-examination were not violated.

As to number 5, the exclusion of the check and so-called note. They were excluded because of the lack of an adequate foundation. The so-called note was in Japanese and was not translated. The record supports the trial judge's rulings with regard to these matters.

The record reveals no prejudicial errors. The judgment and order are affirmed.

WHITE, P. J., and ASHBURN, J. pro tem., concur.

137 Cal.App.2d 415

**ALEX FOODS, Inc., Plaintiff and
Respondent,**
v.

**Bill Woodson METCALFE and Lloyd Tor-
gerson, Defendants and Appellants.**
Civ. 5083.

District Court of Appeal, Fourth District,
California.

Nov. 30, 1955.

Rehearing Denied Dec. 21, 1955.

Hearing Denied Jan. 25, 1956.

Former employer brought suit against former employee and his new employer to enjoin them from soliciting former employer's customers. The Superior Court of Orange County, Kenneth E. Morrison, J., entered orders granting temporary restraining orders and preliminary injunctions, and the former employee and new employer appealed. The District Court of Appeal, Griffin, J., held that evidence sustained Superior Court's finding that as to a small number of customers the necessary elements had been established to warrant conclusion that injunction should be issued precluding former employee and new employer from soliciting and selling to certain restaurants, delicatessen stores, etc., which as customers of former employer had been solicited by former employee, and which had quit taking former employer's products because of such solicitations, and to which former employee was selling his new employer's products, but such was not true as to wholesale buyers, which dealt in competitive lines, and which continued to remain customers of former employer, even though a portion of their business may have been solicited by former employee for new employer.

Order granting preliminary injunction modified and, as modified, affirmed.

1. Injunction ⇨56

Master and Servant ⇨60

A customer list built up by employer over period of years is the employer's property, and its use by a former employee for his own advantage will be enjoined. West's Ann.Labor Code, § 2860.

2. Injunction ⇨56

Equity will intervene to restrain an employee from divulging confidential information gained in course of his employment, or using such information to his employer's prejudice. West's Ann.Labor Code, § 2860.

3. Constitutional Law ⇨88

Every individual possesses a form of property, the right to pursue any calling, business or profession he may choose.

4. Master and Servant ⇨60

A former employee has right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided that such competition is fairly and legally conducted. West's Ann.Labor Code, § 2860.

5. Master and Servant ⇨60

Equity will, to the fullest extent, protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants on their part to the contrary, to follow any of the common occupations of life. West's Ann.Labor Code, § 2860.

6. Injunction ⇨126

Former employer, to obtain injunctive relief against solicitation of its customers by a former employee, must show that information was confidential and not readily accessible to competitors, that former employee solicited customers of former employer with intent to injure him, that former employee sought out certain preferred customers, whose trade is particularly profitable, and whose identities are not generally known to the trade, and that business is such that a customer will ordinarily patronize only one concern, and that established business relationship between customer and former employer would normally continue unless interfered with. West's Ann.Labor Code, § 2860.

7. Injunction ⇨126

In suit by former employer against former employee and his new employer to restrain them from competing with former employer, it is not necessary for former employer to show that former employee actually used former employer's customer lists, if former employee carried such lists in his mind or memory. West's Ann.Labor Code, § 2860.

8. Master and Servant ⇨60

If continuance of employer's trade depends on keeping secret the names of customers or other valuable information known to employer, his employee, having gained knowledge of such secrets in course of employment, cannot thereafter utilize such knowledge to prejudice of employer. West's Ann.Labor Code, § 2860.

9. Injunction ⇨56

Independent of an express contract, equity will enjoin the disclosure by former employee of confidential knowledge of trade secrets which former employee learned in course of employment. West's Ann.Labor Code, § 2860.

10. Injunction ⇨56

Fact that former employee was employed by former employer for years during which he learned the names, addresses, and requirements of former employer's customers justifies injunctive relief, if former employee undertakes to use such information in unfair competition to detriment of former employer, since such knowledge is a part of the good will of the business of the former employer and is a trade secret, and for former employee to act on it is an improper use of confidential information and amounts to unfair competition. West's Ann.Labor Code, § 2860.

11. Master and Servant ⇨60

Equitable protection may be invoked by former employer against subsequent use by a former employee of knowledge of the peculiar likes and fancies and other characteristics of the former employer's customers, where such knowledge will aid him in securing and retaining their business, and such rule applies generally to

trade route cases as well as others involving a knowledge of the customers desired for specialized information, their preferences for certain products, and their buying habits. West's Ann.Labor Code, § 2860.

12. Injunction ⇨128

In suit by former employer, against former employee and his new employer, evidence sustained finding that as to certain customers necessary elements had been established to warrant conclusion that injunction should be issued precluding former employee and new employer from soliciting and selling to certain restaurants, delicatessen stores, etc., which had been solicited by former employee and which had quit taking former employer's products because of such solicitations, but such was not true as to wholesale buyers, which dealt in competitive lines, and which continued to remain customers of former employer, even though a portion of their business may have been solicited by former employee for new employer. West's Ann.Labor Code, § 2860.

13. Injunction ⇨56

Generally, act of former employee in merely informing customers of former employer of change of employment, without more, is not "solicitation" which will be enjoined. West's Ann.Labor Code, § 2860.

See publication Words and Phrases, for other judicial constructions and definitions of "Solicitation".

14. Injunction ⇨56

Equity will not enjoin a former employee from receiving business from customers of his former employer, even though the circumstances be such that former employee should be prohibited from soliciting such business. West's Ann.Labor Code, § 2860.

15. Injunction ⇨56

If customers of former employer added competing line of former employee's new employer without wrongful or unfair solicitation on part of former employee, former employee and new employer could not be enjoined from accepting such busi-

ness and from making sales thereafter to such customers. West's Ann.Labor Code, § 2860.

16. Injunction ⇌ 189

Where, though former employee testified that he solicited most of customers of former employer to buy new employer's products, none of former employer's customers ever testified that former employee unfairly solicited, in any manner, any of the business that they turned over to the former employee and his new employer, and there was no evidence that former employee and new employer ever spoke disparagingly of former employer's food products, or that any of former employer's customers quit taking its products because of unfair solicitation, injunction should only restrain former employee and new employer from soliciting or selling or delivering to former employer's customers who may have been wrongfully or unfairly solicited by former employee. West's Ann.Labor Code, § 2860.

17. Injunction ⇌ 189

Injunction was too broad in its terms, if it was intended to restrain former employee and his new employer from selling to former employer's customers the new employer's products not handled by former employer. West's Ann.Labor Code, § 2860.

18. Injunction ⇌ 192

An injunction to restrain unfair solicitation of former employer's customers may run against former employee's new employer as well as against former employee. West's Ann.Labor Code, § 2860.

Albert Lee Stephens, Jr., Los Angeles, and Mize, Kroese, Larsh & Mize, Santa Ana, for appellants.

Stephen F. Gallagher, Anaheim, for respondent.

GRIFFIN, Justice.

Originally, on May 7, 1954, plaintiff and respondent brought this injunction proceeding against defendant and appellant Bill W. Metcalfe a former employee of plaintiff,

and obtained a temporary order restraining him from competing with plaintiff company in the capacity of driver salesman in the sale of Spanish foods, salads, etc. Later, on May 19, 1954, by amendment to the complaint joining defendant and appellant Lloyd Torgerson, an independent dealer in such goods, and who employed Metcalfe as a driver salesman, Torgerson was, together with Metcalfe, restrained accordingly. Appeals were taken from these respective orders out of an abundance of precaution and fear that plaintiff might believe these temporary restraining orders were still effective, since they were somewhat broader in terms than the preliminary injunctive order subsequently issued. Later, after a hearing of the injunction matter, the court, by minute order entered May 22, 1954, granted a preliminary injunction against both defendants and a formal written order was signed on May 28, 1954, setting forth in detail the specific provisions of the injunction.

Without determining whether the temporary restraining orders are or were effective we will, for the purpose of deciding the real issues here involved, conclude that the temporary orders, if they did continue in existence without a special order dissolving them, were merged with the subsequent formal written order granting the preliminary injunction on May 28, 1954. Knight v. Cohen, 5 Cal.App. 296, 90 P. 145; 14 Cal.Jur. p. 186, sec. 11.

Plaintiff Alex Foods, Inc. (hereinafter referred to as Alex) manufactures perishable Spanish food products, and sells and distributes them throughout Southern California. Its principal place of business and plant are in Orange County. Its principal competitor in that district is XLNT Spanish Food Company (hereinafter referred to as XLNT), a Spanish food products company. Eight additional concerns with sizeable businesses compete with the named companies in the manufacture, sale, and distribution of such Spanish food products. Alex and XLNT manufacture and distribute Spanish foods of the same general nature and character, although XLNT does, and Alex does not, manufacture a line of canned goods in addition to its other Span-

ish food products. Alex distributes a certain cheese line and fish line which XLNT does not distribute.

Defendant and appellant Torgerson is a wholesale food distributor specializing in XLNT Spanish food products. He has sold them since 1929. When this action was commenced he was selling and distributing in Los Angeles County and parts of Orange County pursuant to an agreement with XLNT which allocated the territory to him and fixed its boundaries. At the time this action was filed Torgerson had set up five routes in the territory assigned to him, and these were served by three trucks, each of which worked a different route every day. Three of these routes were in Orange County and had a total of 75 customers.

Defendant Metcalfe is a salesman by occupation. For approximately six years prior to the hearing of this cause he had been a salesman of Spanish foods. From 1946 to 1948, he worked as delicatessen manager for another company and as such he became familiar with many elements of the delicatessen business, including the method of sale and character of food products sold in delicatessen stores including Spanish-American foods. During this time he purchased and merchandised the products of XLNT, Alex, and Superior Food Products Company. In 1948, he accepted employment as a route salesman for one Rothaermel, who was then a distributor of Spanish food products for Alex. He was then assigned a definite route in Rothaermel's territory around Pomona, and was issued a small list of markets and cafes within the area of his route and told to build up the route by calling on all the additional markets and cafes in that area. He remained on that route for about a year. In June of 1949, he was assigned a route in Orange County, and while working this route he serviced with Spanish foods some markets and stores who were customers of Alex when this action was commenced. Some time in 1950, Rothaermel's distributorship was terminated and he "merged" with Alex. Meanwhile, Metcalfe continued to work for Rothaermel on the Orange

County route until the "merger" with Alex and was promoted to supervisor, continuing in that capacity for Alex after the merger until leaving their employ in 1954. Metcalfe's duties as supervisor for Alex included developing routes in new areas, serving as relief route driver when regular drivers went on vacation and at other times when relief was necessary, breaking in new men as route drivers, serving as liaison between the front office and the route drivers, and going along with the regular route drivers in order to smooth over any trouble which had developed at any stop on his route. When Metcalfe relieved a regular driver for Alex, he was given the driver's route list and served the stops thereon. He made no effort on such occasions to acquire new customers. The route lists contained the names and addresses of the customers, what they normally bought and the dates they were called upon. In developing new routes for Alex, Metcalfe was assigned a few stops from an existing route and a new area, and he was instructed to call on every market and cafe in that area. He was left to his own discretion in this pursuit and received no particular instructions from Alex, although Alex did furnish him with an appropriate price list of its products. After acquiring a sufficient number of stops in the new area, Metcalfe would turn the route over to a new driver and repeat the process in another area. In performing the duties of a supervisor and relief route man, Metcalfe operated in the counties of Orange, San Bernardino, San Diego, Riverside, Los Angeles, Ventura and Santa Barbara. As a consequence he became acquainted with the various routes established and operated by Alex in those counties. While Metcalfe was employed by Alex, the company prepared an addressograph system covering the customers on its various routes. Individual route salesmen submitted lists of customers from their routes and the addressograph lists and plates were taken from these salesmen's lists. Metcalfe assisted in the preparation of the lists and plates covering Orange and San Diego counties. In addition to assisting with the addressograph system, Metcalfe also helped manage routes

for Alex. Metcalfe testified he did not keep any of the route books nor any records or memoranda of any information he acquired, when he left Alex. He testified that although he helped prepare these lists, he took none of them with him and did not need such lists because he could well remember the customers' names and places of business and the information contained thereon, without the use of them. As a result of his experience with Alex, Metcalfe became acquainted with the price of products, discount policy for quantity purchases, the type of its products, and difficulties encountered with respect to their perishability.

Toward the end of Metcalfe's employment by Alex, differences arose between Metcalfe and Alex's sales manager over certain matters and between Metcalfe and the company over his future status and duties. On March 20, 1954, Metcalfe wrote Alex a letter in which he stated that on Friday night, March 19th, he was informed that he had been relieved of his duties as supervisor by Rothaermel and that he wished to arrange a meeting with the company to present his side of the story and review any charges that may have been made against him. Apparently, as a consequence, on April 15th, Metcalfe gave the company two-weeks notice of his intention to quit, and on the following day Alex terminated his employment.

It appears from Metcalfe's testimony that on April 17th, Metcalfe telephoned defendant Torgerson and told him that he was no longer working for Alex and was looking for a job; that later that afternoon he met Torgerson at his place of business and Torgerson told him that he was reorganizing certain routes in Orange County for the purpose of covering that area more intensively, and they discussed the possibility of Metcalfe's employment to assist in this work, but that no understanding was then reached.

Torgerson testified that such reorganization was necessary because his driver who handled the Orange County route had diabetes and had to work closer to his home. Metcalfe further testified that during the next few days he had several telephone con-

versations with Torgerson concerning his employment and that on April 21, he saw Torgerson in person and he offered Metcalfe employment as route salesman and to assist in the reorganization of the Orange County routes, and that he then went to work on April 23rd for Mr. Torgerson. He further testified that in the discussions leading to his employment by Torgerson no mention was made of any information acquired by Metcalfe while in Alex' employment concerning its customers, their names and addresses, and which ones were or were not profitable, its routes, route lists, price and credit policies or any aspect of its business; and none was made thereafter prior to the filing of the complaint herein; that he never offered to show, produce or hand over to Torgerson any route books or lists of customers or other information which he used while with Alex; and that Torgerson never requested such information from him.

It appears that for a number of days after his employment by Torgerson, Metcalfe rode with Torgerson and one of his drivers on several of Torgerson's routes in Orange and Los Angeles counties. Metcalfe was assigned several routes in an area in Orange County which had formerly been serviced by one Atkinson, one of Torgerson's regular drivers. He was given a route list which Atkinson had used and a price list, and was instructed to arrange his own schedule in the area and to call on all businesses in the area which might sell XLNT merchandise such as markets, restaurants, schools and delicatessens, and he was left largely to his own discretion in developing the routes to their maximum capacity.

Metcalfe claimed that when he left Alex's employment he bore no ill will toward the company or his superiors there and his feelings toward them were friendly; and that in seeking new customers for Torgerson, while working on the Orange County territory, he did not seek in any manner to disparage the products of Alex or persuade markets or stores to stop purchasing its products and substitute those of XLNT.

Torgerson testified that he assigned Metcalfe to the routes in Orange County in or-

der to achieve more economical operation of routes; that ordinarily, his route men loaded their trucks with merchandise each morning at his place of business before starting on their daily routes; that when they completed their routes they returned to Torgerson's to check in. Metcalfe worked for Torgerson on the routes in Orange County from May 3rd to May 7th, and during this period he obtained 35 new customers for him. When Metcalfe took over this territory all of these customers (some preferred) were handling Alex products, and none of them was handling XLNT products. Metcalfe had had business dealings with 33 of these 35 customers when he worked for Alex. But with the exception of four customers in Costa Mesa, all of these dealings had occurred more than six months prior to the time he commenced working for Torgerson. There is some evidence that a few did, but there is no evidence that the remainder of these customers quit the Alex products and substituted XLNT products. The evidence is that the great majority of them continued to sell both of these products along with other competing products.

On May 7, 1954, Torgerson dismissed Metcalfe because of the filing of this action and the issuance of a temporary restraining order against him, because Torgerson did not want to become involved in any trouble with Alex. Torgerson immediately took over the routes, including the customers obtained by Metcalfe, and when Torgerson was served with a temporary restraining order, these routes were turned over to the officers and employees of XLNT, under some arrangements with them. Apparently, Metcalfe was subsequently employed by XLNT in some other capacity. Included among the customers of plaintiff were a few restaurants, as well as cafeterias and grocery stores, but they were principally large volume food markets, and over 50 per cent of them handled a competing line of Spanish foods. There were a few stores, restaurants, and cafeterias (the number of them is not clear from the record), to which plaintiff formerly sold some of its products, which quit patronizing plaintiff, either in part or in whole, and started patronizing de-

fendants. Defendants offered in evidence a route list of retail grocery stores in Orange County put out by the local newspaper. It showed the name of the store, address, name of manager or owner, rating, and buying connection. Similar route lists for neighboring counties were in evidence. These route lists were available to any salesman representing regional or nationally advertised products. The names of most of the customers to which plaintiff and defendants sold their goods were contained therein, excepting a restaurant or two and delicatessen stores which handled orders of chili con carne, salads, etc.

After hearing, the trial court adjudged and decreed, until further order of the court, that defendants be enjoined and restrained from, directly or indirectly (a) Seeking out or soliciting any of the customers of plaintiff or any routes of plaintiff for the purpose of selling, or offering to sell, to any of said customers, any of the food products hereinafter described, by or through the use of any confidential information of plaintiff secured by defendant Metcalfe during and in the course of his employment by plaintiff for any portion of the period of approximately six years ending on April 22, 1954. The food varieties mentioned are Spanish foods and other foods customarily sold in delicatessen stores and sold or distributed by either plaintiff or defendants in the counties of Orange or Los Angeles. The routes referred to are those developed by plaintiff for the sale and distribution of said food products within those counties which came to the knowledge of the defendant Metcalfe, during and in the course of his employment by plaintiff; (b) Seeking out or soliciting any of said customers of plaintiff with which defendant Metcalfe personally transacted business for or on behalf of plaintiff during the period of his employment by plaintiff for the purpose of selling or offering to sell any of said food products to any of said customers; (c) Selling or delivering any of said food products to (certain of plaintiff's customers hereinafter designated) who, since the employment of defendant Metcalfe by defendant Torgerson, have been solicited by defendant Metcalfe for the sale of any of said

food products; provided that certain customers of plaintiff are those whose identity has been secured by defendant Metcalfe, from confidential information concerning the routes or customers of plaintiff while in the employment of plaintiff, and who were not customers of defendant Torgerson prior to the employment of Metcalfe by Torgerson; (d) Making use of any of the confidential information consisting of the names and addresses of plaintiff's customers, the types of said food products sold to plaintiff's customers, and the volume and price thereof, and their particular needs in connection with said food products, including also any commercial use of the friendly feeling secured or developed by defendant Metcalfe during and in the course of his employment by plaintiff. A writ of injunction was issued accordingly.

Defendants' claim is that the complaint does not state a cause of action, and that the evidence is not sufficient to support such an injunction. In this respect defendants rely principally upon the decisions in *Aetna Bldg. Maintenance Co. v. West*, 39 Cal.2d 198, 246 P.2d 11; and *Avocado Sales Co. v. Wyse*, 122 Cal.App. 627, 10 P.2d 485. They claim that proof of the five elements which are stated therein to be a prerequisite to the issuance of such injunction, were lacking, and it should be denied because (1) There was no confidential information not readily accessible to competitors; (2) The former employee did not solicit the customers of the former employer with intent to injure; (3) There were no preferred customers whose trade was particularly profitable and whose identities were not generally known to the trade which were sought out by the former employee; (4) The business is not such that a customer will ordinarily patronize only one concern; and (5) The business relationship between the customer and the former employee would normally continue unless interfered with because it depends on the quality of the product and the efficiency of the service.

It is further contended that no injunction should issue against defendant Torgerson in any event and that the restraints imposed are too broad in that they restrain defendants from the solicitation of and the sale to

customers of plaintiff of products produced and distributed by defendants, or either of them, even though said products were not produced or distributed by plaintiff.

[1-5] Section 2860 of the Labor Code provides that everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment. A customer list built up by the employer over a period of years is his property, and its use by a former employee for his own advantage will be enjoined. *California Intelligence Bureau v. Cunningham*, 83 Cal.App.2d 197, 188 P.2d 303. Equity will intervene to restrain an employee from divulging confidential information gained in the course of his employment or using such information to his employer's prejudice. On the other hand, every individual possesses a form of property, the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided such competition is fairly and legally conducted. Equity will, to the fullest extent, protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary, to follow any of the common occupations of life. *Continental Car-Na-Var Corp. v. Moseley*, 24 Cal.2d 104, 148 P.2d 9.

The main question here presented is whether, under the facts of the instant case, defendants come within this latter class, are entitled to such protection, and were not guilty of unfair competition in soliciting the customers of plaintiff.

[6] The next question is whether the facts bring defendants within the principles set forth in the line of cases exemplified by *George v. Burdusis*, 21 Cal.2d 153,

130 P.2d 399; *Empire Steam Laundry v. Lozier*, 165 Cal. 95, 130 P. 1180, 44 L.R.A., N.S., 1159, and other cases cited in *California Intelligence Bureau v. Cunningham*, 83 Cal.App.2d 197, at page 202, 188 P.2d 303, pertaining to the so-called "route cases", or whether the facts bring the case within the line of decisions illustrated by *Continental Car-Na-Var Corp. v. Moseley*, 24 Cal.2d 104, 148 P.2d 9; *Avocado Sales Co. v. Wyse*, supra, and similar cases cited in *California Intelligence Bureau v. Cunningham*, supra, 83 Cal.App.2d at page 202, 188 P.2d 303. The elements necessary to be shown in the first class of cases are indicated therein. *Aetna Building Maintenance Co. v. West*, 39 Cal.2d 198, 246 P.2d 11, 15, re-adopts the statement that proof of these elements is necessary to justify the application of the principles giving rights of parties in connection with *retail* delivery routes, and lists them as follows:

"* * * to obtain relief against a former employee it must be shown: (1) The information was confidential and not readily accessible to competitors; (2) The former employee solicited the customers of his former employer with intent to injure him; (3) The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; (4) The business is such that a customer will ordinarily patronize only one concern; (5) The established business relationship between the customer and the former employer would normally continue unless interfered with."

[7] Assuming that some of the facts here related might bring defendants within the principles applicable to the so-called route cases, the evidence produced in this respect, although capable of being otherwise interpreted, might be sufficient to support the trial court's conclusion as to element No. 1 above mentioned in the *Aetna* case that defendant Metcalfe did have knowledge and confidential information of the routes, route sheets, the types of food products sold to plaintiff's customers, the volume price, the particular needs of the customers which were not readily accessible to competitors,

and had a friendly feeling secured or developed by defendant Metcalfe for said customers during and in the course of his employment by plaintiff. It is not necessary to show that the employee actually used such lists if he carried such lists in his mind or memory, *George v. Burdusis*, supra. As to the 2nd element, that he solicited the customers of plaintiff with intent to injure plaintiff might be reasonably inferred from the evidence. As to the 3rd, that he sought out certain preferred customers whose trade was particularly profitable and whose identities were not generally known to the trade may have been established. As to No. 4, it is clear that the requirement that the business be such that a customer will ordinarily patronize one concern is not established as to most of the customers in dispute. In fact the evidence shows that the great portion of these customers were food markets carrying competitive lines, and that they do not ordinarily patronize only one concern. As to the 5th element, although proof of a contrary finding might be supported, it does appear that plaintiff's business with only a few of these customers would have necessarily continued unless interfered with. Some distinction between *retail* delivery route cases and *wholesale* buyers is apparently made. *George v. Burdusis*, supra, 21 Cal.2d at page 159, 130 P.2d 399. Here, the plaintiff was a wholesaler and a great majority of the customers were wholesale buyers handling competing lines, and continued to handle plaintiff's line of goods.

As indicated in the *West* case and *California Intelligence Bureau v. Cunningham*, supra, the required elements related read in the conjunctive and not in the alternative. The question arises as to whether or not all of these elements must concur before injunction could properly issue in a so-called route case. (See interesting discussion on "Unfair Competition", in 41 Cal.Law Review p. 38.) If all of these elements must concur then plaintiff's injunction must fall as to those customers which do not qualify thereunder because of lack of proof of all of such elements.

In *California Intelligence Bureau v. Cunningham*, supra, 83 Cal.App.2d at page 202, 188 P.2d at page 306, a second group of

cases is cited holding that equity will not enjoin a former employee from using knowledge or information gained while in the employ of a former employer if:

"* * * (1) the customers solicited (a) do not constitute a trade secret, or confidential information, or a confidential list in which a proprietary interest might be claimed, or (b) are commonly known to the trade and are called upon by salesmen for various companies, or are *wholesale* buyers whose names appear in directories and are so few in number that anyone might readily discover them, and the list of them is not secret or confidential; (2) the former employer is in open competition with others engaged in similar business, selling in an open, competitive market; (3) the former employee was a salesman of his former employer in a commercial field where there was no assurance of an order unless he could satisfy his customer that his product was better, cheaper, or more salable than that of his competitor, where the customer usually desired to examine, inspect and compare the product and prices offered to him and each sale was a distinct transaction, not necessarily implying that another will follow; (4) no secret or trust reposed in the former employee in the course of his employment is violated and no trade or business secret or confidential information is used by the former employee." (Italics ours.)

[8-11] Regardless of the classification into which the facts herein mentioned bring this case, it is clear that if the continuance of an employer's trade depends on keeping secret the names of customers or other valuable information known to such employer, his employee, having gained knowledge of such secrets in the course of his employment, cannot thereafter utilize such knowledge to the prejudice of his former employer. Independent of an express contract, equity will enjoin the disclosure of confidential knowledge of trade secrets which a former employee learned in the course of his employment. The fact that a defendant was employed by plaintiff for years during which he learned the names, addresses, and

requirements of plaintiff's customers justifies injunctive relief where the defendant undertook to use such information in unfair competition to the detriment of plaintiff. Such knowledge is a part of the good will of the business and is a trade secret. A list of customers is a trade secret if there is confidential information as to such customers. To act upon it is an improper use of confidential information and amounts to unfair competition. "'* * * the additional influence of the friendly contact of the former employee with the persons whose business he would carry to his new connection brings the solicitation within the condemnation of unfair competition.'" *Wallich v. Koren*, 80 Cal.App.2d 223, 226, 181 P.2d 682, 685; *Dairy Dale Co. v. Azevedo*, 211 Cal. 344, 295 P. 10. Equitable protection may be invoked against the subsequent use by a former employee of knowledge of the "peculiar likes and fancies and other characteristics" of the former employer's customers where such knowledge will aid him in securing and retaining their business. This rule applies generally to trade route cases as well as others involving a knowledge of the customers desired for specialized information, their preferences for certain products, and their buying habits. *Aetna Building Maintenance Co. v. West*, *supra*, 39 Cal.2d at page 205, 246 P.2d 11.

[12] The trial court was justified in believing that as to a small number of the 33 customers the necessary elements had been established to warrant the conclusion that injunction should be issued against defendants precluding them from soliciting and selling to certain restaurants, delicatessen stores, etc., who as customers of plaintiff had been solicited by Metcalfe, and who quit taking plaintiff's products because of such solicitation, and to whom he was then selling his competitor's products. But this is not true as to those wholesale buyers, dealing in competitive lines, and who continued to remain customers of plaintiff, even though a portion of their business may have been solicited by defendants.

As to these wholesale buyers of Spanish food products, it is shown that almost every one carries more than one brand of such food products; that it is the present mar-

keting custom, and firmly established, that every such market must furnish as wide a selection of named brand products as possible so that the consumer will be able to select any brand such consumer may particularly desire among food products of similar type. In this respect the sale and distribution of food products to retail markets, as wholesalers, bears no resemblance to the sale of ice, laundry service, or janitorial service, because items such as these are items which are not duplicated by one customer and therefore the sale of such items to a customer already using such an item from one source means displacement from that source to be supplanted by the new item sold. In the case of food products, the sale of an additional food product is not a displacement item as the sale of both products can continue at the same time and the proportion of sales of each product would be wholly dependent upon the quality and price and other factors of marketing ability which are strictly a matter of free and open competition. The customer's place of business is open to the public and is advertised by every medium at their command. Their existence is not a secret of any kind. They are classified in telephone directories and in booklets published by newspapers interested in encouraging business, and they provide plans and routes to serve grocery stores and markets according to their most economical operation.

[13-15] The general rule is stated in the Aetna case to be that merely informing customers of one's former employer of change of employment without more, is not solicitation, and that equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business. The order here involved does not indicate and (since the exhibit from which the witnesses were testifying was not brought up) the record does not show in detail which of the 33 customers may have quit taking plaintiff's products and took defendants' products as a result of defendants' solicitation. The testimony is that a great majority who carried plaintiff's line of food products also carried XLNT

products. It does not show in particular which of these customers took XLNT products as a result of wrongful or unfair solicitation on the part of Metcalfe, or whether these customers voluntarily added the competing line without wrongful or unfair solicitation. It is clear that in the latter case defendants could not be enjoined from accepting this business and making sales thereafter to such customers. *Golden State Milk Prod. Co. v. Brown*, 217 Cal. 570, 20 P.2d 657.

It was held in the Aetna case that where the employee informed his former employer's customers that he was terminating his services and of his plans to go into competing business himself, that was not unfair solicitation since there was no suggestion that the customer cancel its contract with the former employer.

In *Continental Car-Na-Var Corp. v. Moseley*, supra, the employee sent out letters to certain customers of his former employer advising them of his severance of business relations with the former employer and that he was engaging in business for himself. This was held not to be unfair solicitation. See also *Theodore v. Williams*, 44 Cal.App. 34, 37, 185 P. 1014.

[16, 17] Although Metcalfe testified he solicited most of these customers to also buy XLNT products none of plaintiff's customers ever testified that defendant unfairly solicited, in any manner, any of the business they turned over to defendants, and there was no evidence that defendants ever spoke disparagingly of plaintiff's food products, or that any of plaintiff's customers quit taking its products because of such unfair solicitation. Accordingly, the injunction should only restrain defendants from soliciting or selling or delivering to the class of customers indicated who may have been wrongfully or unfairly solicited by Metcalfe, during the period in question. The injunction extended only to Orange and Los Angeles counties, as indicated by the order, and not to other neighboring counties, as contended by defendants. The injunction was too broad in its terms if it was intended thereby to restrain defendants from selling its products not handled by plaintiff.

[13] It is established that the injunction to this extent may also run against defendant's new employer as well. *George v. Burdusis*, supra; *Santa Monica Ice & Cold Storage Co. v. Rossier*, 42 Cal.App.2d 467, 109 P.2d 382. In the absence of a specific finding, the question as to which particular customers may have been so wrongfully and unfairly solicited would become a factual question to be determined upon any possible contempt proceedings.

Order granting preliminary injunction should be and is modified accordingly and affirmed as thus modified.

BARNARD, P. J., and MUSSELL, J.,
concur.



137 Cal.App.2d 573

Fred G. ROBINSON, Plaintiff, Cross-Defendant and Appellant,
v.

Stephen CUNEO, Defendant, Cross-Complainant and Respondent.
Civ. 8598.

District Court of Appeal, Third District,
California.
Dec. 6, 1955.

Rehearing Denied Jan. 3, 1956.

Action against adjoining landowner for interference with plaintiff's rightful use of water. Defendant cross-complained, seeking to quiet his title to an easement across plaintiff's land. The Superior Court, Merced County, R. R. Sischo, J., entered a judgment denying plaintiff any recovery on his complaint, and, responsive to cross-complaint, quieted defendant's title to an easement or right of way for an irrigation ditch across the land of the plaintiff. On plaintiff's appeal, the District Court of Appeal, Van Dyke, P. J., held that the evidence sustained the judgment that plaintiff take nothing but held that there was insufficient evidence to support the trial

court's adjudication that plaintiff's right to use the water from ditch was subject to defendant's rights thereto.

Reversed in part and in part affirmed.

1. Waters and Water Courses ⇨158½(1)

In action against adjoining landowner for interference with plaintiff's rightful use of water, wherein defendant cross-complained, seeking to quiet his title to an easement across plaintiff's land, evidence sustained finding that defendant owned an easement or right of way for use, maintenance, repair and control of irrigation ditch across plaintiff's land and that such easement included, in addition to strip of land on which ditch was located, a strip of land for a distance of 10 feet in width from the bottom of the outside of each bank of said ditch.

2. Easements ⇨38

Owner of servient tenement still owns fee, even if a right of way be established across it, and as such owner he make any use of easement strip not inconsistent with full easement rights of easement owner, and such easement owner owns no part of land itself and has no right to exclude owner from use of any land, except in so far as use interferes with his easement rights.

3. Waters and Water Courses ⇨152(8)

In action against adjoining landowner for interference with plaintiff's rightful use of water, wherein defendant cross-complained, seeking to quiet his title to an easement across plaintiff's land, evidence would not sustain finding that such right as plaintiff had to use water from ditch was subject to prior and superior right of defendant.

4. Waters and Water Courses ⇨144½

One of two adjoining landowners for whose land water originating in river had been appropriated had no right to have ditch running across his land to his neighbor's land maintained in semi-full status merely because that status made it more convenient for him to take water therefrom, and the neighbor incurred no liability by restoring ditch to its original pro-

portions, even though deepening of ditch lowered water level.

5. Waters and Water Courses $\Rightarrow$ 152(8)

In action against adjoining landowner for interference with plaintiff's rightful use of water, wherein defendant cross-complained, seeking to quiet his title to an easement across plaintiff's land, evidence supported judgment that plaintiff take nothing on his claim for crop damage.

C. Ray Robinson, Merced, for appellant.

Preston, Braucht & George, Merced, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment denying appellant any recovery on his complaint and, responsive to a cross-complaint, quieting respondent's title to an easement or right of way for an irrigation ditch across the land of appellant. The judgment further adjudicated the relative rights of the parties to use of water flowing in the ditch.

Appellant and respondent are owners of adjoining agricultural land. The respondent's land lies to the southwest of the land of appellant. The ditch crosses appellant's land, the flow of the water being from the east to the west. The water originates in the Merced River to the east and flows across intervening lands to the easterly boundary of appellant's property. At that point and adjacent to appellant's land is a sump or dredge pond into which the water from the ditch empties. The dredge pond was left when the land to the east of appellant's land was dredged. The dredging operation destroyed the old existing ditch but the testimony is that it was sufficiently restored as the dredging progressed so that the water still flows from the river in approximately the same way and along the same course as it did before the dredging was done. From the pond the water flows into the ditch, crosses appellant's land and goes on to the land of respondent where it is used for irrigation purposes. In 1951 appellant leased his land to a tenant for cotton cropping on shares, intending to irrigate the crop with

water brought to his land by the old ditch from the river. He claimed that the respondent so interfered with his rightful use of water as to cause the loss of the cotton crop and he sued for the damages that ensued.

Respondent answered the complaint and though he did not deny that appellant had some right to the use of water, yet he claimed that he had not interfered with such right and for that and other reasons was not responsible for the loss of the cotton crop. He also cross-complained, seeking to quiet his title to an easement across appellant's land for maintaining the ditch and flowing water along it. At the close of the trial the trial court viewed the ditch and thereafter made findings to the following effect: That appellant's title to his land was subject to an easement over and across the same for the use, maintenance, repair and control of an irrigation ditch; that this easement for more than twenty years last past had been owned by and in the possession of respondent; that the right of way for the ditch included a strip of land for a distance of ten feet in width from the bottom "of the outside of each bank of said ditch"; that respondent had not prevented appellant from using his right to water; that respondent was not responsible for the loss of the cotton crop; that such right as appellant had to use water from the ditch was subject to the prior and superior right of respondent and limited to such water as might be flowing in the ditch in such quantities and at such time that its use by appellant would not interfere with or restrict the use of said ditch or the water therein by respondent.

[1-3] Appellant contends that the findings of the trial court as to the respective rights and interests of the parties in the irrigation ditch across the appellant's land and in the waters that might flow therein are not supported by the evidence. The decree itself is somewhat ambiguous. It adjudges that respondent, at the time the action was begun, was and still is the owner of and entitled to possession of an easement or right of way for the use, maintenance, repair and control of an irrigation ditch across appellant's land. We think this

part of the decree was substantially supported by the evidence. We do not construe the decree in its use of the word "control" as indicating a control exclusive of the rights of appellant as owner of the fee or as exclusive of his rights in the use of the ditch and the water therein upon his own land, whatever those rights may be, but rather as a statement of the secondary easements that go with a primary easement over the property of another. The decree next declares that the easement includes a strip of land on which the ditch is located and in addition thereto a strip of land for a distance of ten feet in width "from the bottom of the outside of each bank of said ditch". There was no recorded description of the easement as it existed over the lands of appellant which used this specific description as to lateral extent. However, there were grants in evidence inferentially referring to the same ditch as it was located and maintained over other lands which support the trial court's finding that across the appellant's lands it had the same lateral extent. There was also evidence that in cleaning out the ditch the operator of the dragline had done no more than to restore it to its original dimensions, which, of course, included space on both banks whereon to deposit material which had accumulated in the ditch and was being removed therefrom. In view of the fact that the ditch was in some places excavated to dimensions of eight feet across the top, six feet across the bottom and a depth of four to six feet, it is a reasonable deduction by the trial court that spoil banks of the dimension fixed by the court were necessary to the proper exercise of the easement rights. In addition to the foregoing the trial court inspected the ditch and since the easement found to exist included the secondary easements of keeping the ditch cleaned and of piling the spoil on the banks thereof we think the whole record substantially supports the conclusion of the trial judge that the easement had the lateral extent adjudged. The decree further adjudged that the claim of appellant "in and to said easement and right of way is without any right whatsoever and that said cross-defendant, Fred G. Robinson, has no right,

title, interest, claim or estate in or to said easement or right of way or any part thereof and that said Fred G. Robinson be and he is hereby enjoined and debarred from asserting any claim whatever in or to said right of way or easement across said land and premises adverse to defendant and cross-complainant." If by the foregoing it was intended to be adjudged that the appellant as owner of the servient tenement had no right, and was enjoined from claiming any right to the use of the easement strip in such way as not to interfere with the easement rights, then the decree would be against the law. The owner of the servient tenement still owns the fee, even if a right of way be established across it, and as such owner he may make any use of the easement strip not inconsistent with the full easement rights of the easement owner. Such easement owner owns no part of the land itself and has no right to exclude the owner from the use of any of the land, except in so far as a use interferes with his easement rights. However, we do not construe the decree as doing more than adjudging that the rights of the respondent as owner of the easement are not to be interfered with by the owner of the servient tenement. We hold that nothing more was intended and nothing more was adjudged. *Hannah v. Pogue*, 23 Cal. 2d 849, 856, 147 P.2d 572. The decree then proceeded to declare as follows: "provided, however, that without any obligation on the part of said defendant and cross-complainant to supply or maintain water therein and subject to the prior and superior right of said defendant and cross-complainant to the use of said water, plaintiff, Fred G. Robinson, shall have the use of such water as may be flowing in said ditch in such quantities, and at such times, and in such manner as not to interfere with or restrict the use of said ditch or the water therein by defendant, Stephen Cuneo." This is the only part of the decree which purports to adjudge the rights of the parties in the waters flowing in the ditch. Reference must be made to the evidence to ascertain whether or not this adjudication that respondent's rights in the water flowing in the ditch were superior to those

of appellant may be sustained. Counsel on neither side made any special effort to ascertain what these rights of the respective parties were. There was introduced in evidence an abstract of title to appellant's land, a bulky document containing some 500 pages. We have examined this exhibit and from that examination think we understand why counsel have foreborne to enter upon a definitive examination as to the extent of water rights in the water flowing in the ditch. References to a ditch appear in many of the conveyances reflected in the abstract, the earliest references going back to 1855 and antedating the patents to the land. The ditch is referred to as the Hamlin Ditch, the Mill Ditch and by other names, and it appears from both the abstract and the testimony that the ditch takes water from the Merced River and carries it across intervening lands and across the lands of appellant and on to the lands of respondent. It appears that in early times the water was used to run a mill in addition to being devoted in part to irrigation of the lands it traversed and that after use at the mill it was conveyed back into the Merced River at a lower point. In none of the conveyance references that we have found in the abstract is there any description of the capacity of the ditch or its width or depth save only the provisions we have referred to as the spoil bank strip on either side of the excavation and while this in itself gives some idea as to the capacity of the ditch it is anything but accurate. The record does not anywhere show the amount of water received into the ditch at the point of appropriation from the waters of the Merced nor the amount transported by the ditch across the various properties traversed thereby, nor is there any evidence of record or otherwise herein as to how much water has been used on the various parcels of land traversed by the ditch nor as to how much acreage has been irrigated thereby. It does appear, however, as a fair inference from the record history of the ditch and from the testimony that various landowners have used the ditch in common to transport water for use upon their land. Appellant testified that of his own knowl-

edge (he was 81 years old when he testified), he, and his father who owned the land before him, had made varied uses of the water brought down the ditch during the years since his childhood, and there was testimony that at least on some occasions considerable irrigation over a considerable area was obtained by using water thus brought to his land. The appropriation undoubtedly originated over 100 years ago and we think the record disclosed with certainty that the appropriation, whatever it may have been originally, has been exercised continuously from the first and, further, that this use of the appropriated water and of the ditch for the transportation of the same has never been singly owned by anyone, but has been, although a fluctuating, nevertheless a continuous, common use by the owners of the land across which the ditch has been maintained. One of the long-time employees of respondent testified that about the same time that the ditch was cleaned across appellant's land the drag-line used for that purpose was sent all the way to the Merced River to clean the ditch between the appellant's land and the river; and that, although the land immediately to the east of appellant's land and known as the Goldman Ranch had been dredged 10 or 12 years ago and although in the dredging the original ditch had been necessarily destroyed, yet the dredger had restored the ditch by depositing tailings for banks and sealing the banks and the bottom by the placement of "slickens" so that when the dredge left the dredging field the waterway was intact and usable. We cannot read this record otherwise than to say that it shows the water concerning which the parties were here contending was appropriated water originating in the river and carried to the contestants' lands by the ancient ditch. That being so, and nothing to the contrary appearing, there is no support for the trial court's adjudication that in respect to their several rights to the use of the water transported by the ditch respondent's rights therein are superior to those of appellant's. In so far as the decree purports to so adjudicate, it lacks support and must be reversed.

[4,5] Turning now to the appellant's contention that the evidence does not support that part of the judgment denying him relief for the loss of his cotton crop, we think his contention cannot be sustained. The evidence was conflicting, but the following appears which sufficiently supports the trial court's denial of relief to the appellant: For many years that portion of the ditch which crosses appellant's land has been cleaned from time to time by various methods which did not restore it to its original depth. In earlier times this cleaning had been done by a "Fresno" scraper drawn by teams. Later it had been done by what the witnesses described as a "V" dragged by a tractor running along the ditch. Notwithstanding such cleaning, the ditch had gradually silted up and just before time to irrigate appellant's crop the respondent had the ditch excavated by a dragline. There was testimony, including that of the dragline operator, that the excavation had done no more than to restore the ditch both in width and in depth to its original proportions. The dragline operator testified that he had been able to ascertain the old dimensions of the ditch by observing various markings of the original ditch limits manifested by soil colorings and soil texture and was thus able to confine his excavations to the material that had silted in. There is nothing in the record to justify a holding that respondent had in any way through the years lost the right to maintain the ditch in its original condition as to depth and width. Appellant complains that the deepening of the ditch served to lower the water level therein and thus to prevent him from obtaining a proper supply of water. If such lowering took place, it is shown by the record to have been caused by the restoring of the ditch to its original proportions and appellant had no right to have the ditch maintained in its semi-filled status merely because that status made it more convenient for him to take water therefrom. There is no evidence that respondent interfered with the flow of appropriated water from the river, nor, indeed, if the flow was insufficient, did appellant show that he did

anything to increase the flow. In addition to the foregoing there was evidence that appellant's land, not having been leveled or in any way artificially prepared for irrigation, was not capable of such irrigation and would not have produced a crop except in limited areas. On the whole record we find substantial and, therefore, sufficient support for the trial court's judgment that appellant take nothing as against respondent.

That portion of the judgment appealed from which purports to declare the relative rights of the parties to the use of water brought to and across appellant's land by the irrigation ditch or their relative rights to the use of water from the river or which purports to regulate as between the parties the use of water in the ditch is reversed. Otherwise, the judgment is affirmed. Appellant to recover his costs.

PEEK and SCHOTTKY, JJ., concur.



137 Cal.App.2d 698

SONOMA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, a body corporate and politic, Petitioner,

v.

Jimmie ANDERSON, as County Treasurer of Sonoma County and ex officio Treasurer of Sonoma County Flood Control and Water Conservation District, Respondent,

and

Walter M. Robbins and Jessie P. Robbins, Intervenor on behalf of themselves and all other taxpayers of the Sonoma County Flood Control and Water Conservation District, Intervenor.

District Court of Appeal, Third District,
California.

Dec. 9, 1955.

Rehearing Denied Jan. 5, 1956.

Proceeding on a petition for writ of mandate. The District Court of Appeal, Van Dyke, P. J., held that since it appeared

that a pending appeal to Supreme Court from Superior Court's judgment dismissing suit to enjoin issuance and sale of bond furnished a plain, speedy, and adequate remedy to petitioner, District Court of Appeal would have to refuse to enter upon a consideration of the issues pending before Supreme Court.

Order accordingly.

Mandamus ☞5

Where it appeared that pending appeal to Supreme Court from Superior Court's judgment dismissing suit to enjoin issuance and sale of bond furnished a plain, speedy, and adequate remedy to petitioner, District Court of Appeal, wherein petition for writ of mandate had been filed, would refuse to enter upon a consideration of the issues pending before Supreme Court. Act Cong. May 17, 1950, 64 Stat. 170 et seq.

Joseph Maddux, Dist. Atty., Sonoma County, Santa Rosa, for petitioner.

F. L. Manker, Santa Rosa, for respondent Anderson.

Kasch & Cook, Ukiah, for intervenors Robbins et al.

VAN DYKE, Presiding Justice.

Petition for writ of mandate. Petitioner, a flood control and water conservation district, asks this court to command its treasurer to sign, execute and deliver to the buyer bonds of the district in the sum of \$5,598,000. Its petition shows that the Congress of the United States has enacted Public Law 516, 81st Congress, Chapter 188, Second Session, approved by the President of the United States May 17, 1950, 64 Stat. 170 et seq., whereby a plan for flood control, water conservation and related purposes in the Russian River Basin in California was approved substantially in accordance with the recommendations of the Board of Engineers for Rivers and Harbors and as recommended by the Chief of Engineers. By that legislation there was authorized to be appropriated by the Federal Government the sum of \$11,522,000 for accomplishment

of the initial stage of the plan, that is, the construction of Coyote Valley Dam to control and impound the flood waters of the East Fork of Russian River. The legislation carried a proviso that prior to starting construction local interests should contribute the sum of \$5,598,000 in cash in full repayment of the conservation benefits to be derived from the work, the contribution to be transferred to the Secretary of the Army for application to the cost of construction. It is further stated in the petition that proceedings had been taken by petitioner to issue bonds in the required amount which should be a charge upon the properties in the district and that it had submitted that proposition to the qualified voters of the district, with the result that more than a two-thirds majority voted in favor of the bonds. Thereafter the proposed bonds were offered for sale and were bid in by the Bank of America National Trust and Savings Association, the bid containing a proviso that the bonds be delivered within sixty days and that they be delivered free of any litigation with respect thereto. It is further shown that three days before the bonds would have been executed and delivered and the money paid to the treasurer of petitioner and on November 14, 1955 a suit was filed in the Superior Court of the County of Sonoma by Walter M. and Jessie P. Robbins who, as plaintiffs in their own behalf and purporting to sue likewise for all other taxpayers of the petitioner district, brought action against the district, its board of directors and the treasurer of the district, who is respondent herein, seeking to enjoin the issuance and sale of the bonds upon various grounds; that the treasurer of the district is in doubt as to the legality of the proceedings taken by the petitioner district for the issuance of said bonds and of the legality of said bonds if issued for the reasons alleged by the plaintiffs in said superior court action. Notwithstanding the pendency of said action in the superior court petitioner urged this court to issue its alternative writ and ultimately its peremptory writ upon the ground that the public interest, welfare and necessity demanded that the Coyote Valley Dam be constructed without hindrance or

delay since it was allegedly necessary to protect life and property in the district from disastrous floods and to provide water for domestic use in the City of Santa Rosa and elsewhere. In this connection it was alleged that the United States Army is now prepared to start construction, subject to the condition that prior to starting construction the said district shall contribute the sum of \$5,598,000 in cash, failing which no work could be done upon the dam. This court issued an alternative writ and set the matter for hearing. That hearing was held. It now appears that the superior court in the action brought therein has sustained a demurrer without leave to amend and has entered its judgment dismissing said action; further that, following the entry of that judgment, plaintiffs in that action have appealed to the Supreme Court of this state and that the appeal is now pending therein.

We have concluded that it would be improper under all of the circumstances presented here for this court to take any other action at this time than to discharge the alternative writ heretofore issued and deny the peremptory writ requested without decision on the merits. It is apparent that the issues which the plaintiffs pose in the superior court action and in the appeal they have taken to the Supreme Court are exactly the same issues as this court must decide if it proceeds herein. Respondent in this proceeding, the treasurer of the district, was also a defendant in the superior court action and is now a respondent in the appeal to the Supreme Court. The district is a party to both proceedings. As to the plaintiffs and appellants in the action begun in the superior court, and now on appeal, they were not originally made parties herein, although the petition of the district stated it was willing to have them intervene. They have now filed herein a petition for intervention, and have raised the same

points herein as were presented by them for adjudication in the other action. This court is, as it should be, sympathetic to the plea made by the petitioner that a speedy determination of the issues raised in these proceedings ought to be had in the public interest, but we conceive it to be our proper course to refuse to enter upon the decision of issues now pending before the Supreme Court by the appeal taken. We do not think that the necessary delay that will be occasioned by our refusal to go further in response to the petition herein will be in any sense vital to the interests of the district. Before a determination made by us could become final the limit of time within which under the bids the bonds were to be delivered to the bidder will have elapsed in any event, for it was a condition of the bid, subject, we understand, to a right in the bidder to waive the requirement, that the bonds be delivered by the 17th of January next. Speaking generally, courts are reluctant, and properly so, to enter upon the determination of issues already pending before other courts, even if they have the jurisdictional power to do so. But specifically it appears herein that the appellate procedure already invoked furnishes a plain, speedy and adequate remedy to the petitioner. *Millett v. Association of Mare Island Employees*, 44 Cal.App. 271, 274, 186 P. 378; *McMullen v. Glenn-Colusa Irr. Dist.*, 17 Cal.App.2d 696, 62 P.2d 1083; *People v. County of Tulare*, 45 Cal.2d 317, 289 P.2d 11.

Both respondent and intervenors have demurred to the petition herein, urging the foregoing grounds for a denial of the relief requested.

Those demurrers are sustained. The alternative writ heretofore issued is discharged, and the peremptory writ is denied.

SCHOTTKY and PEEK, JJ., concur.

137 Cal.App.2d 430

Alcide COMASTRI, Plaintiff, Cross-Defendant, and Respondent,**v.****Stanley BURKE, Special Administrator of the Estate of Jessie H. Paterson, Deceased, substituted for Jessie H. Paterson, Defendant, Cross-Complainant, and Appellant.****Civ. 16371.****District Court of Appeal, First District,
Division 2, California.****Dec. 2, 1955.**

Action to quiet title with respect to proceeds of home, the purchase of which was partly paid for by \$19,000 drawn by deceased joint tenant of home from alleged joint tenancy bank account of claimant and deceased joint tenant. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., found respondent entitled to proceeds of sale with interest for period proceeds were out of his possession because of unfounded claim, and claimant appealed. The District Court of Appeal, Nourse, P. J., held that fact that one party to joint tenancy bank account died did not conclusively vest title to such deposit in both of the survivors, and prevent a showing by one of the surviving joint tenants of the true intention as to the account and also held that, although respondent who was entitled to proceeds of sale of home, was out of possession of proceeds during pendency of claim, he was not entitled to interest for that period.

Partly affirmed and partly reversed with instructions.

1. Joint Tenancy ⚭3

Evidence warranted finding that funds which a sister deposited in joint bank account of three sisters were the property of the sister whose funds were initially deposited in the account.

2. Joint Tenancy ⚭3

Where funds of first sister were deposited in bank account which in form was joint account of three sisters and on death of third sister the funds were deposited in

second account in form of joint account of first and second sisters and on marriage of first sister the funds were deposited in third account in same form, the death of third sister did not, by virtue of statute, give rise to any such conclusive presumption of intention as to disclose that second and third accounts were true joint tenancy accounts, but actual intention of first and second sisters, as proved by parol evidence, would determine true nature of second and third accounts. West's Ann.Financial Code, § 852.

3. Joint Tenancy ⚭3

Provision of Bank Act authorizing creation of joint tenancy bank accounts, and providing in part that the making of deposit in joint tenancy form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be party, of intention to vest title to such deposit in survivor or survivors is limited to situation where "surviving depositor or depositors" is the party on one side, whereas on the other side there is a party not a living depositor. West's Ann.Financial Code, § 852.

4. Jury ⚭14(9)

In quiet title action, defendant was not entitled to trial by jury as a matter of right.

5. Damages ⚭69

Interest ⚭51

In action to quiet title with respect to proceeds of home, the purchase of which was partly paid for by \$19,000 withdrawn by deceased joint tenant of home from joint bank account of claimant and deceased joint tenant, the surviving joint tenant of home was not entitled to interest over the period that proceeds of sale of the home were held in escrow or in deposit in court pending litigation of the claimant's claim, on basis of section of Civil Code defining interest as compensation for use, forbearance, or detention of money, and in addition interest could not be granted as damages for wrongful prosecution of claim in absence of lack of probable cause and malice. West's Ann.Civ.Code, § 1915.

Stanley Burke, San Francisco, for appellant.

Davis & Barber, San Francisco, for respondent, Robert H. Kroninger, Oakland (of counsel).

NOURSE, Presiding Justice.

Jessie H. Paterson has appealed from an adverse judgment in a quiet title action, instituted by respondent Alcide Comastri, with respect to the proceeds of a home which had stood in the names of Mary D. Comastri, the deceased wife of said Alcide Comastri and said Alcide Comastri as joint tenants. Mary D. Comastri was the sister of Mrs. Paterson and will hereinafter be called sister Mary. Mrs. Paterson's claim was based on the contention that the home was bought by sister Mary with money taken from a joint account in which Mrs. Paterson had an equal interest, that the withdrawal by sister Mary of much more than half of the funds in said account invaded Mrs. Paterson's interest and that she could follow her joint tenancy interest in the home so bought. Respondent Comastri took the position that the account was not a true joint account but that sister Mary was the true owner with full right of disposition during her lifetime, which position was upheld by the trial court. Pending the appeal Mrs. Paterson died and Stanley Burke, special administrator of her estate, was substituted as appellant.

The following facts are undisputed.

[1] In May 1934 an account was opened at the San Francisco Bank in form payable to sister Mary, Mrs. Paterson or Agnes G. Nye, or to the survivor of them. Agnes G. Nye was a sister of the other two depositors and will further be called sister Agnes. The initial deposit of more than \$12,000 was made from funds of sister Mary. Following the death of sister Agnes, sister Mary in July 1941 withdrew the increased balance of the account and placed it in the same bank in an account in form payable to sister Mary or Mrs. Paterson or to the survivor of them. In July 1945 sister Mary married respondent Comastri and in the following August she withdrew the in-

creased balance of the second account and placed it in a third account in the same bank payable in the identical manner as the second one except that sister Mary was now named as Mary B. Comastri. From this account sister Mary withdrew on October 13, 1945 more than \$19,000 which she applied to the purchase of the home the title to which was taken in the names of herself and her husband as joint tenants. She died on January 8, 1947. All withdrawals from the three successive accounts were made by sister Mary only, all deposits in these accounts over and above the transactions already stated were made by her from her own funds, except one deposit of \$1,578.22 made by Mrs. Paterson on October 23, 1934. It was however found by the court that the funds then deposited were also the property of sister Mary and this finding, although attacked by appellant, must be sustained as a reasonable inference from the evidence. Sister Mary at all times until one day before her death retained possession of the passbooks of the successive accounts. Mrs. Paterson did not include any part of the interest accrued on said accounts in her income tax returns.

The court found and concluded further in substance that the three accounts were not true joint tenancy accounts; that it was agreed at the opening of the first and second account between the depositors that all moneys then or thereafter deposited in said accounts would remain the sole property of sister Mary and that it was never intended and that Mrs. Paterson never understood that she had any vested interest in any of the three accounts. Respondent Comastri was adjudged entitled to the proceeds of the sale of the house and moreover to interest during the period that he had been out of possession of said proceeds as a result of the unfounded claim of Mrs. Paterson.

Appellant's attack on these findings and conclusions is mainly a proposition of law based on section 15a of the Bank Act, Deering's General Laws Act 652 (now Financial Code, § 852) which read in part:

"When a deposit shall be made in any bank by any person or persons whether mi-

nor or adult in the names of such depositor or depositors and another person or persons, and in form to be paid to any of them or the survivor or survivors of them, such deposit and any additions thereto made by any such persons after the making thereof, shall become the property of such persons as joint tenants, and the deposit together with all dividends or interest thereon, shall be held for the exclusive use of such persons and may be paid to any of them during their lifetime or to the survivor or survivors after the death of one or more of them, and such payment and the receipt or acquittance of the person or persons to whom such payment is made shall be valid and sufficient release and discharge to such bank for all payments made on account of such deposit prior to the receipt by such bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors." St.1921, p. 1367, amended by St. 1925, p. 512, St.1929, p. 444.

It was held in *Paterson v. Comastri*, 39 Cal.2d 66, 244 P.2d 902 (a suit between the same parties concerning funds withdrawn from three other ostensible joint accounts in the names of sister Mary and Mrs. Paterson), that during the life of the codepositors, the presumption that the money deposited had become the property of the codepositors as joint tenants was rebuttable, and that such applied also to funds withdrawn by one codepositor during the life of the parties, even if one of the depositors had subsequently died. The presumption, conclusive in the absence of fraud or undue influence, that it was the intention to create a true joint tenancy, applied only after death of a codepositor in favor of the survivor to moneys remaining in the account at the time of death. The section was to be deemed a part of each contract creating a joint bank account and to per-

mit parol evidence of the true intention of the parties contrary to the express terms of a written contract. "To hold otherwise 'would do violence to intention, for those who open such accounts have seldom any thought of restricting their enjoyment of the fund, their right to draw and spend, by the shackles of a formula. * * * It would foster litigation, for each of the two depositors, the one opening the deposit as fully as the other, would be subject to an accounting for moneys afterwards withdrawn, and forced to make division on the footing of equality.' Cardozo, Ch. J., in *Moskowitz v. Marrow*, 251 N.Y. 380, at page 397, 167 N.E. 506, at page 512, 66 A. L.R. 870." 39 Cal.2d at page 73, 244 P.2d at page 906. It was held that there was sufficient evidence to support the trial court's finding that Mary did not intend to create true joint tenancy accounts with Mrs. Paterson but that the funds withdrawn were her own property.

Appellant contends that in the case before us the death of sister Agnes caused the presumption of intention to create a true joint tenancy account to become conclusive and to exclude all reliance on true intention as to the account of which she was a codepositor. It is urged that therefore the funds with which the second account was opened were true joint tenancy funds of Mrs. Paterson and her sister Mary and that the finding that all funds in that account had always been the property of sister Mary alone was unjustified. It is contended that there was no evidence of any agreement changing the true joint tenancy character of the second account and that said character continued into the third account. Respondent's position is that under the rule of the prior *Comastri* case the true intention as to the character of the third account could be proved by parol evidence and that there was evidence to prove that independent of the character of the original deposit, it was not the intention and understanding of sister Mary and Mrs. Paterson that the third account should be a true joint account in which Mrs. Paterson had a present equal interest. However, respondent also urges that appellant's ap-

plication of the rule of the prior Comastri case to the situation of the first account is unsound and that, although that rule prevented persons claiming against the survivors or the Bank to rely on a true intention of decedent contrary to survivorship, it did not govern the relation or evidence as between the two survivors themselves.

There is no doubt that the evidence, especially the testimony of Mrs. Paterson herself justified the inference that Mrs. Paterson did not understand that she had a present interest in any of the three accounts, but that she understood that her rights would commence only when she would be the survivor of the three sisters. However, she did not distinguish between the three accounts mentioned. She stressed that all three were joint accounts and she did not testify to any agreement expressly limiting her rights. Hence it seems doubtful whether an inference could reasonably be drawn that she had agreed to give up any present interest which the law might have granted her on the death of sister Agnes. Under these circumstances we prefer to base our decision on the limited character of the conclusive presumption of section 15a of the Bank Act, as to which we have concluded that respondent's position is sound.

[2,3] The previous cases were concerned with two joint depositors only; no case has been cited to or found by us in which the exact point here involved has been decided. However, we understand the principle of the earlier cases, particularly *Paterson v. Comastri* and *Moskowitz v. Marrow*, supra, to be that between living depositors and as to their relations during their joint lives, their actual intention must govern and may be proved by parol evidence to prevent results not contemplated by the parties, in particular by the one who actually furnished the money for the account. Logically this principle must then also be applied to the relation of two survivors among themselves, especially when one of them furnished all the money in the account. If a depositor has added to his account the names of two relatives for the purpose of making them beneficiaries after his death and agents during his life,

it would be a most unreasonable and frustrating rule, which would necessarily terminate the real depositor's free right of disposition on the death of one of the intended agents. Such an undesirable result we should accept only if the words of the statute clearly indicated that it was intended by the Legislature. The words of section 15a, supra, do not necessitate said conclusion. They do not expressly provide for the conclusive character of the presumption in actions between surviving depositors. The expression "any action or proceeding to which * * * the surviving depositor or depositors may be a party," can well be construed as limited to a situation in which said "surviving depositor or depositors" is the party of the one side, whereas of the other side there is a party not a living depositor (ordinarily a party deriving his right from a deceased depositor). As this construction leads to a sensible result in line with the prior decisions and is not inconsistent with the language of the statute or with any apparent intention of the Legislature we shall adhere to it. Appellant's main contention is thereby necessarily decided adversely to him.

[4,5] Two additional grievances are developed by appellant. There is no merit in his contention that the court erred in denying his demand for a jury trial. We held in *Daniels v. Baldwin*, 115 Cal.App.2d 487, 489, 252 P.2d 351, 352, in proceedings of a similar character in equity that "the parties are not entitled to a trial by jury as a matter of right." However, we agree with his contention that there is no basis for the recovery of interest by respondent over the period that the proceeds of the sale of the home were held in escrow or in deposit in court pending the litigation of Mrs. Paterson's claim. Appellant does not owe interest on the basis of section 1915 of the Civil Code as compensation "for the use, or forbearance, or detention of money" as none of these three causes is present in this case. Neither can the interest be granted as damages for the wrongful prosecution of the claim of interest in the home as there is no finding or even contention of lack of probable cause and malice, without which

the making of an unfounded claim is not tortious.

Insofar as the judgment appealed from grants respondent interest it is reversed with instructions to the trial court to amend the conclusions of law and the judgment in accordance with our holding; in all other respects the judgment is affirmed, each party to bear its own costs.

DOOLING and KAUFMAN, JJ., concur.



137 Cal.App.2d 626

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Wilson Joseph MOFFETT, Defendant and
Appellant.
Cr. 5445.

District Court of Appeal, Second District,
Division 3, California,
Dec. 8, 1955.

Defendant entered plea of guilty to burglary. The Superior Court of the County of Los Angeles, H. Burton Noble, J., entered judgment accordingly and order denying new trial and motion to withdraw guilty plea. Defendant appealed. The District Court of Appeal, Vallée, J., held that evidence on defendant's contentions that he had not participated in burglary, he had not heard proceedings at time he had pleaded guilty, he had thought he was pleading guilty to misdemeanor, his plea was result of promise that two other charges would be dismissed and that counsel believed he was innocent showed no abuse of discretion of trial court's in denying withdrawal of guilty plea.

Appeal from order denying motion to withdraw plea dismissed; judgment and order denying new trial affirmed.

1. Criminal Law ⇨1023(3), 1134(10)

Motion to withdraw guilty plea made prior to judgment was reviewable on appeal from judgment, and order denying such motion was not appealable. Pen.Code, § 1018.

2. Criminal Law ⇨274, 1149

Granting or denial of motion for withdrawal of guilty plea rests in sound discretion of trial judge whose discretion will not be disturbed on review unless an abuse thereof is clearly shown. Pen.Code, § 1018.

3. Criminal Law ⇨274

While guilty plea may be withdrawn for good cause shown such as mistake, ignorance, inadvertence or any other factor overcoming defendant's exercise of free judgment, basis of application for relief must be established by clear and convincing evidence. Pen.Code, § 1018.

4. Criminal Law ⇨274

Evidence on defendant's contentions that he had not participated in burglary, he had not heard proceedings at time he had pleaded guilty, he had thought he was pleading guilty to misdemeanor, his plea was result of promise that two other charges would be dismissed and that counsel believed he was innocent showed no abuse of discretion in trial court's refusal to allow withdrawal of plea of guilty of burglary. Pen.Code, § 1018.

Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged with burglary. On March 28, 1955, being represented by counsel, he pleaded "not guilty" and his trial was set for May 5, 1955. On May 5, 1955, again represented by counsel, he withdrew his plea of "not guilty" and pleaded "guilty" as charged. The court found that the burglary was of the second degree. Defendant was granted leave to make ap-

plication for probation and the hearing on the application was set for June 2, 1955. On June 2 defendant, by his counsel, moved the court for leave to withdraw his plea of "guilty." The motion was denied and hearing on the application for probation was continued to June 9, 1955. On that date defendant, by his counsel, renewed the motion for leave to withdraw his plea of "guilty." The motion was denied. He then made a motion for a new trial, which was denied. Probation was denied. Defendant was sentenced to state prison. At all times prior to June 2, 1955 he was on bail.

Defendant appeals from the judgment, from the order denying his motion for a new trial, and from the order denying his motion to withdraw his plea of guilty. His only point is that the court erred in denying his motion to withdraw his plea of guilty.

[1] The motion to withdraw his plea of guilty was made prior to the judgment and is reviewable on the appeal from the judgment. Hence the order denying that motion is not appealable and the appeal therefrom will be dismissed.

The following occurred at the time defendant withdrew his plea of not guilty and pleaded guilty:

"Mr. Umann [attorney for defendant]: At this time, your Honor, the defendant requests permission to withdraw his plea as to case No. 171688.

"The Court: Mr. Moffett, is it your desire to withdraw your plea of not guilty to Information 171688 for the purpose of entering a new and different plea?

"The Defendant: Yes, your Honor.

"The Court: You are doing that voluntarily, are you?

"The Defendant: Yes, your Honor.

"Mr. Amstutz [Deputy District Attorney]: Is Wilson Joseph Moffett your true name?

"The Defendant: Yes.

"Mr. Amstutz: Mr. Moffett, you are charged in Information 171688 with the crime of a felony, to wit, burglary, having been committed by you on or

about the 4th day of March, 1955, at which time it is stated that you entered a market known as Ken's Market. The Court has granted you permission to withdraw your former plea of not guilty for the purpose of entering a new and different plea.

"You are doing this freely and voluntarily, are you, Mr. Moffett?

"The Defendant: Yes.

"Mr. Amstutz: You discussed this matter with your counsel?

"The Defendant: Yes.

"Mr. Amstutz: No one has made you any promises or offers of reward or lesser sentence to change your plea; is that right?

"The Defendant: No."

"Mr. Amstutz: How do you plead to Information 171688, guilty or not guilty?

"The Defendant: Guilty."

The motion to withdraw the plea of guilty was predicated on the mere statement of defendant's counsel that defendant denied his participation in the burglary, he did not hear the proceedings at the time he pleaded guilty, he thought he was pleading guilty to a misdemeanor, his plea was the result of a promise made to him that two other charges would be dismissed if he pleaded guilty, and that he (counsel) believed defendant "would be innocent under the Cahan case", *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905. Counsel stated: "If the Court please, with respect to the Cahan case, in this particular case merchandise was found or taken out of an automobile, that is, according to the police officers." The court said: "As I recall the case, the man was found asleep in a car in the night time and the officers approached the car, which they have a right to do when they find anybody asleep on the public highway, and in the course of their investigation they used the key to open up the back and found some stolen merchandise in the back of his car. Is that approximately the situation?" To which counsel for defendant replied: "That is the situation."

[2-4] A defendant who seeks to withdraw a plea of guilty must show good cause therefor. Pen.Code, § 1018. The granting or denial of such an application rests in the sound discretion of the trial judge, and his decision will not be disturbed on review unless an abuse of that discretion is clearly shown. *People v. Ottenstror*, 127 Cal.App.2d 104, 109, 273 P.2d 289. While a plea of guilty may be withdrawn for good cause shown—that is, by reason of the mistake, ignorance, inadvertence, or any other factor which overcame the defendant's exercise of free judgment—and a plea of not guilty substituted, the basis of the application for relief must be established by clear and convincing evidence. *People v. Cooper*, 123 Cal.App.2d 353, 356, 266 P.2d 566. There was no such showing in the case at bar. There was not only no clear and convincing evidence of good cause for granting the application, there was no evidence at all. The record is not clear as to the basis of the statement of the trial judge with respect to the investigation made by police officers. Apparently it was predicated on the report of the probation officer. The source of the information of the probation officer does not appear. There is nothing in the judge's statement indicating defendant entered his plea of guilty by reason of mistake, ignorance, inadvertence, or any other factor which overcame his exercise of free judgment. Nor is there anything in the statement indicating defendant was not guilty of the burglary charged. He was represented by counsel and had more than a month while on bail in which to consider his change of plea from "not guilty" to "guilty." There is no basis whatever for a claim of an abuse of discretion.

The Cahan case, *People v. Cahan*, supra, 44 Cal.2d 434, 282 P.2d 905; had no bearing on the question before the trial judge. That case deals with the admissibility of evidence obtained in violation of constitutional guarantees against unreasonable searches and seizures. Here no question of the admissibility of evidence was before the court. The sole question was whether there was a sufficient showing that the plea of guilty had been entered under one of the circumstances stated.

The appeal from the order denying defendant's motion for leave to withdraw his plea of guilty is dismissed. The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J.,
concur.



137 Cal.App.2d 555

Matter of the ESTATE of Emile H.
HOFFMAN, Deceased.

CITIZENS NATIONAL TRUST and SAVINGS BANK OF LOS ANGELES, Los Angeles Unit Shrine Crippled Children's Hospital, Inc., a corporation, Ernest L. Hurst, Recorder of Al Malaikah Temple of Shrine, Sarah Jane Shaffer, and Mr. and Mrs. Art McCooley, Proponents and Respondents,

v.

Gertrude BLANK and Bernard Hoffman,
Contestants and Appellants.

Civ. 21004.

District Court of Appeal, Second District,
Division 1, California.

Dec. 6, 1955.

Rehearing Denied Dec. 30, 1955.

Hearing Denied Feb. 1, 1956.

Proceeding in the matter of the estate of deceased testator, wherein proponents sought to have lost will and lost codicil and second codicil admitted to probate. The Superior Court of Los Angeles County, Wm. P. Houghton, J., entered judgment in favor of proponents, and contestants appealed. The District Court of Appeal, Doran, J., held that where signing of document by testator and indication of desire and intention to have witnesses attest it as a will, shortly followed by actual signing by two witnesses, constituted but a single transaction, and, at most, witnesses and testator were separated by only a few feet and perhaps by a partly closed door, it was within "presence" of testator within meaning of provision of Probate Code requiring will to be executed by testator in

"presence" of two attesting witnesses who shall sign will in "presence" of testator.

Judgment affirmed.

Nourse, J. pro tem., dissented in part.

1. Wills ⚡386

Where record disclosed substantial evidence in support of trial court's findings in proceeding to have lost will and codicils admitted to probate, District Court of Appeal on appeal would not draw conclusions and inferences contrary to those adopted by the trial court.

2. Wills ⚡386

Whether or not a will has been executed in accordance with statutory requirements is a question of fact, and trial court's determination on that issue cannot be overturned unless it is without support in the evidence. Probate Code, § 50.

3. Wills ⚡117

Requirement of the Probate Code that will be executed by testator in the "presence" of two attesting witnesses who shall sign will in presence of testator will be given a liberal and practical interpretation. Probate Code, § 50.

4. Wills ⚡117

The word "presence" as used in provision of the Probate Code requiring a will to be executed by testator in "presence" of two attesting witnesses, who shall sign will in "presence" of testator, means within the immediate nearness or vicinity of testator, and within his call or influence. Probate Code, § 50.

See publication Words and Phrases, for other judicial constructions and definitions of "Presence".

5. Wills ⚡117

Where signing of document by testator and indication of desire and intention to have witnesses attest it as a will, shortly followed by actual signing by two witnesses, constituted but a single transaction, and, at most, witnesses and testator were separated by only a few feet and perhaps by a partly closed door, it was within "presence" of testator within meaning of provision of

Probate Code requiring will to be executed by testator in "presence" of two attesting witnesses who shall sign will in "presence" of testator. Probate Code, § 50.

6. Wills ⚡302(8)

In contested proceeding for probate of lost will and lost codicil thereto, evidence sustained trial court's finding that lost will and lost codicil were in existence at time of death of testator and had either not been found or had been lost or destroyed by some person other than testator. Probate Code, § 350.

Adelman, Schwartz & Ferguson, Isaac E. Ferguson, Beverly Hills, for appellants, Gertrude Blank and Bernard Hoffman.

A. G. Ritter, Los Angeles, for respondent, Citizens Nat. Trust & Savings Bank.

Rollin L. McNitt, Los Angeles, for respondent, Sarah Jane Shaffer.

J. Marion Wright, Los Angeles, for respondents, Los Angeles Unit Shrine Crippled Children's Hospital, Inc., and Ernest L. Hurst, Recorder, etc.

Arnerich, DelValle & Sinatra, Los Angeles, for respondents, Art McCooley et ux.

DORAN, Justice.

This is an appeal by Gertrude Blank and Bernard Hoffman, children of the decedent, from a judgment admitting to probate a lost will and lost codicil thereto, and a second codicil to said will. The petition for probate, filed by the respondent Citizens Nat'l Trust & Savings Bank, named executor, alleges the due execution of the instruments in question; that same had become lost or destroyed and could not be found after diligent search, and the usual jurisdictional facts. It further alleges due execution of the second codicil and that said codicil expressly republishes and reaffirms the previous will and codicil.

Under the terms of the will and codicils, testator bequeathes \$1,000 to each of the two children, \$5,000 to friends, Mr. and Mrs. Art McCooley, \$100 per month out of income to Sarah Jane Shaffer. The residue of the estate is given to the Los Angeles

Unit Shrine Crippled Children's Hospital Inc., and in case any part of the hospital bequest should lapse or fail, then to Ernest L. Hurst, Recorder of Al Malaikah Temple of the Shrine.

Objections were filed by the two children on the ground that the second codicil was not subscribed or acknowledged by decedent in the presence of the attesting witnesses, present at the same time, that decedent did not declare "that it was his will or a codicil to his will"; that the witnesses did not sign the instrument at decedent's request and in his presence; that "no exact date of purported subscription, acknowledgment or attestation appears in the instrument", the codicil being dated "June —, 1953); and that the second codicil is ineffective because the original will and first codicil are not admissible.

Contestants' objections to the admission of the original will and first codicil were and are that the same were "not entitled to be admitted to probate as lost or destroyed instruments pursuant to the provisions of section 350 of the Probate Code of California, since it does not appear that said will and codicil were actually in existence at the time of decedent's death, or destroyed fraudulently or by public calamity in the lifetime of the decedent".

After a three-day hearing, the trial court found that the contestants' material allegations were not true except that the second codicil "was executed in June 1953 on or about the 16th day thereof but that the exact date of said execution is not set forth in said codicil".

It was further found that the decedent had never revoked the will or first codicil "which came into the possession and custody of decedent at the respective dates thereof and remained in his possession and custody continuously thereafter until some time prior to his death; that it is true that no person other than decedent saw said will and first codicil at any time after March 28, 1950; that it is true that decedent rented a safe deposit box from Citizens National Trust and Savings Bank of Los Angeles and made nine entries into said safe deposit box in the year 1950, two entries in

1951, one entry in 1952, and one entry in February 2, 1953, and that upon decedent's death neither said will or codicil were found in said safe deposit box. The court finds that it is true that said will and first codicil were in existence at the time of decedent's death and have either not been found or have been lost or destroyed by some person other than decedent".

It is appellants' contention that "For lack of any evidence that the will of March 14, 1950 and codicil of March 28, 1950 were in existence when the maker died on November 27, 1953, these instruments were not admissible to probate under Section 350 of the Probate Code. The second codicil falls with the missing will and first codicil; or independently, because not executed in compliance with section 50 of the Probate Code. Accordingly, the judgment of the trial court should be reversed".

[1] The appellants' position is untenable. From a partisan consideration of the record appellants have sought to draw certain conclusions and inferences contrary to those adopted by the trial court. The rule of appellate review is, however, directly opposed to this procedure where the record discloses substantial evidence in support of the trial court's findings. That the record in the present litigation abundantly sustains the findings and judgment cannot well be doubted.

According to the testimony of Attorney Ritter, the testator, on March 10, 1950, went voluntarily to the Attorney's office and expressed a wish to leave the bulk of the property to the Shrine Crippled Children's Hospital. The testator mentioned the two children who are appellants herein, but not the fact that a former wife was still living. After conference with the attorney the will was drawn and executed by Hoffman on March 14, 1950.

On March 20, 1950, Hoffman again went to the attorney's office for advice as to the charitable bequests, and directed the drafting of a codicil which provided that if any part of the bequest to the Children's Hospital should fail, then the same should go to the Recorder of Shrine, Al Malaikah Temple as an individual. Such a codicil

was drawn and executed by Hoffman on March 27, 1950. Both in the case of the will and this codicil, the decedent was given the original and a carbon copy, Attorney Ritter retaining another carbon copy. Neither Ritter nor the secretary, who were the witnesses, ever saw the executed copies after March 28, 1950.

On June 12, 1953, Attorney Ritter was requested to visit Hoffman, then a patient at La Vina Sanitarium in Altadena, and did so, taking along the office carbon copies of the will and first codicil. Ritter testified that Hoffman "wanted me to be sure and to promise him that I would see that the property was left and distributed in the way which his will indicated". The attorney mentioned each item in the will and Hoffman stated that no change was desired except that a \$5,000 bequest Christ Mission of New York City should be stricken out and that sum given to "a couple of friends who have been very good to me by the name of McCooey". As to the rest of the will, Hoffman said: "I want that the way it is left". Likewise, as to the first codicil, decedent said: "That is just the way I want it and I'm counting on you to see that my wishes are carried out".

The second codicil, just mentioned, was found among the decedent's papers and on its face appears to be regular. There was no question as to the signatures of either the testator or the witnesses. The original will and first codicil were not found. The second codicil was not executed by Hoffman in the presence of the attorney, but was later signed by the testator on "June —, 1953", as the instrument states, and bears the signatures of two nurses as attesting witnesses. It is claimed by appellants that the two witnesses did not sign at the same time but separately entered the room for that purpose.

Grace L. Works, one of the nurses witnessing the codicil, testified that the decedent was in bed at the time and the codicil was on a cabinet nearby; that Hoffman "asked me if I would be willing to sign this. It was a codicil to his will"; that decedent then signed the paper in the witness' presence and that the other witness was not then present but came into

the room two or three minutes later; that testator asked Mrs. Works to find another witness, whereupon, "I stepped to the door, Mrs. Krone was in the hallway, and I called to her and she came over to me and I said, 'Mr. Hoffman wants to see you; he wants you to sign a paper'".

Mrs. Krone then walked over to the decedent, and then returned to Mrs. Works and said, "It's a will—he wants me to sign his will. Is it all right?", whereupon Mrs. Works said, "Yes, it is all right. I have signed it". Mrs. Krone then witnessed the paper. At that time Mrs. Works was standing in the doorway which was then open, and Hoffman's bed was about five feet from the door.

The testimony of Mrs. Krone was substantially similar, but to the effect that the door "was just open a short distance", and that Mrs. Works "was about four or five feet from me down the hall, right 'catty-corner' from the door", or about 9 feet from the bed. Appellants contend that "the testimony of Mrs. Works and Mrs. Krone is replete with irreconcilable contradictions and inherent falsities", and that the evidence shows that the second codicil was not executed in compliance with the statutory requirements.

[2] As said in *In re Estate of Emden*, 87 Cal.App.2d 115, 120, 196 P.2d 627, 630, "Whether or not a will has been executed in accordance with the statutory requirements is a question of fact and the trial court's determination on that issue cannot be overturned unless it is without support in the evidence." Such is the situation in the instant case.

[3, 4] An examination of the cases dealing with the subject indicates judicial approval of a liberal and practical interpretation of the statutory provisions requiring a testamentary instrument to be executed by the testator in the "presence" of two attesting witnesses who shall sign the will in the "presence" of the testator. As stated in *In re Estate of Tracy*, 80 Cal. App.2d 782, 182 P.2d 336, 337, "'Presence' is defined in Webster's New International Dictionary, 2d Ed., 1939, page 1955 thus: 'The part of space within one's ken, call,

influence, etc.; immediate nearness or vicinity of one; proximity.'” The same opinion notes that “In a number of decisions where the meaning of the word ‘presence’ has arisen in connection with the execution of wills, the courts have adopted what is known as the ‘conscious presence rule’”.

In *Re Estate of Miner*, 105 Cal.App. 593, 288 P. 120, quoting from the headnote, where “the first witness was in the same or an adjoining room with the door open during all the time the second witness was present, and heard and saw everything that was said or occurred between the testatrix and the second witness with the exception that she did not see the latter sign, the conduct of the testatrix could not be construed otherwise than as a declaration to the attesting witnesses, ‘present at the same time,’ that the instrument was her will.”

So, also, in *In re Estate of Jacobs*, 24 Cal.App.2d 649, 76 P.2d 128, a similar rule of liberal construction was followed, and “the trial court was justified in finding the due execution of the will; and * * * was not compelled to accept as true the testimony of one of the beneficiaries, which was slightly at variance with that of said other witness, as to where the latter was standing while the doctor was writing and reading the will.”

[5] From these and other cases, the so-called “one transaction” and “conscious presence” tests have been applied with salutary and practical results. In the present case, the testator’s signing of the document and indication of desire and intention to have the witnesses attest it as a will, shortly followed by the actual signing by the two witnesses, as hereinbefore set forth, constitute but a single transaction. At most, the witnesses and the testator were separated by only a few feet and perhaps by a partly closed door; this was nothing if not within the testator’s “conscious presence”.

Viewing the evidence as an entirety, and in the light most favorable to the trial court’s findings, it is true, as stated in respondents’ brief, that “testator at all times referred to his will as being in existence and at no time made any indication of a de-

sire to revoke or destroy it. In his last codicil, which was executed by him in June, 1953, he declared over his signature that he expressly reaffirmed and republished the provisions of his previous will and codicil. * * * So also in October, 1953, shortly before his death, he again referred to his will and requested his attorney to see that his wishes should be carried out in that regard. There is nowhere in the record any evidence to the contrary”.

[6] It is not known what happened to the original, executed drafts of the will and first codicil, but the record affords substantial evidence in support of the trial court’s finding “that said will and first codicil were in existence at the time of decedent’s death and have either not been found or have been lost or destroyed by some person other than decedent”. To require more than this would be to demand the impossible. There is no question as to the authenticity of the carbon copies of these instruments, nor that, with the executed second codicil, these documents represent the testator’s testamentary wishes. Appellants’ contentions are without merit.

The judgment is affirmed.

WHITE, P. J., concurs.

NOURSE, Justice pro tem.

I dissent.

I concur in the majority opinion insofar as it holds that the so-called second codicil was executed and witnessed in the manner required by law.

I dissent from the majority opinion insofar as it holds that the evidence herein is sufficient to uphold a finding that the original will and first codicil were in existence at the time of the testator’s death, and I am further of the opinion that the findings of the trial court are so conflicting as not to constitute in fact a finding that said will and codicil were in existence at the time of the testator’s death.

There is little conflict in the evidence here and the evidence establishes the following pertinent facts:

The original will and first codicil were both drawn by decedent’s attorney and executed by decedent in March of 1950. By

their terms the contestants, who are the children and natural objects of the testator's body, were each given legacies of \$1,000, and the balance of the testator's substantial estate was devised and bequeathed to strangers to his blood.

The second codicil was executed in June, 1953. It referred to the original will and the first codicil and substituted two friends as legatees in place of one of the charities who were legatees under the original will and codicil.

At the time of the execution of the original will and at the time of the execution of the first codicil, the executed originals and the first carbon copies were handed by the attorney, who drafted them and who was one of the witnesses thereto, to the testator. After the date of the execution of the first codicil, the original will and copy thereof and the first codicil and the copy thereof remained in the possession of the testator and were never seen by any other person.

On October 1, 1953, the testator asked his attorney to be sure that the terms of his will were carried out. Between that date and the date of his death on the 26th of November, 1953, he made no mention of his will. After the testator's death a search was made for the original will and codicil, copies of which had been retained by the attorney who drew them, but although this search was very thorough, neither the will nor the first codicil nor the copies thereof, which had been retained by the testator, could be found. The second codicil and a copy thereof, together with numerous other papers relating to the decedent's business affairs, and the keys to his safe deposit box, were found in a satchel which the testator had in his possession at the time he drew the second codicil to his will (this was drawn in a sanitarium) and which he had kept with him from that time until his death.

The contestants were residents of an eastern state and at no time had any means or opportunity of securing possession of the will and first codicil or destroying them. The only persons who had the means or access to the will were persons who either had nothing to gain or lose by destruction

of the original will or codicil, or who stood to benefit by their continued existence.

The evidence further shows that the decedent had divorced his wife, the mother of the contestants, many years before his death and had left his first wife to raise and care for the contestants; that much of the last year of his life was spent in sanitariums and hospitals and that during the nearly two months that elapsed between his last mention of his will and the time of his death, he was a very ill person and must have known that death was impending.

The respondents offered the first will and codicil for probate as lost wills and it was incumbent upon them to prove that these wills were in existence at the time of the testator's death, or that they had been destroyed fraudulently or by public calamity in the lifetime of the testator without his knowledge, Probate Code, § 350.

From the facts which were established by uncontradicted evidence that the wills in question were in the possession of the testator from the date of their execution; that they were never in the possession or seen by any other person and that they could not be found at his death, the presumption arises that they had been destroyed by the testator, *In re Estate of Ronayne*, 103 Cal.App.2d 852, 856, 230 P.2d 423; *In re Estate of Bristol*, 23 Cal.2d 221, 224, 143 P.2d 689; *In re Estate of Johnston*, 188 Cal. 336, 339-340, 206 P. 628. This presumption may be overcome by other evidence, direct or indirect. If there is evidence upon which an inference contrary to the presumption may reasonably be drawn, and the trial court draws that inference, then it is the duty of this court to uphold the findings of the trial court as to the existence of the will at the time of death. *In re Estate of Ronayne*, *supra*, 103 Cal.App.2d at page 857; 230 P.2d 423; *In re Estate of Bristol*, *supra*, 23 Cal.2d at pages 224-225, 143 P.2d 689; *In re Estate of Moramarco*, 86 Cal.App.2d 326, 334, 194 P.2d 740.

The inference that the will was in existence must, however, be based upon facts from which the inference can reasonably be drawn. It seems to me that the facts in this case do not furnish the basis for

such an inference. The only facts which it is claimed furnish a basis for the inference are that the second codicil, which refers to the lost wills, was found among the testator's papers; that he had mentioned his will approximately two months before his death; that he had, on numerous occasions after the drafting of the original will, stated that he intended to leave the greater part of his estate to the charitable institution which is the chief beneficiary under the lost will and codicil, and had mentioned as recipients of his bounty the two persons who are made legatees by the second codicil; that he felt an animosity towards his children, the contestants, because of their failure to loan him money upon request, although this animosity was not expressed during the last year of his life. These facts do not, in my opinion, furnish any basis for the inference that the wills were in existence at the time of death, and therefore, cannot stand as evidence against the presumption that he had destroyed them. The most that can be said for them is that they constitute evidence that the wills were in existence as late as October 1, 1953, some two months before his death. If these facts are a sufficient foundation for the inference that the will and first codicil were in existence at the date of death, then mere proof of their execution would likewise furnish a basis for that inference. The only difference in the foundation is that of time. If the wills had been executed on October 1, 1953, and could not be found two months later, at the time of death, it certainly could not be contended that the provisions of section 350, Probate Code, had been met. Yet under these facts, the proof of their existence on October 1st, would have been conclusively established by direct evidence and that is the only fact which the indirect evidence offered here establishes. It is the law that the presumption declared by subdivision 32 of section 1963, Code Civ.Proc., that a thing once proved to exist continues to exist, will not aid one who seeks to prove a lost will. In re Estate of Ross, 199 Cal. 641, 647, 250 P. 676. How, then, can an inference be used to accomplish this same purpose? Yet that is exactly what has been done here, for, as I have

pointed out, the evidence which is the alleged basis for the inference only proves the existence of the wills on October 1st, nearly two months prior to death.

When the facts depended upon here to establish the existence of the wills at the date of death are considered in the light of the further admitted facts that the testator was, during the approximately two months that elapsed since his last mention of his will and his death, faced with the knowledge of impending death, and the fact that his will and codicil, for all practical purposes, disinherited his natural children, whose care and maintenance he had left to their mother, they cannot constitute any basis for the inference mentioned, but support the inference or presumption, whichever it may be, that he himself had destroyed his will.

The present case seems to me to be distinguishable on the facts, from the cases relied upon by the proponents. In *In re Estate of Bristol*, supra, 23 Cal.2d 221, 143 P.2d 689, the lost will admitted to probate was a natural will and there was opportunity for, and motive for it to have been destroyed by a person adversely affected by it, and shortly before his death, the testator had taken actions from which it could be reasonably inferred that his will was then in existence. It was upon the basis of these facts that the Supreme Court held that the finding of the trial court that the will was in existence at the time of death would not be disturbed by the appellate court.

In *In re Estate of Moramarco*, supra, 86 Cal.App.2d 326, 194 P.2d 740, the will was a natural will and its destruction would have enabled the Italian government to expropriate a substantial portion of his estate, a situation which the testator had expressed himself as desiring to make impossible. The testator's papers had, shortly before his death, been moved from one place of safekeeping to another and it was probable that in the moving the will in question had been lost and the testator had within three days of his death mentioned his will as in existence.

In *In re Estate of Ronayne*, supra, 103 Cal.App.2d 852, 230 P.2d 423, the testa-

trix, two days before death, had stated that the alleged lost will was in her home but she was not sure where, and upon her death her husband, who was left but \$100 by the will, took possession of the home and all its contents and made search for the will impossible.

In *In re Estate of Reynolds*, 94 Cal. App.2d 851, 211 P.2d 608, the testator had mentioned the will as in existence two days prior to death.

In *In re Estate of Reid*, 79 Cal.App.2d 34, 179 P.2d 353, there was evidence that the will had been destroyed by the testatrix' former husband after the date of death, and the trial court so found.

In *In re Estate of Dean*, 62 Cal.App. 2d 418, 144 P.2d 849, there was evidence that a person adversely affected by the alleged lost will had come into possession of it after the testator's death and destroyed it. There was also evidence that the testatrix had, within ten days of her death, twice stated that she had a will and that the same was in her safe deposit box to which box the person whom the court found had destroyed the will had access.

It is apparent that in each of the cited cases there was evidence that the will was in existence shortly before death and that, with the exception of the *Moramarco* case, someone other than the testator had the opportunity to and the motive to destroy the will. In the case at bar, none of these facts exist and on the contrary, we have the motivating facts that the will in question was unfair to the natural objects of the testator's bounty, and for two months after any mention of his will he was faced with this fact and the fact of impending death.

Assuming, however, that the facts here permit an inference that the wills were in existence at the time of death, the findings seem to me to be so in conflict as to destroy any basis for this inference as drawn by the

trial court. The trial court's findings upon this issue are as follows:

"* * * that it is not true that decedent revoked said last will or codicil or first codicil at any time prior to his death, * * ; that it is true that said will and first codicil *came into the possession and custody of decedent at the respective dates thereof and remained in his possession and custody continuously thereafter until some time prior to his death*; that it is true that *no person other than decedent saw said will and first codicil at any time after March 28, 1950*; * * * that upon decedent's death neither said will or codicil were found * * * The court finds that it is true that said will and first codicil were in existence at the time of decedent's death and have either not been found or have been lost or destroyed by some person other than decedent." (Emphasis added.)

The findings that we have italicized are that the will and codicil were in the exclusive possession of the testator, that they never were seen by any other person and therefore were not in their possession, and that they went out of the possession of the testator prior to his death. These findings are only consistent with the inference or presumption that the wills had been destroyed by the testator, for if they had been misplaced by him they would still remain in his possession and as they were never seen by any other person they could not have been fraudulently destroyed by any such person. In face of these findings there is no basis for the finding of the ultimate fact of the existence of the wills at the time of death, and there is not one iota of evidence in the record to support the finding that the wills were lost or destroyed by some person other than the decedent. In fact the evidence is to the contrary and the finding that they were never seen by any other person is to the contrary.

I would reverse the judgment.

Hearing denied; TRAYNOR and McCOMB, JJ., dissenting.

137 Cal.App.2d 552

Florence J. WILSON, Vera May Marshall, Mary Lillian Elliott, Roy Emmet Wilson, Lester M. Wilson, J. Duval Wilson, Betty W. Brown, J. H. Wilson, James Otis Wilson and Vivian Fawcett, Plaintiffs and Appellants,

v.

KNUDSEN CREAMERY CO. OF CALIFORNIA, a corporation, and Harold Louis Vershaw, Defendants and Respondents.

Civ. 20994.

District Court of Appeal, Second District,
Division 1, California.

Dec. 6, 1955.

Action for death of automobile driver in intersectional collision. The Superior Court of Los Angeles County, Allen W. Ashburn, J., rendered judgment on verdict for defendants, and plaintiffs appealed. The District Court of Appeal, Nourse, J., pro tem., held that where truck driver, proceeding at about 50 miles per hour on paved highway, saw object quarter of mile ahead to right of highway, and subsequently recognized it as automobile which had been partially concealed by trees and which was approaching highway at about 20 miles per hour on side road, but where, until automobile driver entered intersection, or got so close thereto that he could not in exercise of reasonable care have stopped and avoided collision, he was not in position of danger, and when he did reach such position, truck driver had no chance to avoid collision although he did everything reasonably possible to do so, there was no basis for application of last clear chance doctrine to establish liability of truck driver for death of automobile driver.

Judgment affirmed.

1. Negligence ⇨133(4)

In negligence action, evidence of plaintiff's negligence placing him in position of danger from which he could not escape by exercising ordinary care, whether because of physical impossibility or his total unawareness of danger, and evidence that defendant knew of plaintiff's dangerous situation and knew or in exercise of ordi-

nary care should have known that plaintiff could not escape therefrom, that defendant had last clear chance to avoid accident by exercising such care, but failed to do so, and that plaintiff was injured as proximate result of such failure, is necessary to justify instruction stating last clear chance doctrine.

2. Automobiles ⇨227(3)

Where truck driver, proceeding at about 50 miles per hour on paved highway, saw object quarter of mile ahead to right of highway and subsequently recognized it as automobile which had been partially concealed by trees and which was approaching highway at about 20 miles per hour on side road, but where, until automobile driver entered intersection, or got so close thereto that he could not in exercise of reasonable care have stopped and avoided collision, he was not in position of danger, and when he did reach such position, truck driver had no chance to avoid collision although he did everything reasonably possible to do so, there was no basis for application of last clear chance doctrine to establish liability of truck driver for death of automobile driver.

Harry G. McMahon, Dave Bach, Jr.,
Arcadia, for appellants.

Veatch & Thomas, Henry F. Walker,
Los Angeles, for respondents.

NOURSE, Justice pro tem.

This is an action for wrongful death. The plaintiffs, the wife and children of the deceased, appeal from a verdict and judgment in favor of the defendants.

The appellants make but one assignment of error, to wit: That the trial court erred in refusing appellants' request to instruct the jury on the doctrine of last clear chance. We have concluded that the action of the trial court in refusing the requested instruction was proper.

Appellants, in their opening brief, in order to establish a factual basis for their claim of error, have somewhat tortured the evidence.

The evidence, viewed in the light most favorable to the appellants, establishes the following facts and circumstances:

The accident occurred at the intersection of State Highway 138 and 121st Street, near Pear Blossom on the Mojave Desert. Highway 138, which runs generally west and east, is a two-lane paved highway 23 feet in width plus 5-foot gravel shoulders. For some distance before it intersects 121st Street from the right, it is on a descending downgrade. 121st Street is a sand and gravel road 20 feet in width, running north and south, intersecting Highway 138 from the south and dead ending there. Along the west side of 121st Street, and for some distance south of the intersection, there is a row of small trees, the most northerly of these trees being approximately 25 feet from the southerly line of Highway 138. This row of trees only partially obscures the view of traffic north bound on 121st Street, as an automobile so travelling could be seen as it passed the gaps between the trees. The defendants' truck and semi-trailer were travelling east on Highway 138, and the decedent, Wilson, north on 121st Street. Wilson was travelling at a speed of 15 to 20 miles an hour, according to the testimony of the driver of defendants' equipment, the defendant Vershaw, who was the only eyewitness of the accident, and did not change his speed from the time he was first seen by Vershaw until the time of impact. Defendants' equipment was travelling at a speed of 45 to 50 miles an hour up to the time of the application of its brakes. When the defendant Vershaw was approximately one-quarter of a mile west of the intersection he saw an object just north of the southerly end of the row of trees. He could not then recognize it as the Ford automobile with which he was later involved. He could not and did not see the driver until the Ford emerged from the row of trees and at that time he, Vershaw, saw that Wilson was looking straight ahead. When Wilson entered the intersection, Vershaw applied his brakes and attempted to swerve to his left. The impact between the cars occurred 11 feet north of the south edge of the pav-

ing on Highway 138, and 14 feet west of the westerly boundary of 121st Street, it thus being apparent that as Wilson entered the intersection he turned to the left. Defendants' truck left skid marks of 142 feet west of the point of impact and of 138 feet east of the point of impact to the point where it jack-knifed and stopped at the northerly edge of Highway 138. Wilson's Model "T" Ford was demolished and came to rest 127 feet east of the point of impact. Wilson was decapitated.

These facts do not establish a basis for the application of the doctrine of last clear chance, and it would have been error to instruct the jury upon that doctrine.

[1] In order for an instruction stating that doctrine to be proper there must be substantial evidence to show, "(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.'" *Daniels v. City & County of San Francisco*, 40 Cal.2d 614, 619, 255 P.2d 785, 788.

[2] The evidence here fails to establish the third element above mentioned. Until Wilson entered the intersection or got so close thereto that he could not, in the exercise of reasonable care, have stopped and avoided the accident, he was not in a position of danger. It is clear, under the facts here, that when he did reach such a position the defendant driver did not have a clear chance, or any chance to avoid the accident, and it is further clear that the defendant driver, from the time Wilson

reached a position of danger, did everything reasonably possible to avoid the accident.

Appellants rely upon *Daniels v. City & County of San Francisco*, supra, and *Sills v. Los Angeles Transit Lines*, 40 Cal.2d 630, 255 P.2d 795. These cases are clearly distinguishable from the one at bar upon their facts. In each of them the plaintiff's car had come to a stop in the path of the defendant's vehicle, and after it so came to a stop the defendant had a clear opportunity to avoid the accident by the exercise of reasonable care. The case at bar, on the other hand, is analogous to and governed by the decisions in *Rodabaugh v. Tekus*, 39 Cal.2d 290, 294, 246 P.2d 663; *Poncino v. Reid-Murdock & Co.*, 136 Cal. App. 223, 232, 28 P.2d 932; *Johnson v. Sacramento Northern Ry.*, 54 Cal.App.2d 528, 532, 129 P.2d 503; *Dalley v. Williams*, 73 Cal.App.2d 427, 436, 166 P.2d 595; *Folger v. Richfield Oil Corp.*, 80 Cal.App.2d 655, 660, 182 P.2d 337; *Berton v. Cochran*, 81 Cal.App.2d 776, 781, 185 P.2d 349; *Allin v. Snavelly*, 100 Cal.App.2d 411, 415, 224 P.2d 113.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



137 Cal.App.2d Supp. 884

Michael W. LEAHY, a Minor, by his Guardian ad litem, Mary Patricia Leahy,
Plaintiff and Appellant,

v.

Donald C. SMITH, etc., Defendant and Respondent.

C. A. 8776.

Appellate Department, Superior Court,
Los Angeles County, California.

Nov. 28, 1955.

by a judgment of the Municipal Court of the Los Angeles Judicial District, Joseph Marchetti, J., and appealed. The Superior Court, Appellate Department, held that if a collective bargaining agreement purports to be made for the benefit of all employees, both members and nonmembers of the union, an action for its breach may be maintained by one who is not a member of the union.

Judgment reversed.

1. Labor Relations ⇐777

If collective bargaining contract purports to be made for benefit of all employees, both members and nonmembers of the union, an action for its breach may be maintained by one who is not a member of the union.

2. Contracts ⇐187(1)

Third party may recover directly on contract to which he is not a party (1) when terms of contract are expressly broad enough to include third party either by name or as one of a specified class, and (2) third party was evidently within intent of terms so used, if (3) the promisee had, in fact, a substantial and articulate interest in the welfare of third party in respect to the subject of the contract.

3. Labor Relations ⇐262, 777

Where collective bargaining agreements contained provision for trust fund for benefits "to the employees of the employers, members of the Union" and in all other cases the agreements designated the persons for whose benefit they were intended by words "employees" or "employee" or by other words merely stating nature of position held, without, in any case, anything limiting the designations to persons who were members of the union, purpose of agreement was to make provisions for benefit of all employees, whether union or nonunion, and nonunion employee was entitled to sue thereon.

Action by nonunion employee of defendant to enforce rights as third-party beneficiary under collective bargaining agreement. The employee was nonsuited

Jones & Jones, Long Beach, for appellant.

Gordon P. Shallenberger, San Pedro, for respondent.

Before SHAW, P. J., and BISHOP and PATROSSO, JJ.

BY THE COURT.

The sole question presented by this appeal by the plaintiff from the judgment of nonsuit is whether the plaintiff, a non-union employee of defendant, is entitled to rights as a third-party beneficiary under two collective bargaining agreements entered into between the Union and the defendant employer. Plaintiff does not claim to be a union member and holds only a "work permit" card issued by the Union.

The right of a union member to recover as a third-party beneficiary under such an agreement has been recognized in California, *Sublett v. Henry's, etc., Lunch*, 1942, 21 Cal.2d 273, 275, 131 P.2d 369; *Division of Labor Law Enforcement, Department of Industrial Relations v. Dennis*, 1947, 81 Cal.App.2d 306, 308, 183 P.2d 932; *MacKay v. Loew's, Inc.*, 9 Cir., 1950, 182 F.2d 170, 172, 18 A.L.R.2d 348, certiorari denied 340 U.S. 828, 71 S.Ct. 65, 95 L.Ed. 608. But whether a non-union employee is such an intended beneficiary has not been decided.

[1,2] "If the contract purports to be made for the benefit of all employees, both members and nonmembers of the union, an action for its breach may be maintained by one who is not a member of the union." 56 C.J.S., *Master and Servant*, § 28(83) b, p. 270. And in 18 A.L.R.2d at page 370, appears the statement: "It has been generally held that a collective labor agreement between an employee and a labor union for the benefit of all the employees, or a class of employees, may be enforced by an individual employee, within the scope of the agreement, even though he is not a member of the contracting union." This same criterion is laid down by the cases from other jurisdictions which have discussed the problem. *Yazoo & M. V. R. Co. v. Webb*, 5 Cir., 1933, 64 F.2d 902, 904; *Yazoo & M. V. R. Co. v. Sideboard*, 1931, 161 Miss. 4, 133 So. 669; *Gregg v. Starks*, 1920, 188 Ky. 834, 224 S.W. 459; *Coyle v. Erie R. Co.*, 1948, 142 N.J.Eq. 306, 59

A.2d 817, reversed on other grounds 1 N.J. 350, 63 A.2d 702. As said in *Yazoo & M. V. R. Co. v. Sideboard*, supra, 133 So. at page 671: A non-union member may recover "(1) When the terms of the contract are expressly broad enough to include the third party either by name as one of a specified class, and (2) the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits, if (3) the promisee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract."

[3] The two collective bargaining agreements in this case cover two different periods of time, and plaintiff was employed by defendant in parts of each period. The contracts are attached as exhibits to the complaint, and their execution is admitted by the answer, so no question of proof arises in regard to them. The two agreements are substantially alike. On reviewing them, we conclude that the plaintiff was within the class of persons for whose benefit they were intended.

In the first paragraph of each agreement is a provision requiring new employees who are not members of the Union to join it within a limited period of time, but such non-union persons may continue to work on union permits. This provision is for the benefit of the Union and does not affect the plaintiff here. *MacKay v. Loew's, Inc.*, supra, 182 F.2d 170, 172.

One paragraph of each agreement provides that concessionaires of defendant shall enter into "collective bargaining agreements with the union in behalf of the employees in such stores, markets or establishments." This appears to be a statement of the general purpose of the agreement.

In a following paragraph there is provision for a trust fund to be contributed by the employer to provide benefits "to the Employees of the Employers, members of the Union."

In all other cases the agreements designate the persons for whose benefits they are intended by the words "employees" or

"employee" or by other words merely stating the nature of the position held, without, in any case, anything limiting these designations to persons who are members of the Union.

Construing these provisions together, we conclude that the general purpose of the agreements is to make provisions for the benefit of all employees of the defendant, and that in any case to which such intent

does not extend words of express limitation are to be found.

Plaintiff is therefore entitled to sue on the agreements. He gave testimony which need not be reviewed here, from which it could be inferred that he was entitled to recover some amount of money in excess of what he had been paid. The nonsuit was erroneous.

The judgment is reversed.

45 Cal.2d 710

CITY OF VERNON, a municipal corporation, Plaintiff and Appellant,
v.

CITY OF LOS ANGELES, a municipal corporation, Defendant and Respondent.

L. A. 22911.

Supreme Court of California.
In Bank.

Dec. 6, 1955.

Rehearing Denied Jan. 5, 1956.

Action by plaintiff-city for declaratory relief and injunction and determination that it was entitled to discharge sewage into defendant-city's sewage system. The Superior Court, Los Angeles County, William J. Palmer, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Schauer, J., held that where, due to judgment in action to abate nuisance, defendant-city was required to build sewage disposal facilities much more expensive than those contemplated by parties at time defendant-city contracted to dispose of plaintiff-city's sewage, the contract, on its original terms, become impossible of performance, and plaintiff-city was not entitled to specific performance.

Judgment affirmed.

Carter and Traynor, JJ., dissented.

Opinion, 275 P.2d 72, vacated.

1. Judgment ⇨704

Where first city, which, with second city, was defendant in action to abate nuisance arising from second city's disposal of both cities' sewage, contended that, under contracts, sewage disposal was sole responsibility of second city, but trial court heard no evidence on issue of contracts, and stated that each city had responsibility for disposal of its own sewage, judgment of abatement against both cities was not a determination of first city's rights under contract, and was not res judicata as to first city's action to obtain specific performance of contracts.

2. Contracts ⇨309(1)

A thing is impossible in legal contemplation when it can only be done at an excessive and unreasonable cost.

290 P.2d—53½

3. Municipal Corporations ⇨712

That contract whereunder defendant-city agreed to dispose of plaintiff-city's sewage became impossible of performance due to requirement that much more expensive disposal facilities be constructed by defendant-city did not require determination that contracts were altogether abrogated, regardless of what performances had already been rendered by either party, and permitted salvaging of some terms of contracts.

4. Specific Performance ⇨13

Where, due to judgment in action to abate nuisance, defendant-city was required to build sewage disposal facilities much more expensive than those contemplated by parties at time defendant-city contracted to dispose of plaintiff-city's sewage, the contract, on its original terms, became impossible of performance, and plaintiff-city was not entitled to specific performance.

5. Municipal Corporations ⇨712

Where defendant-city's performance of contract for disposal of plaintiff-city's sewage was excused because of conditions which arose subsequent to enactment of statute ratifying and confirming previous contracts between municipalities for, inter alia, joint use of sewage disposal systems, this statute did not operate to render the contract enforceable. St.1939, p. 37.

6. Municipal Corporations ⇨712

Where defendant-city's performance of contract to dispose of plaintiff-city's sewage was excused due to impossibility, defendant-city was not liable to plaintiff-city for damages plaintiff-city had been required to pay as a result of defendant-city's alleged negligent disposition of sewage.

Carson B. Hubbard, City Atty., Huntington Park, Edward R. Young, John F. O'Hara and John W. Shenk, III, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones and John L. Flynn, Asst. City Attys., and Weldon L. Weber, Deputy City Atty., Los Angeles, for respondent.

SCHAUER, Justice.

The City of Vernon by its complaint for declaratory relief and injunction seeks a determination that under contracts entered into between it and defendant City of Los Angeles in 1909, 1925, 1931, and 1938 it is entitled to discharge a certain amount of its sewage through the sewer system of Los Angeles without payment to Los Angeles; Vernon also seeks injunctive enforcement of the contracts and damages in the amount which Vernon is required to pay by the judgment in *People v. City of Los Angeles* (1948), 83 Cal.App.2d 627, 189 P.2d 489 (an action in which the State obtained judgment against the parties to this action and others to abate the nuisance caused by their discharge of sewage into Santa Monica Bay). By its answer Los Angeles seeks determinations that the contracts are without effect; that Vernon be required to finance its share of the cost of new sewage disposal facilities built by Los Angeles in accordance with the decision for the State in *People v. City of Los Angeles* (1948), *supra*, 83 Cal.App.2d 627, 189 P.2d 489, and that Vernon has no right to use the sewage system of Los Angeles except on payment of its share of the cost of the facilities used.

After trial the superior court decreed that Vernon is not entitled to the relief sought; that the contracts between Vernon and Los Angeles (except for certain salvageable elements) are terminated and "have been invalid and unenforceable since a time not later than the entry of * * * judgment in the State Abatement Action"; and that Vernon is entitled to use the new facilities only on payment of its share of their cost. Vernon has appealed. It contends that the decision of the superior court is based upon the erroneous determination that the decree in the abatement action (*People v. City of Los Angeles* (1948), *supra*, 83 Cal. App.2d 627, 189 P.2d 489) decided against Vernon the issues raised in this action as to its contracts with Los Angeles. We have concluded that although such determination of the trial court is erroneous, its judgment can and should be upheld on the basis of its further determination that the performance of the contracts was excused

and the contracts were discharged because performance became impossible except at impractical, excessive, unreasonable expense not contemplated by the parties when the contracts were made.

The Effect of the Abatement Decree

The determination of the trial court in this action that the essential issues herein were finally decided against Vernon in the abatement action is a serious error which, as is hereinafter explained, involves an attempt to re-write or disregard a substantial portion of a final judgment of the superior court and opinions of a District Court of Appeal and of this court. Although this error does not require reversal, discussion of it in connection with the background of this action will aid understanding of the present controversy.

The factual background of this litigation and the abatement action is as follows: Years ago cities (including Vernon) other than Los Angeles and sanitation districts in the Los Angeles area which subsequently became defendants in the abatement action found themselves financially unable to construct adequate sewage disposal facilities. The City of Los Angeles had constructed an outfall sewer system with a capacity which exceeded its then expected needs. Beginning in 1909 with Vernon, the cities other than Los Angeles and the sanitation districts made contracts with Los Angeles by which Los Angeles agreed to dispose of their sewage. "[T]he contracts between the city of Los Angeles and the other municipalities and sanitation districts under discussion were for an indefinite period, or, in some instances, for the life of the outfall sewer system itself, and in no instance carried any provision permitting the contracts to be cancelled when or if the city of Los Angeles required the use of that portion of the capacity of its outfall sewer system covered by the above-mentioned contracts" (at page 631 of 83 Cal.App.2d, at page 429 of 189 P.2d).

Sewage was originally disposed of by Los Angeles under its 1909 contract with Vernon by transporting it through an outfall sewer to Hyperion and discharging it

raw into Santa Monica Bay about 900 feet offshore. In 1922, pursuant to requirements of the State Department of Public Health, Los Angeles commenced construction of new facilities, including a screening plant and a submarine tube extending about a mile offshore at Hyperion. These facilities were operated under a permit issued to Los Angeles in 1923.

In 1940, because Los Angeles had violated the terms of the 1923 permit and created a nuisance, the State suspended the permit; however, it granted a temporary permit on condition that Los Angeles at once prepare plans for the construction and financing of adequate sewage disposal works. Los Angeles did not comply with the terms of the temporary permit and the State revoked such permit. It also revoked permits of other defendants, including Vernon. Thus all rights of the contracting parties to dispose of sewage through the existing facilities were terminated.

In 1943 the State brought the abatement action. Judgment for the State was entered on February 1, 1946, and affirmed in *People v. City of Los Angeles* (1948), supra, 83 Cal.App.2d 627, 189 P.2d 489. This court denied a hearing, and the United States Supreme Court denied certiorari (335 U.S. 852, 69 S.Ct. 80, 93 L.Ed. 400).

Both before and after the institution of the abatement action Los Angeles attempted to work out means, alone or in cooperation with the other cities, whereby the sewage could be adequately disposed of by methods conforming with health and safety laws. Vernon did not make similar efforts; it sat by, resting on its claim that all its responsibility for disposition of its sewage, including its responsibility to the People of the State of California, had been assumed by Los Angeles. Through the years the pressing need for continued and improved disposition of sewage increased with the increase of the volume of sewage originating in the cities which used the Los Angeles facilities, including, as found by the trial court, "the enormous increase in volume of sewage originating in the City of Vernon as a result of the greatly

increased industrial activity within its boundaries."

After certiorari to review the abatement injunction was denied, Vernon, having elected to use the Los Angeles system, did not, as required by the injunction, report what steps it had taken to comply with the portion of the injunction which required it to arrange to finance its share of the cost of the new plant; instead, it reported its reasons for having taken no steps to comply with that portion of the injunction. It claimed that it was unable to understand the decree, although other cities had been able to understand and comply with its terms.

In the abatement action the trial court determined that Los Angeles had plans for an acceptable new plant to be built at Hyperion; that it would be to the best interests of all defendants to dispose of their sewage through such new plant although it would be possible for some of the defendants other than Los Angeles, including Vernon, to make arrangements at great expense to dispose of their sewage without using the facilities of Los Angeles. The judgment ordered that Los Angeles build a new plant of sufficient capacity to abate the nuisance; that each other defendant either provide its own facilities for disposing of its sewage in a safe and sanitary manner or arrange to finance its share of the cost of the new plant proportionate to gallonage allotted to it; that such other defendants notify the court of the manner in which they elected to comply with the abatement injunction. The decree provided for continuing supervision by the court. Vernon elected to dispose of its sewage through the new facilities to be built by Los Angeles but did not make arrangements to finance its share of the cost of such facilities until it was compelled to do so by contempt proceedings (see *City of Vernon v. Superior Court* (1952), 38 Cal. 2d 509, 241 P.2d 243).

As previously indicated, in the present action defendant Los Angeles takes the position and the trial court determined that it had been decided in the abatement action that Vernon has no rights against Los An-

geles under the sewage disposal contracts which are the subject of the present action. The answer filed by Vernon in the abatement action denied the allegations against Vernon of the State's complaint, set forth the contracts of 1909, 1925, 1931, and 1938 with Los Angeles, and alleged Vernon's position that under the contracts Los Angeles agreed to keep its sewer system in good condition; that upon delivery of Vernon sewage into the Los Angeles system Los Angeles had sole responsibility for its sanitary disposal; that Los Angeles alone was responsible for the nuisance and for the construction at its sole expense of facilities to abate it.

The superior court in its findings of fact in the present action purports to determine "that the issues created by the denials and affirmative allegations set forth in the answer of the City of Vernon [in the abatement case] were unavoidably and unequivocally before the court in said case * * * and, by the judgment entered in that case, were judicially determined by the court against the City of Vernon." The relevant facts are, however, that at the trial of the abatement action the court refused to admit the contracts between Vernon and Los Angeles in evidence, and the findings and judgment in the abatement action did not refer to the particular issues there and here raised by Vernon as to its rights under the contracts. The conclusions of law in the abatement action contained the following statements which relate to the contracts: Each city has the primary duty to dispose of its sewage in a safe and sanitary manner; none of the defendants is released from such duty by any permission or right created by contract, ordinance, or otherwise; "regardless of past relationships or contractual or other rights, privileges or obligations between the various defendants," the State is entitled to an injunction restraining defendants from maintaining sewage works without a permit and from discharging sewage into the bay in a manner which would create a nuisance.

It is apparent from the findings, conclusions, and judgment in the abatement action that the trial court there decided that

Vernon's contracts with Los Angeles were no defense in that action but that it did not purport to decide what contractual rights Vernon might have against Los Angeles apart from the abatement action. On the appeal of Vernon and others in the abatement action the District Court of Appeal made it clear that such was the effect of the abatement injunction so far as Vernon's rights against Los Angeles were concerned. It said (at page 648 of 83 Cal.App.2d, at page 501 of 189 P.2d), "the court rightfully refrained from passing upon any of the rights, obligations or liabilities affecting the various defendants by reason of their contractual relations with each other, and left those matters open for future adjudication in a proper proceeding. Although the aforesaid contracts concerned the disposal of sewage, the court would not be justified in this action to adjudicate the rights existing between the various appellants by reason of their contracts one with the other. Insofar as the judgment herein is concerned, if any of the appellants have any rights against the city of Los Angeles, or vice versa, by reason of any existing contract, such rights have been preserved and may be enforced in a proper action."

After the affirmance of the abatement injunction and the denial of a hearing and of certiorari, Vernon instituted the present action. It did not take steps, by levy of taxes or issuance of bonds or imposition of charges, to raise funds for payment of its share of the cost of the new sewage plant, and it was found guilty of contempt for failing to comply with the abatement injunction. It sought review of the contempt judgment, contending, among other things, that bringing the present action was compliance with the injunction. This court rejected that contention and affirmed the contempt judgment. (*City of Vernon v. Superior Court* (1952), *supra*, 38 Cal.2d 509, 518, 241 P.2d 243.) We said, "The obvious purpose of the injunction was to get the nuisance promptly abated and to that end to get the new plant built and paid for without the delay attendant on independent or later ensuing litigation to determine the validity and effect of the old contracts of Vernon and other corporate defendants."

This court then quoted the language of the District Court of Appeal which is quoted in the preceding paragraph and said of that language and of the superior court ruling there under discussion, "This ruling preserves to petitioners all contractual rights they may possess under the mentioned contracts but likewise it requires them to settle or litigate those rights independently of compliance with the injunction decree" (at page 519 of 38 Cal.2d, at pages 248, 249 of 241 P.2d).

[1] It therefore appears that the determination of the trial court in the present action that the abatement injunction decided adversely to Vernon the questions of its contractual rights against Los Angeles is erroneous and contrary to the clear language of the District Court of Appeal in affirming the injunction and of this court in upholding the determination that Vernon was in contempt.

Legal Impossibility

As a further ground of decision the trial court determined that there was available to Los Angeles the defense of impossibility—not literal impossibility, but impracticability due to excessive and unreasonable expense. (See *Mineral Park Land Co. v. Howard* (1916), 172 Cal. 289, 293, 156 P. 458, L.R.A.1916F, 1; Restatement, Contracts, § 454.) For the reasons hereinafter stated, we conclude that this determination of the trial court is tenable.

Pursuant to the 1909 agreement Los Angeles built within Vernon and connected to the Los Angeles disposal system a main sewer and a lateral sewer for the joint use of the two cities. By that contract Los Angeles agrees to operate and maintain the joint sewers and Vernon agrees to pay five per cent of the cost of operation and maintenance. Each city agrees to operate and maintain its own sewer system at its own expense, "other than those portions which are constructed and used by them jointly. * * * [I]n consideration of the construction of the [joint] sewers above named, by the City of Los Angeles at its own cost and expense, and of the connection of said

sewers with the outfall sewer also constructed by the said City of Los Angeles [for discharge of sewage into the bay] and of the privilege of connecting the sewer system to be constructed hereafter by the said City of Vernon with said sewers, and of discharging the sewage of said City of Vernon with said sewers," Vernon shall pay Los Angeles fifty per cent of the cost of the main sewer, not to exceed \$12,000, and twenty per cent of the cost of the lateral sewer, not to exceed \$1,300. The agreement contains no provision as to its termination.

As previously stated (p. 4), pursuant to a state permit issued in 1923, Los Angeles built a screening plant and submarine tube at Hyperion. These facilities were used in performance of the 1909 contract.

By the 1925 contract Vernon agrees in its use of sewers to abide by the rules which Los Angeles prescribes for the use of its sewers.

The 1931 agreement (which was never carried out but rather became the subject of much controversy between the parties) provides that Vernon shall be permitted to discharge not more than 11.7 cubic feet of sewage per second¹ into the Los Angeles sewer system pursuant to the 1909 contract; for this right Vernon is not required to pay anything; upon the execution of the agreement Vernon shall pay \$234,220 for the right to discharge additional amounts of sewage in excess of 11.7 cubic feet per second and \$36,200 as its share of the cost of construction by Los Angeles in Vernon of a relief sewer; for sewage in excess of 11.7 cubic feet per second Vernon shall pay Los Angeles such proportion of the annual cost of operation, maintenance, replacement, and repair of the sewage disposal facilities of Los Angeles used by Vernon as the additional quantity of sewage discharged by Vernon bears to the total amount of sewage discharged through the Los Angeles system. "Los Angeles shall operate, maintain and keep in good condition and repair said sewage system, outfall sewers, treatment plant and ocean outlet therefrom for the term of this agreement." The term of the

1. The amount of sewage discharged by Vernon has always been and now is less than 11.7 cubic feet per second.

agreement shall be the life of the North Outfall Sewer. (As indicated above, Los Angeles had completed construction of this sewer in 1924; its permit to use this sewer was suspended in 1940 and revoked in 1943.)

Vernon did not perform its promises to pay \$234,220 and \$36,200 under the 1931 agreement. In 1937 Los Angeles filed two actions against Vernon, one for payments under the 1931 agreement and one for an injunction against discharging sewage into the Los Angeles system.

The 1938 agreement states that Los Angeles and Vernon desire to settle all controversies as to the prior agreements and to provide for future operation and maintenance of sewage disposal facilities. The right of Vernon to dispose of 11.7 cubic feet of sewage per second through the Los Angeles outfall sewers is acknowledged. Los Angeles agrees to sell and Vernon agrees to buy the right to dispose of an additional 4.3 cubic feet per second; for this right to dispose of additional sewage Vernon agrees to pay \$112,885.45 by April 1, 1939, together with specified annual payments, until 1965, totaling \$135,356.60; "in lieu of such annual payments, Vernon may * * * pay the then current worth of unpaid future annual payments, discounted at the rate of 3% per annum compounded annually." Vernon further agrees that if it exercises its right to dispose of sewage in excess of 11.7 cubic feet per second, it will pay its proportionate share, measured by the ratio of its sewage in excess of 11.7 cubic feet per second to the total flow of sewage through the Los Angeles outfall sewers and treatment plant, of the cost to Los Angeles of operation, repair, replacement, construction and reconstruction of the Los Angeles outfall sewers and treatment plant. The contract provides for dismissal of the 1937 actions instituted by Los Angeles. There are additional provisions as to gauging stations, a relief sewer, and other matters which need not be set out. The agreement contains no provision as to its termination.

Vernon made the \$112,885.45 payment provided for by the 1938 contract after it was due, with interest to compensate for

the delay; it prepaid the annual payments as the contract provided it might do; Los Angeles accepted the payments in discharge of the obligations for which they were tendered.

The trial court in the present action determined that pursuant to the abatement injunction the lawful existence of the screening plant and the tube built pursuant to the 1923 permit has expired; that Los Angeles is required to build a new plant and tube at a cost of approximately \$41,000,000; that the cost of operating and maintaining the new plant and tube will be approximately \$500,000 per annum; that Los Angeles cannot continue performance under its contracts with Vernon "except at an excessive and unreasonable cost; that it is not practicable for the City of Los Angeles to continue the performance under the terms of the contracts * * * with the use of the new * * * plant and * * tube."

The trial court in the present action further determined "That it was not intended by the plaintiff and defendant herein that the City of Los Angeles was obligating itself, under the terms * * * of the contracts heretofore entered into between said parties, to build * * * and operate large and extensive facilities or treatment works for the purification of sewage * * *; that neither nor all [sic] of said contracts provide for, nor was it contemplated by either of the parties hereto in entering into said contracts, that the City of Los Angeles was or would be required under said contracts to erect * * * and operate a * * * treatment plant costing approximately \$41,000,000 for the treatment of sewage arising within the boundaries of the City of Vernon."

The foregoing determinations of the trial court support the position of Los Angeles, succinctly stated in its brief, that "since further use of the facilities contemplated by the parties would be unlawful and the use of new facilities (ordered by the Court [in the abatement action]) would be unreasonably excessive in cost, further performance under said contracts by Los Angeles is excused."

[2] The controlling principles as to legal impossibility excusing performance have been long recognized in this state and are stated in *Mineral Park Land Co. v. Howard* (1916), supra, 172 Cal. 289, 293, 156 P. 458, L.R.A.1916F, 1, where defendants contracted to take gravel from plaintiff's land at a certain price, and it was subsequently found that the gravel, although present, could be taken only at prohibitive cost: "'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.'" (1 *Beach on Contracts*, sec. 216.) We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."

As we understand the composite contracts of the parties, and as is implicit in the trial court's findings, the parties contemplated that there would be available for legal use disposal facilities, whether those in existence or to be constructed, the cost of which would not be completely disproportionate to the costs expressly referred to in those contracts. Therefore, the case is not like the cases relied upon by Vernon where it was held that unforeseen hardship or unexpected expense did not excuse performance. (*Western Industries Co. v. Mason M. etc. Co.* (1922), 56 Cal.App. 355, 360, 205 P. 466; *Orr v. Forde* (1929), 101 Cal. App. 694, 702, 282 P. 429; see also *Lloyd v. Murphy* (1944), 25 Cal.2d 48, 55, 153 P.2d 47 ["laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation"].)

Vernon points to undisputed evidence that both before and after the parties entered into the 1938 contract officials of Los Angeles were concerned with and attempting to arrange for financing and construc-

tion of new sewage disposal facilities; such evidence, it says, shows that Los Angeles at the time of the making of the contract recognized and assumed the risk of the possibility that it would have to build expensive new facilities. Such a conclusional finding is not impelled as a matter of law. It is reasonable to believe that what was in the contemplation of the parties when they negotiated the 1938 contract was not the radical development of the 1943 abatement action but the working out of past and then existing difficulties without expense running into many millions.

Vernon asserts that "Plaintiff is entitled to an answer to the questions: 'If the contracts are invalid, *when* were they invalid? By what manner did they become invalid?' These are the issues raised by the complaint and the answer—material issues—and should be answered one way or the other." The findings, conclusions, and judgment herein sufficiently resolve these "issues" by the determination that conditions were such, by the time the abatement judgment was entered, that performance of the contracts had become impracticable.

[3,4] Despite the language that the contracts are "terminated" and "invalid," the effect of the judgment herein is not to determine that when performance by one party became impracticable the contracts were altogether abrogated, regardless of what performances had already been rendered by either party. Such a determination would be incorrect. (See *Ogren v. Inner Harbor Land Co.* (1927), 83 Cal. App. 197, 199, 256 P. 607.) More accurately, the judgment determines that certain described "facilities and rights" created under the contracts (such as the gauging stations and relief sewer provided for by the 1938 contract) can and should be salvaged, and although the case was not tried in such a way that all obligations between the parties could be precisely adjusted by the judgment herein, such judgment expressly contemplates an adjustment of those obligations; it decrees that Vernon is liable to Los Angeles for any monetary obligations accrued under the contracts prior to the entry of judgment in the abate-

ment action,² "provided, however, that if all the benefits received by her from the City of Los Angeles under all said agreements prior to the entry of said judgment in said State Abatement Action have had a fair value less than the total payments made by her and those now owing to the City of Los Angeles, she, Vernon, shall be credited with such excess of payments over such value of benefits received."³

Other Contentions

[5] Vernon urges that the contracts were validated by the Municipal Sewer District Act of 1939 (Stats.1939, ch. 24; Deering's Laws, 1939 Supp., Act 5192a). Section 4 of that act provided, "All contracts made prior to the adoption and passage of this act between any two or more municipal corporations * * * providing for the joint construction, use or operation of sewer systems, or sewage disposal systems, are hereby ratified and confirmed * * *" Since further performance of the contracts is excused because of conditions which arose subsequent to the 1939 act, we need not discuss the effect of that act or of other, previous laws as to sewage disposal contracts which are cited by Vernon.

[6] Vernon's second cause of action is for damages in the amount which it is required to pay under the abatement judgment in return for its use of the Los Angeles disposal facilities. This cause of action is based on the theory that the negligent failure of Los Angeles to perform its contractual duty to keep its sewage disposal facilities in good condition and carry away the sewage of Vernon was the proximate

cause of the abatement judgment against Vernon. Since performance of such duty was excused, the cause of action cannot be maintained.

Vernon asserts that the trial court's adjudication that it is not entitled to specific performance may be based upon determinations, which Vernon claims are erroneous, that it suffered no detriment commensurate with the benefits granted it under the contracts and that the consideration paid by it was disproportionately small as compared with the value of the obligations assumed by Los Angeles. The determination that further performance is excused is independent of determinations as to adequacy of consideration, and the latter subject need not be discussed.

In its petition for hearing by this court after decision of the District Court of Appeal Vernon asserted for the first time that the judgment of the trial court, if it is affirmed, will deprive Vernon of property without due process of law. This contention is but a variant of the argument, hereinbefore discussed and rejected, that since the making of the contracts there have been no developments which can excuse their further performance.

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., SPENCE, J., and BRAY, J. pro tem., concur.

CARTER, Justice (dissenting).

I dissent.

I agree with the majority opinion that the trial court erred in concluding that the

2. As stated supra, p. 13, Vernon made and Los Angeles accepted payments which discharged the two principal monetary obligations under the 1938 contract. Whether Vernon made all other, lesser payments for various facilities and rights under such contract cannot be determined from the record herein.

3. Concerning the subject of this declaration the trial court made the following statement in a memorandum opinion:

"The case [for declaratory relief] was not tried by either side on a theory that required presentation of evidence which would have enabled the court to

make a financial adjustment between the parties. Hence, the court presently can only suggest a program that seems to be just, doing so with the understanding that the parties are free to work out an amicable adjustment at variance with the court's suggestions. In any such adjustment Vernon, it seems, should be charged with all payments accrued under the composite agreement up to the entry of judgment in the State Abatement Action, and, if up to that time the benefits received by her under the agreements had a fair value less than the total cost to her, she should be credited with the difference."

decree in the abatement action determined the issues raised in this action. I am further convinced, however, that the trial court erred also in concluding that Los Angeles is excused from performing its contractual obligations by reason of impossibility.

It is the general rule, so well established that it requires but token citation of authority, that the mere fact that performance of a promise is made more difficult and expensive than the parties anticipated when the contract was made, will not excuse the promisor from his obligation to perform his part of the contract. *Metzler v. Thye*, 163 Cal. 95, 124 P. 721; *Coulter v. Sausalito Bay Water Co.*, 122 Cal.App. 480, 10 P.2d 780; *Williston on Contracts* (Rev. Ed.), Vol. 6, § 1963; *Rest., Contracts*, § 467. "Parties should be careful about making contracts, for once made the courts will not relieve them for light or trivial reasons. Public policy is subserved by leaving the parties and their rights to be measured by the terms of their engagements. *California Cured Fruit Ass'n v. Stelling*, 141 Cal. 713 [75 P. 320]. They may have made an unfortunate arrangement, but when they have entered into it voluntarily, they are bound by it in the absence of equitable grounds for avoidance. *Cook v. Snyder*, 16 Cal.App.2d 587 [61 P.2d 53]. They must be presumed to have contracted with reference to existing conditions known to them. *Dore v. Southern Pac. Co.*, 163 Cal. 182 [124 P. 817]. A person contracting with eyes open and aware of the facts is presumed to undertake performance at the risk of interference from agencies not expressly provided against. *McCulloch v. Liguori*, 88 Cal.App.2d 366 [199 P.2d 25]. Moreover, contracting parties cannot escape performance of their undertakings because of unforeseen hardship. *Metzler v. Thye*, 163 Cal. 95 [124 P. 721]." (12 Cal.Jur.2d *Contracts*, § 226.) Applied to factual situations analogous to that presented here, the rule has been stated that laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation. *Aristocrat Highway Displays v. Stricklen*, 68 Cal.App.2d 788, 157 P.2d 880; *Western*

Industries Co. v. Mason M. etc. Co., 56 Cal.App. 355, 205 P. 466; *McCulloch v. Liguori*, 88 Cal.App.2d 366, 199 P.2d 25; *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P.2d 47; *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 P. 1085; *Klauber v. San Diego St.-Car Co.*, 95 Cal. 353, 30 P. 555.

Looking at the present factual situation, we note that a governmental act—the abatement action—has caused Los Angeles to make certain expenditures, and has made performance by Los Angeles of its contractual obligations more expensive. Applying the general rule to this factual situation, we would conclude that Los Angeles is not excused from performing its contractual obligations, and that Los Angeles therefore has no right to retain all of the payment made by Vernon under court order to help finance the construction of a facility whereby Los Angeles may legally perform its contractual obligation.

The rule has developed in modern times that supervening impossibility will, in proper cases, excuse a promisor's failure to perform. Unusual or unexpected expense does not establish impossibility of performance. *Metzler v. Thye*, 163 Cal. 95, 124 P. 721; *Glens Falls Indem. Co. v. Perscallo*, 96 Cal. App.2d 799, 216 P.2d 567. Failure to perform may be excused, however, when the added cost is so great as to have the effect of making performance impracticable. In legal contemplation a thing is impossible when not practicable, and a thing is impracticable when it can be done only at an excessive and unreasonable cost. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458, L.R.A.1916F, 1.

The following characteristics should be particularly noted in regard to this defense of legal impossibility: First, it operates to excuse a non-performing obligor from liability for his failure to perform. Second, it operates only when performance of the obligor's part of the contract is impracticable. Third, the unanticipated expense which will render performance impracticable must be very much greater (in the *Mineral Park* case it was 10 or 12 times greater) than the expected or usual cost of performance. With these characteristics in mind, it is evident that the majority opin-

ion has erred in supporting the trial court's judgment on the basis of legal impossibility.

Among the contractual obligations of Los Angeles, which the majority opinion says are excused, is a duty to accept at designated places, and to dispose of a specified quantity (up to 16 cubic feet per second) of sewage from Vernon. It should be noted that this duty was performed by Los Angeles up until the time of commencement of this action; it is presumably being performed by Los Angeles while this case is pending in the courts; and it will assuredly be performed in the future, after a decision is rendered in this case. It is obvious, then, that the doctrine of legal impossibility as here applied by the majority does not excuse an obligor from liability for failure to perform a contractual duty; instead that doctrine is employed by the majority to rewrite the contract between these parties. Los Angeles will continue to perform the services which it undertook to perform by this contract; Vernon will continue to dispose of its sewage at designated points on the Los Angeles outfall sewer; but Vernon, the obligee, will be required to pay more money, now and in the future, for this continuation of performance of the contractual obligations of Los Angeles.

I am aware of no prior decision of this or any other court in which the doctrine of legal impossibility has been applied to increase the consideration to be paid by the promisee while recognizing that the promisor will continue to perform as before. By the same token, I can find neither law nor logic to support a decision which terms "impracticable" or "impossible" of performance, a contract which both parties and this court recognize as having been performed and is expected to be performed for an indefinite period in the future. This situation comes as near approaching a legal paradox as any which has come under my observation.

As an additional matter, careful examination of the record in this case raises a question as to whether the cost of performing the contract, using the new facilities, is substantially disproportionate to the antici-

pated cost of performance. The majority opinion refers to certain payments made by Vernon to Los Angeles. The total sum which Vernon had paid up to the time of trial for the use of the facilities of the Los Angeles sewer system was \$296,801.50, in addition to the granting of flowage rights through Vernon. The majority opinion then refers to the trial court's finding that Los Angeles is required to build a new treatment plant and tube at a cost of about \$41,000,000, and that operation and maintenance of these facilities will cost about \$500,000 per year. But these figures, juxtaposed in the majority opinion, are misleading. The figures "\$41,000,000" and "\$500,000" have but slight bearing on the cost to Los Angeles of performing its contractual obligation to Vernon.

If this were a proper case for application of the doctrine of legal impossibility (if Vernon were seeking damages for a refusal by Los Angeles to accept any sewage from Vernon), the figure which would be computed to determine whether performance was unreasonably or excessively expensive would be the increased cost of performing this contract. Presumably the cost of performance before the advent of the abatement action was not disproportionate to the approximately \$300,000 consideration paid by Vernon. To compute the increase in cost, one must recognize the additional facts that Los Angeles is building a sewage disposal plant with capacity for 260 million gallons per day; that 10 million gallons per day of this capacity is allotted to Vernon. If the plant were designed and constructed without allotment of gallonage to Vernon, it would still have capacity for 250 million gallons per day. The increased cost of performing the contract is the difference in cost of construction between a 260 million gallon per day plant and a 250 million gallon per day plant. What this difference would be is impossible to determine from the record before us. It requires no engineer, however, to deduce that the cost of construction would not increase in direct proportion to the increase in capacity; the structural differences between a 250 million gallon per day plant and a 260 million gallon per day plant would presumably be slight. It is clear, at any rate, that the in-

crease in cost attributable to making the plant large enough to take care of Vernon's sewage, and thus the increased cost of performing the Vernon sewage contract, would not be 10 or 12 times as great as the approximately \$300,000 which it would have cost to perform the contract if the abatement action had not intervened.

Another point on which I am convinced the majority opinion is in error relates to Vernon's second cause of action, on the theory of negligence. The majority opinion states: "Vernon's second cause of action is for damages in the amount which it is required to pay under the abatement judgment in return for its use of the Los Angeles disposal facilities. This cause of action is based on the theory that the negligent failure of Los Angeles to perform its contractual duty to keep its sewage disposal facilities in good condition and carry away the sewage of Vernon was the proximate cause of the abatement judgment against Vernon. *Since performance of such duty was excused, the cause of action cannot be maintained.*" (Italics added.)

On this point the majority opinion appears to be inconsistent with itself. It is beyond dispute that a negligence action may be predicated on the breach of a duty arising out of contract. *L. B. Laboratories, Inc., v. Mitchell*, 39 Cal.2d 56, 244 P.2d 385. If the breach which causes the damage and gives rise to the cause of action occurs while the contractual duty is subsisting, can plaintiff's right to maintain a cause of action for that breach be destroyed by the later occurrence of events which are held to excuse the performance of the duty? Obviously not.

The main theory of the majority opinion is that Los Angeles' performance of duties under the contracts is excused because of excessive or unreasonable expense occasioned by the decree in the abatement action. But Vernon seeks relief by way of damages for the alleged negligent operation of the sewage disposal facilities which brought about the abatement action. In other words, Vernon alleges a breach of contractual duties by Los Angeles before the existence of the conditions which are held in the majority opinion to excuse per-

formance of those duties. Clearly the breach of duty alleged by Vernon in its second cause of action is a sufficient basis for maintenance of that cause of action even if the majority opinion were correct in holding the duty to be later excused. In other words, it was a breach of duty on the part of Los Angeles which brought about the condition on which its defense of impossibility of performance is predicated.

The pleadings relating to the second cause of action raised the issues (1) whether Los Angeles owed a contractual duty to maintain the old treatment plant and ocean outlet in good repair; (2) whether Los Angeles breached that duty by negligence, carelessness and mismanagement in the operation and maintenance of the treatment plant and ocean outlet; and (3) whether such breach, if any, was the direct and proximate cause of damage to Vernon. Much of the testimony in the trial court related to these issues. The failure of the trial court to make direct findings on these issues was prejudicial error. *Baggs v. Smith*, 53 Cal. 88; *Taylor v. Taylor*, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074; *Strong v. Strong*, 22 Cal.2d 540, 140 P.2d 386; *Elliott v. Bertsch*, 59 Cal.App.2d 543, 139 P.2d 332; *Mayer v. Beondo*, 83 Cal.App.2d 665, 189 P.2d 327, 190 P.2d 23; *Chamberlain v. Abeles*, 88 Cal.App.2d 291, 198 P.2d 927; *Flenbaugh v. Heinrich*, 89 Cal.App.2d 214, 200 P.2d 580.

The trial court's finding of fact relative to the second cause of action reads as follows: "Insofar as the allegations of paragraphs III, IV, V and VI of said second cause of action purport to assert any present obligation of the City of Los Angeles, or any present right of the City of Vernon, arising from any or all of the aforesaid contracts and/or from any conduct on the part of the City of Los Angeles, each of said allegations is untrue. It is not true that any negligence and/or carelessness or other conduct of the defendant was the proximate cause of the judgment entered against Vernon in said State Abatement Action, or of the order of the court which, in effect, required Vernon to pay the sum of \$901,250 or any other sum as its proportionate share of the new treatment plant

and/or submarine outfall and/or any other facility for sewage disposal, which said judgment required the City of Los Angeles to construct; and it is not true that plaintiff will be damaged in said or any sum by compliance with the orders or any order of said judgment. To the contrary, plaintiff has been benefited by the compliance with said judgment on the part of the defendant, and plaintiff has been and will be benefited by said compliance to an extent greater in fair monetary value than the total of all sums which she, Vernon, has been or will be required by said judgment to pay."

This finding does not purport to deal with the issue of a contractual duty owed by Los Angeles to Vernon during the period prior to the judgment in the abatement action. There is no finding on the factual question whether Los Angeles breached its contractual duty. The finding that Vernon will not be damaged by compliance with the abatement judgment, but will instead be benefited, is obviously based on the trial court's erroneous conclusion that Los Angeles is excused from performing the contract. If Vernon is required to pay for a service which Los Angeles is contractually bound to render, obviously Vernon will be damaged to the extent of the value of the service, which damage was suffered by Vernon as the result of the failure of Los Angeles to perform its contractual duty by operating its sewage disposal facilities in such a manner as to create a public nuisance which necessitated the abatement action. It should be noted that Vernon had no power to control the manner of operation of the disposal facilities.

In my opinion Los Angeles should be held to the terms of the contract which it made with Vernon. Vernon's contractual right to flow 11.7 cubic feet per second of sewage into the Los Angeles sewer system without further payment should be upheld. Vernon should have the further right to flow an additional 4.3 cubic feet per second of sewage into the Los Angeles sewer system, subject to payment of a proportionate share of the sewage disposal cost as provided in the contract. Los Angeles should

be ordered to return to Vernon so much of the payment made by Vernon pursuant to the decree in the abatement action as is attributable to the 16 cubic feet per second flow which Los Angeles is contractually bound to accept.

For the reasons above stated I would reverse the judgment.

TRAYNOR, J., concurs.

Rehearing denied. McCOMB, J., not participating. BRAY, J., pro tem., participating in place of SHENK, J.

CARTER and TRAYNOR, JJ., dissenting.



45 Cal.2d 751

**The PEOPLE of the State of California,
Plaintiff and Appellant,**

v.

**Beverly MICHAEL, Defendant and
Respondent
Cr. 5764.**

**Supreme Court of California.
In Bank.
Dec. 9, 1955.**

Prosecution for violation of narcotics laws. Defendant moved to set aside information. The Superior Court, Los Angeles County, David Coleman, J., set aside information, and the people appealed. The Supreme Court, Traynor, J., held that where defendant sought to set aside information on ground that evidence had been obtained by illegal search and seizure, evidence adduced before magistrate that entry into defendant's house and subsequent discoveries there were made with consent of defendant and her mother justified admission and use of evidence at preliminary hearing to establish probable cause for holding defendant to answer.

Order reversed.

I. Searches and Seizures ¶7(28)

To protect his right to object to an unreasonable search or seizure, a defendant need not forcibly resist an officer's asser-

tion of authority to enter his home or search it or his person, but if he freely consents to an entry or search, or voluntarily produces evidence against himself, his constitutional rights are not violated in any search or taking of evidence pursuant to his consent if not unreasonable.

2. Searches and Seizures ⇨7(28)

Whether in a particular case an apparent consent was in fact voluntarily given to a search or seizure, or was in submission to an expressly implied assertion of authority, is a question of fact to be determined in light of all circumstances.

3. Criminal Law ⇨234

In narcotics prosecution, wherein defendant sought to set aside information on ground that evidence had been obtained by illegal search and seizure, evidence adduced before magistrate that entry into defendant's house and subsequent discoveries there were made with consent of defendant and her mother justified admission and use of evidence at preliminary hearing to establish probable cause for holding defendant to answer. Pen.Code § 995; West's Ann.Health and Safety Code § 11500.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

Forno & Umann and Harry M. Umann, Los Angeles, for respondent.

A. L. Wirin and Fred Okrand, Los Angeles, as amici curiae on behalf of respondent.

TRAYNOR, Justice.

By information defendant was charged with four counts of possessing narcotics in violation of Health and Safety Code section 11500 and one prior felony conviction of violating the same section. Her motion to set the information aside (see Penal Code § 995) was granted on the ground that all of the evidence against her had been obtained by an illegal search and

seizure in violation of her constitutional rights. The People appeal.

At the time of her arrest defendant was living at her mother's home. Two state narcotics inspectors, an investigator from the Los Angeles District Attorney's office, and a Los Angeles police officer went to defendant's residence. They knocked on the door, identified themselves as officers, and were admitted by defendant's mother. They did not have a search warrant. One of the officers identified himself to defendant and asked her if she had any narcotics in the house. Defendant's mother then left the room and returned with a bottle containing a narcotic, which the officer took from her. She told the officers that "This is all she has." Defendant told the officer she knew the bottle contained a narcotic, and on being asked whether she had any more narcotics, she produced a box from her bedroom containing other narcotics and hypodermic equipment, which she handed to the officer. Defendant was arrested, the evidence was taken to police headquarters and analyzed, and four narcotics were identified.

The Attorney General contends that the evidence in this case was voluntarily produced by defendant and her mother and was therefore not illegally obtained. Defendant, on the other hand, contends that the admission of the officers into her home and the production of the narcotics were in submission to authority and without effective consent. Accordingly, she contends that anything the officers heard and any physical evidence they obtained after the entry without a warrant was inadmissible.

[1-3] To protect his right to object to an unreasonable search or seizure a defendant need not forcibly resist an officer's assertion of authority to enter his home or search it or his person, *United States v. Di Re*, 332 U.S. 581, 594, 68 S.Ct. 222, 92 L.Ed. 210; *Amos v. United States*, 255 U.S. 313, 317, 41 S.Ct. 266, 65 L.Ed. 654, but if he freely consents to an entry or search, or voluntarily produces evidence against himself, his constitutional rights are not violated and any search or taking

of evidence pursuant to his consent is not unreasonable. *Zap v. United States*, 328 U.S. 624, 628, 66 S.Ct. 1277, 90 L.Ed. 1477; *Davis v. United States*, 328 U.S. 582, 593-594, 66 S.Ct. 1256, 90 L.Ed. 1453; *In re Dixon*, 41 Cal.2d 756, 761, 264 P.2d 513. Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances. Since the cases that have determined this question under varying factual circumstances are difficult if not impossible to reconcile (compare e. g., *Davis v. United States*, *supra*, 328 U.S. 582, 593-594, 66 S.Ct. 1256, with *Johnson v. United States*, 333 U.S. 10, 12-13, 68 S.Ct. 367, 92 L.Ed. 436; *Waxman v. United States*, 9 Cir., 12 F.2d 775, with *Pritchett v. State*, 78 Okl.Cr. 67, 143 P.2d 622, 623-625; *Smuk v. People*, 72 Colo. 97, 209 P. 636, 637, with *Salata v. United States*, 6 Cir., 286 F. 125, 127, and may reflect imperfectly the factual situations before the courts that decided them, they point to no compelling solution in the present case. On the record before us, we have concluded that the officer's testimony before the magistrate constituted sufficient evidence that the entry into the house and subsequent discoveries were made with the consent of defendant and her mother to justify the admission and use of the evidence at the preliminary hearing to establish probable cause for holding defendant to answer.

This is not a case in which entry was made pursuant to the supposed authority of an invalid search warrant. (See, *United States v. Kelih*, D.C., 272 F. 484, 490; *Salata v. United States*, *supra*, 286 F. 125, 127; *Hernandez v. State*, 137 Tex.Cr.R. 343, 129 S.W.2d 301, 305.) Nor is it a case in which the officers entered without the permission or knowledge of the occupants (see *Dukes v. United States*, 4 Cir., 275 F. 142, 144-145; *Farris v. United States*, 9 Cir., 24 F.2d 639, 639-640), or demanded the right to search without a warrant. (See, *Amos v. United States*, *supra*, 255 U.S. 313, 317, 41 S.Ct. 266; *United States v. Slusser*, D.C., 270 F. 818, 819.) All that appears is that four officers

went to defendant's home, identified themselves, and were admitted by defendant's mother. Within approximately a minute of their arrival they asked defendant if she had any narcotics, and all of the evidence was then voluntarily produced by the two women. Under these circumstances, to hold as a matter of law that the evidence was produced in response to an unlawful assertion of authority would seriously hamper officers in the reasonable performance of their duties. Thus, it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority.

We are not unmindful of the fact that the appearance of four officers at the door may be a disturbing experience, and that a request to enter made to a distraught or timid woman might under certain circumstances carry with it an implied assertion of authority that the occupant should not be expected to resist. (See, *State v. Lindway*, 131 Ohio St. 166, 2 N.E.2d 490, 493; *People v. Lind*, 370 Ill. 131, 18 N.E.2d 189, 192; *Petition of Shoemaker*, D.C., 9 F.2d 170, 171.) Neither defendant nor her mother testified at the preliminary hearing, however, and the testimony that was given indicates only that the evidence was voluntarily produced in response to a reasonable inquiry. (See, *In re Dixon*, *supra*, 41 Cal. 2d 756, 761, 264 P.2d 513; *Gray v. State*, 243 Wis. 57, 63, 9 N.W.2d 68; *United States v. Pugliese*, 2 Cir., 153 F.2d 497, 498-499; *United States v. Sferas*, 7 Cir., 210 F.2d 69, 73-74; *State v. Hagan*, 47 Idaho 315, 274 P. 628, 629; *Hernandez v. State*, *supra*, 137 Tex.Cr.R. 343, 129 S.W.2d 301, 305; *Clark v. State*, 78 Okl.Cr. 423, 149 P.2d 994, 996-997.)

The order is reversed.

GIBSON, C. J., SHENK, CARTER, SCHAUER and SPENCE, JJ., and McCOMB, J. pro tem., concur.

45 Cal.2d 755

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

James MARTIN, Defendant and Respondent.
Cr. 5767.

Supreme Court of California,
In Bank.

Dec. 9, 1955.

Prosecution for horse race bookmaking and occupying and keeping premises for purpose of bookmaking. The Superior Court, Los Angeles County, David Coleman, J., set aside information, and the people appealed. The Supreme Court, Traynor, J., held that where officers, upon identification, were admitted to defendant's office, where they found paraphernalia used for bookmaking, they were reasonably justified in concluding that defendant was occupying premises for illegal purpose, and defendant's arrest, and the seizure of paraphernalia before his arrest, were lawful.

Order reversed.

1. Criminal Law 6394

Purpose of rule excluding illegally obtained evidence, is not to provide redress or punishment for a past wrong, but to deter unlawful enforcement of the law.

2. Criminal Law 6394

Illegally obtained evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights.

3. Arrest 63(3), 71

Where officers, upon identification, were admitted to defendant's office, where they found paraphernalia used for bookmaking, they were reasonably justified in concluding that defendant was occupying premises for illegal purpose, and defendant's arrest, and the seizure of paraphernalia before his arrest, were lawful. Pen. Code, § 337a, subd. 2; § 836, subd. 1.

4. Searches and Seizures 7(1)

Looking through a window does not constitute an unreasonable search.

5. Arrest 63(3)

Officers who, looking through defendant's office window, saw gambling paraphernalia, were entitled to act upon what they saw and arrest defendant. Pen.Code, § 836, subd. 1; § 844.

6. Arrest 68

Where officer had arrested defendant six days before under similar circumstances, and defendant again appeared to be committing offense of bookmaking in officer's presence, it was unnecessary for officer expressly to inform defendant of intention to make arrest before officer was justified in entering defendant's office through window. Pen.Code, §§ 841, 844.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

John J. Bradley and Max Solomon, Los Angeles, for respondent.

A. L. Wirin and Fred Okrand, Los Angeles, as amici curiae on behalf of respondent.

TRAYNOR, Justice.

By information defendant was charged with two counts of horse-race bookmaking, Penal Code § 337a(1) and two counts of keeping and occupying premises for the purposes of such bookmaking. Penal Code § 337a(2). The trial court granted defendant's motion to set the information aside (see Penal Code § 995) on the ground that all of the evidence against him had been obtained by illegal searches and seizures in violation of his constitutional rights. The People appeal.

Two of the counts were based on defendant's activities that were discovered by the arresting officers on April 20, 1955, at an office on Ventura Boulevard in Los Angeles. About 11:30 in the morning three police officers went to the premises, a small one-story office building. One testified that on arriving, "I went to the front door of the office at this address and I looked through the door through a mail chute into

the door into the small office. At first I didn't see anything. The room appeared to be empty. I knocked on the door and nobody answered. Nobody came to the door or answered; so I looked through again and I could see the defendant inside the room. He was on the telephone standing off to the left from the door using the telephone, at which time I knocked again and identified myself, and the defendant came and opened the door and let the three of us in." Inside the room the officers found two small tables, two telephones, two blackboards, a box of chalk, a wet rag, and a scratch sheet for the day. Part of one of the blackboards was wet as if it had just been wiped. There were also two two-by-twelve planks on the floor near the door. The officers stayed in the room for approximately an hour and answered the telephones, which rang frequently. Telephone callers, who identified themselves by numbers, called in bets on various races during this period. As an expert on the practice of bookmakers in Los Angeles County, one of the officers testified that in his opinion the room was a relay spot, a place where either betters or the handbooks that take bets from betters telephone their bets. At a relay spot the bets are either recorded temporarily until they can be telephoned on to a "phone spot or office" or are passed on directly to the phone spot by mechanically relaying the telephone calls.

The other two counts were based on defendant's activities that were discovered by the arresting officers six days later at another small office building on Ventura Boulevard. The same three officers went to the premises about 11:30 in the morning. While they were looking the place over, a woman came from a house in the rear, questioned them, and they identified themselves. After talking to her the officers looked through the rear window of the building. One of them testified: "In the inside I could see two two-by-twelve planks barricading the door. I could see a blackboard laying on the floor, a box of chalk on it, a wet rag or a rag. I opened the window. I smelled cigarette smoke in the room. I could see what turned out to be the defend-

ant moving around inside the room. I identified myself, called for the defendant to open the door, which he didn't do, so I entered through the window. * * * In the front room I found the defendant, two telephones on a card table, a pile of warm ashes in the corner." While the officers were present the phones rang frequently, and although many of the callers hung up when the officers answered, one attempted to place bets. It was the officer's opinion that this room was also a relay spot.

At the time of the first arrest defendant told the officers that a man had offered him \$2 to go in and watch the place in case any salesman came around, and at the time of the second arrest defendant told the officers that a man on Ventura Boulevard had offered him a day's wages to sit in the place. The officers did not have a search warrant on either occasion.

The Attorney General contends that since defendant disclaimed any interest in the premises searched and the property seized, his constitutional rights could not have been violated and that therefore he has no standing to challenge the legality of the searches and seizures. (See, *Casey v. United States*, 9 Cir., 191 F.2d 1, 3; *Mello v. United States*, 3 Cir., 66 F.2d 135, 136; *Connolly v. Medalie*, 2 Cir., 58 F.2d 629, 630.) We cannot agree with this contention.

It is true that in *Goldstein v. United States*, 316 U.S. 114, 62 S.Ct. 1000, 86 L.Ed. 1312, the United States Supreme Court recognized that the rule is well established in the lower federal courts that only those whose constitutional rights have been violated may object to the introduction of illegally obtained evidence against them. In the light of that rule it held that the federal wire-tapping statute should not be interpreted as forbidding the use of wire-tap evidence against a person not a party to the conversation. It was careful to point out, however, that it had never decided that the rule applied in the lower federal courts with respect to unconstitutionally obtained evidence was correct. There are several United States Supreme Court decisions cited below, however, that are logically inconsistent with the rule applied in the low-

er federal courts, and it is impossible to reconcile that rule with the reasons that compel the exclusion of the evidence.

Thus, the rule of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy. *Connolly v. Medalie*, supra, 58 F.2d 629, 630. In adopting the exclusionary rule, however, this court recognized that it could not be justified on that theory, *People v. Cahan*, 44 Cal. 2d 434, 443, 282 P.2d 905, and based its decision on the ground that "other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." 44 Cal. 2d at page 445, 282 P.2d at page 911. This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them.

[1] The United States Supreme Court has clearly recognized that the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter lawless enforcement of the law. "The Government cannot violate the Fourth Amendment * * * and use the fruits of such unlawful conduct to secure a conviction. [Citation.] Nor can the Government make indirect use of such evidence for its case [citation], or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. [Citation.] All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encour-

age the kind of society that is obnoxious to free men." *Walder v. United States*, 347 U.S. 62, 64-65, 74 S.Ct. 354, 356, 98 L.Ed. 503; see also, *United States v. Mitchell*, 322 U.S. 65, 70-71, 64 S.Ct. 896, 88 L.Ed. 1140. In *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153, it gave effect to this policy by reversing the conviction of both defendants although only the rights of one had been violated. It pointed out that had the evidence been returned to the defendant from whom it was illegally taken, it would not have been available for use against the other defendant, and held therefore that its admission was prejudicial as to both. (See also, *Anderson v. United States*, 318 U.S. 350, 356-357, 63 S.Ct. 599, 87 L.Ed. 829; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319; *United States v. Thomson*, 7 Cir., 113 F.2d 643, 646, 129 A.L.R. 1291; *United States v. Haupt*, 7 Cir., 136 F.2d 661, 672.) It is true that in the *McDonald* case a pretrial motion for the return of the evidence by the defendant whose rights were violated had been erroneously denied. There is no basis for concluding, however, that a defendant whose rights have not been violated should have standing to challenge a pretrial ruling against his codefendant, if he has no standing to challenge the legality of the original seizure. In either situation his right to object to the use of the evidence must rest, not on a violation of his own constitutional rights, but on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law.

[2] Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights. Accordingly, it must be determined whether the evidence was illegally obtained in this case.

Defendant contends that on each occasion the officers' entry into the premises was illegal and therefore the officers cannot justify the arrests, searches, or seizures

by any observations made by them thereafter. (See *Johnson v. United States*, 333 U.S. 10, 16-17, 68 S.Ct. 367, 92 L.Ed. 436.)

[3] On the first occasion one of the officers looked through a mail chute in the door and determined that defendant was inside. He then knocked and identified himself, "and the defendant came and opened the door and let the three of us in." In this case, as in *People v. Michael*, Cal.Sup., 290 P.2d 852, there is no evidence that the officers demanded that the door be opened or that they be admitted, and as we pointed out in that case, "it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes." Similarly, it is not unreasonable for officers to make such calls at business premises, and on the record before us, the officer's testimony before the magistrate supports the conclusion that the entry into the office was made with defendant's consent. Once the officers had gained admittance to the office, they had reasonable cause to believe that a public offense was being committed by defendant in their presence. The telephones, tables, blackboards, chalk, scratch sheet, and the wet rag are all innocent when considered separately. Together, however, they constituted the usual paraphernalia of a "relay spot," and the officers were reasonably justified in concluding that defendant was occupying the premises for the purposes of bookmaking in violation of Penal Code section 337a(2). Defendant's arrest was therefore lawful under subdivision 1 of Penal Code section 836, *Coverstone v. Davies*, 38 Cal.2d 315, 320-321, 239 P.2d 876, and cases cited, and it is immaterial that the seizure of the paraphernalia used in the commission of the crime may have preceded rather than followed the arrest. *People v. Simon*, Cal. Sup., 290 P.2d 531.

On the second occasion, six days later, the same officers looked through the rear window of another small office building. A blackboard, chalk, and a rag were visible, and the door was barricaded by two two-by-twelve planks. Although it does not appear that the officers observed telephones or a scratch sheet from the window, the presence of the other paraphernalia to-

gether with barricades similar to those found at the time of the first arrest justified their conclusion that these premises were also a "relay spot." Moreover, since the barricades were in place, they could reasonably infer that someone was present and that an offense was therefore being committed in their presence.

[4, 5] Since looking through a window does not constitute an unreasonable search, *Safarik v. United States*, 8 Cir., 62 F.2d 892, 895; *Smith v. United States*, 4 Cir., 2 F.2d 715, 716; *United States v. Strickland*, D.C., 62 F.Supp. 468, 471; *State v. Hawkins*, 362 Mo. 152, 240 S.W.2d 688, 692-693; *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56, 59; see also, *United States v. Lee*, 274 U.S. 559, 563, 47 S.Ct. 746, 71 L.Ed. 1202, the officers were entitled to act upon what they saw and arrest defendant. Penal Code § 836(1); *Coverstone v. Davies*, supra, 38 Cal.2d 315, 320-321, 239 P.2d 876.

[6] Defendant contends, however, that the officer's entry through the window was unlawful and that any evidence obtained thereafter is therefore inadmissible. Section 844 of the Penal Code provides that "To make an arrest, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." This section was substantially complied with in this case. The officer identified himself and asked defendant to open the door. Since he had arrested defendant six days before under similar circumstances and since defendant appeared to be committing an offense in his presence, "the purpose for which admittance [was] desired" was reasonably apparent, and it was unnecessary expressly to inform defendant of the intention to make an arrest. *People v. Pool*, 27 Cal. 572, 576-580; *People v. Young*, 136 Cal.App. 699, 705, 29 P.2d 440; *Allen v. McCoy*, 135 Cal.App. 500, 508-509, 27 P.2d 423, 28 P.2d 56; Penal Code § 841; see, *Restatement, Torts*, § 128,

comment f. Moreover, even if it is assumed that raising the window was unlawful, on the ground that it occurred before the request for admittance, such illegality, if any, is immaterial in this case. Before the window was opened the officers had grounds for making an arrest, and once their demand for admittance was refused, they were entitled to enter through the window. Under these circumstances, the fact that one of the officers opened the window and then spoke to defendant rather than shouting through it or the door, was entirely unrelated and collateral to the entry and to the securing of the evidence to which defendant objects, and it could not therefore render that evidence inadmissible. *People v. Boyles*, Cal.Sup., 290 P.2d 535 and cases cited.

The order is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., and McCOMB, J. pro tem., concur.



45 Cal.2d 729

CITY OF OXNARD, a municipal corporation, Petitioner,
v.

Ethel DALE, as City Clerk of the City of Oxnard, California, and Wm. H. Groff, as City Treasurer of the City of Oxnard, California, Respondents.

L. A. 23700.

Supreme Court of California.
In Bank.

Dec. 9, 1955.

Petition for writ of mandamus to compel issuance of municipal revenue bonds. The Supreme Court, Gibson, C. J., held that where bond proceeds were to be used to expand existing sewer system and bonds pledged all revenues from such system for payment of interest and principal, such

bonds did not violate constitutional provision prohibiting municipality from incurring indebtedness in any year in excess of income without a vote of two-thirds of the electors.

Peremptory writ of mandate issued as prayed.

Opinion, 286 P.2d 491, vacated.

1. Mandamus ⇨103

Mandamus is an appropriate remedy to compel officers of municipal corporation to sign revenue bonds, if proposed bond issue meets the requirements of the law, since acts demanded are ministerial duties. West's Ann.Gov.Code, § 54300 et seq.

2. Municipal Corporations ⇨864(4)

A constitutional provision prohibiting municipality from incurring any indebtedness in any year in excess of its revenue for such period without vote of two-thirds of the electors is not violated by revenue bonds or other obligations which are payable solely from a special fund, provided that governmental body is not liable to maintain the special fund out of its general revenue, or by tax levies should special fund prove insufficient. West's Ann.Const. art. 11, § 18.

3. Municipal Corporations ⇨864(4)

Where city planned to expand existing sewer system through issuance of bonds which would be serviced by entire revenue from such system, fact that city formerly used such revenue to service general bonds was immaterial on question of whether new bond issue payable from said revenue in priority to general bonds would violate constitutional provision respecting debt limitation. West's Ann.Const. art. 11, § 18.

4. Municipal Corporations ⇨864(4)

Revenue bonds authorized by electors and city council resolution, and which were to be serviced and redeemed solely from sewer system revenues, did not constitute an indebtedness or liability within constitutional limitation and were valid. West's Ann.Gov.Code, §§ 54300 et seq., 54386; West's Ann.Const. art. 11, § 18.

Joseph W. Goss, City Atty., Oxnard, O'Melveny & Myers, James L. Beebe and James W. Beebe, Los Angeles, for petitioner.

William A. Reppy and F. Gile Tiffany, Jr., Oxnard, for respondents.

GIBSON, Chief Justice.

[1] Petitioner, a municipal corporation of the sixth class, seeks a writ of mandate requiring respondent city treasurer to sign, and respondent city clerk to countersign, certain revenue bonds which the city proposes to issue pursuant to the Revenue Bond Law of 1941. Gov.Code, § 54300 et seq. Mandamus is, of course, an appropriate remedy to compel respondents to sign the bonds, if the proposed issue meets the requirements of the law, since the acts demanded are ministerial duties. Cf. *City of Fairfield v. Hutcheon*, 33 Cal.2d 475, 202 P.2d 745; *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 21 P.2d 425.

The sole question presented is whether the proposed bonds, and the statute under which they were authorized by the voters and the city council, are contrary to section 18 of article XI of the California Constitution, which provides, insofar as pertinent here: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof * * *."

The city has owned a sanitary sewer system since 1905. The system and its additions and improvements were financed largely by the issuance of general obligation bonds, of which a total amounting to \$795,200 remains outstanding and unpaid. Charges for use of the sewer system were first imposed in 1946, and since that time all expenses of operation and maintenance

have been paid from sewer revenues. The revenues have been used, further, to pay part of the interest and principal on general obligation sewer bonds issued in 1949, but the city does not presently intend to continue to apply sewer revenues toward the retirement of these bonds.

A treatment plant, financed by a portion of the general obligation bonds referred to above, is now being constructed, and the city proposes to construct interceptor sewers to transport sewage to the treatment plant. Pursuant to the Revenue Bond Law of 1941 the city council, in March 1954, called a special election to submit to the voters the issuance of sewer revenue bonds in the amount of \$450,000 to finance the construction of the interceptor sewers. It was specified that the bonds were to be payable exclusively from the revenues of the entire sewer system of the city, together with all additions and improvements thereafter made, and that the bonds were not to be secured by the taxing power of the city. The Revenue Bond Law of 1941 requires authorization of such bonds by a majority vote, Gov.Code, § 54386, and, since the election was called pursuant to that statute, it may be inferred that the bond measure was submitted to the voters upon the theory that only a majority vote was required. The bonds were approved at the ensuing election.

Subsequently the city council adopted a resolution authorizing the proposed bonds in accordance with the measure submitted to the voters. The resolution recites that issuance of the bonds was approved by more than a majority of the voters; that they are to be issued pursuant to the Revenue Bond Law of 1941 and are to be secured by a pledge and lien upon, and payable solely from, the gross revenues of the entire sewer system, including extensions later constructed; that the bonds are not a debt of the city; and that the bondholders cannot compel the exercise of the taxing power of the city or the forfeiture of any of its property.

The resolution further provides that the city is to covenant, among other things, that it will operate the system in an efficient manner and will prescribe sufficient

charges for the services of the system to pay interest and principal on the bonds and the expenses of operation. Revenues are to be used, first, for payment of principal and interest on the bonds and then for current expenses of the system. Surplus funds can be invested or used to redeem the proposed bonds and, under some circumstances, may be used for other sewer purposes, including payment of principal and interest of general obligation bonds of the city issued for sewer purposes. No claim is made that the proposed bonds will in any way vary from the requirements of the Revenue Bond Law of 1941. Although it is not specifically alleged that the issuance of the proposed bonds, if considered as a debt of the city, will create an indebtedness in any year in excess of the income of the city for such year within the meaning of section 18 of article XI, this appears to be conceded and, further, may be inferred from the recital in the resolution authorizing the bonds that funds must be provided for the purpose of constructing the interceptor sewers.

[2] It is settled in California and recognized in almost all of the other states that, as a general rule, a constitutional provision such as section 18 of article XI is not violated by revenue bonds or other obligations which are payable solely from a special fund, provided the governmental body is not liable to maintain the special fund out of its general funds, or by tax levies, should the special fund prove insufficient. Department of Water and Power of City of Los Angeles v. Vroman, 218 Cal. 206, 216 et seq., 22 P.2d 698; California Toll Bridge Authority v. Kelly, 218 Cal. 7, 10 et seq., 21 P.2d 425; California Toll Bridge Authority v. Wentworth, 212 Cal. 298, 302 et seq., 298 P. 485 (discussing many cases from other jurisdictions); Shelton v. City of Los Angeles, 206 Cal. 544, 548 et seq., 275 P. 421; see Garrett v. Swanton, 216 Cal. 220, 227 et seq., 13 P. 2d 725; 38 Am.Jur. 150 et seq. As pointed out in the case of California Toll Bridge Authority v. Wentworth, supra, 212 Cal. at page 302, 298 P. at page 486, such an obligation is not considered to be an indebtedness or liability of the political subdivision

or agency issuing the bonds, within the meaning of the constitutional limitation.

The cases in California are not entirely clear as to the extent of the operation of the special fund doctrine, and there is a conflict of authority on the subject in other states. Some of the courts in other jurisdictions have held that revenue bonds payable solely from a special fund will not be free from the constitutional limitation unless the fund is restricted to the revenues from the particular improvement which is to be constructed out of the proceeds of the bonds in question, but under the prevailing view the doctrine may be applicable where the revenues of the entire existing system, as well as those of the proposed improvement, are pledged. See Joint Report of Committees of the American Society of Civil Engineers, the Section of Municipal Law of the American Bar Association and others (1951), 12 Ohio State L.J. 147, 182 et seq.; 38 Am.Jur. 155-156.

The first case in California discussing this problem is Garrett v. Swanton, 216 Cal. 220, 13 P.2d 725, where a city agreed to purchase a pumping plant on a conditional sales plan, with payments to be in installments over a period of years out of a special fund maintained by profits from the entire water system. There, as here, the city had previously issued general obligation bonds to finance the system, and, by ordinance, water revenues were being used for the payments on the bonds. It was held that the special fund doctrine was inapplicable under the facts of the case and that the contract was in violation of section 18 of article XI. The court said that the contract indirectly created a general liability of the city, and it reasoned that any deficiency of revenue would require the taxpayers to contribute to the water fund, from which both the contract and the bonds were being paid, in order to make the payments on the bonds. The court also stated, in effect, that the possibility of a forfeiture under the conditional sales contract might make it necessary for the city, if it wished to protect its investment, to pay contract installments from general funds and that the creation of this inducement amounted to a violation of the Constitution. Cf. In

re City and County of San Francisco, 195 Cal. 426, 438-442, 233 P. 965; *Chester v. Carmichael*, 187 Cal. 287, 291-294, 201 P. 925. In the present case, however, the resolution authorizing the proposed revenue bonds specifies that the bondholders shall have no right to cause the forfeiture of any property of the city.

Two subsequent decisions of this court, while distinguishing the *Garrett* case on its facts, have departed from its reasoning insofar as it may be applicable here. *Department of Water and Power of City of Los Angeles v. Vroman*, 218 Cal. 206, 22 P.2d 698; *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 21 P.2d 425; see also *City of Glendale v. Chapman*, 108 Cal.App. 2d 74, 80 et seq., 238 P.2d 162; cf. *Board of State Harbor Com'rs for San Francisco Harbor v. Dean*, 118 Cal.App.2d 628, 632 et seq., 258 P.2d 590. The *Kelly* case involved revenue bonds authorized by the toll bridge authority and payable out of a special fund consisting of revenues from the operation of a bridge to be built from the proceeds of the bonds. The director of public works refused to sign the bonds upon the theory that they were rendered invalid by certain legislation adopted after they had been judicially approved. This legislation contemplated the appropriation of money, for purposes of building approaches and maintaining and operating the bridge, from existing special funds for highway construction and maintenance. 218 Cal. at page 14, 21 P.2d at page 427. In holding that the plan did not violate section 1 of article XVI of the Constitution, prohibiting creation by the state of debts or liabilities in excess of \$300,000 without a vote of the people, this court rejected contentions that the practical and ultimate result of the legislation would be to convert the bonds into general obligations of the state and that the state, in effect, would be compelled to protect its property by general fund expenditures. After pointing out that payment of the bonds was secured only by the revenues collected from the particular bridge for which the bonds were issued, the court said, "While it may be to the interests of the state, in the event of necessity, to make contribution for the preservation of the

bridge, the better to conserve the amount of funds it has spent in assisting the consummation of the enterprise, it does not follow that the bonds themselves will be thereby converted into a liability against the general funds of the state." 218 Cal. at page 13, 21 P.2d at page 427. Further, the court said that even if the statutes had purported to pledge the construction and maintenance funds for operation and maintenance of the bridge, such action would not constitute the pledging of the credit of the state because the construction and maintenance funds were special funds. 218 Cal. at page 14, 21 P.2d at page 427.

The language in the *Kelly* case, 218 Cal. 7, 13-14, 21 P.2d 425, appears to be inconsistent with the position taken in the *Garrett* case, 216 Cal. 220, 13 P.2d 725, to the effect that the Constitution was violated because an economic or practical necessity might arise which would require the taxpayers to contribute money in order to protect the city's investment if the special fund should prove to be inadequate. Moreover, there is nothing in section 18 of article XI which suggests that the economic advisability of making such an expenditure is tantamount to an "indebtedness or liability." The quoted words obviously refer only to a legally enforceable obligation, and where, as here, the terms of the bonds expressly limit liability to the revenues of the system; there can be no such obligation to the bondholders upon the part of the city or its taxpayers, because the bonds provide in effect that the bondholders assume the risk that the system may prove unable to produce sufficient revenue. The covenant of the city to impose charges for sewer services adequate to cover bond payments and expenses of the system does not amount to a guarantee that the system will be successful, and the covenant is not contrary to section 18 of article XI because it does not create a financial liability, measurable in terms of the city's annual income. *City of Glendale v. Chapman*, 108 Cal.App.2d 74, 80, 238 P.2d 162; cf. *Shelton v. City of Los Angeles*, 206 Cal. 544, 551-552, 275 P. 421.

In the *Vroman* case, 218 Cal. 206, 22 P. 2d 698, the Department of Water and Power of the City of Los Angeles proposed to

enter into a contract with the Reconstruction Finance Corporation to borrow money to finance the construction of lines and other facilities to transmit electricity from the Colorado River, and, under the contract, the loan was to be repaid solely from the revenues of the entire electric system of the city. General obligation bonds had previously been issued by the city, and, as in the present case, the revenues of the system had been used to meet payments of interest and principal due on the general bonds. It was held that the contract was valid and that the loan was in no sense an obligation of the city within the meaning of section 18 of article XI. The objecting party urged that the loan was to be repaid out of revenues from the existing electrical system as well as out of revenues from the proposed transmission lines and that for this reason the Constitution was violated. The court, however, stated that it attached no particular significance to the objection and added that if the argument had any importance it was in connection with another objection to the effect that the fund might prove to be inadequate and the taxpayers might be required to meet the sums to become due on the general bonds theretofore issued. 218 Cal. at pages 218-219, 22 P.2d at page 704. With respect to the latter contention the court stated that if the funds of the department should become depleted, the taxpayers might be called upon to provide revenues to make payments on the general bonds, but that "the electors in authorizing those bonds bound the taxpayers constitutionally to meet those payments, and nothing has occurred since the issuance thereof which would relieve them of that burden * * *."

[3] It follows that, in the present case, the former practice of the city to use the revenues from the sewer system to make payments on the general obligation bonds has no bearing upon the question whether the incurring of a subsequent obligation to be paid solely from those revenues, in priority to the general bonds, will violate sec-

tion 18 of article XI. It may be noted, in this connection, that in the absence of some specific statutory or contractual provision the city could properly reduce or discontinue the imposition of charges for use of its sewer system and arrange for the assessment of taxes to make the payments on its general bonds. Since the city may terminate use of sewer revenues as a means of servicing the general bonds, it is, of course, immaterial that the city, at the same time, pledges the revenues for the payments to be made on an issue of revenue bonds.

[4] As we have seen, an obligation which is payable out of a special fund is not an "indebtedness or liability" of a governmental body within the meaning of section 18 of article XI of the Constitution if the governmental body is not required to pay the obligation from its general funds, or by exercise of its powers of taxation, should the special fund prove insufficient. Respondents concede, as they must, that the special fund doctrine would be applicable and controlling here if the revenues pledged to secure the proposed bonds were secured by the revenues to be produced from the interceptor lines alone. Insofar as concerns the constitutional limitation, we can see no sound reason to distinguish between that situation and the one presented here where the pledge consists of the revenues of the entire system and where those revenues had formerly been used to make payments on the city's general obligation bonds. *Garrett v. Swanton*, 216 Cal. 220, 13 P.2d 725, is overruled to the extent that it is inconsistent with the views expressed herein. Accordingly, the proposed bonds, and the statutes under which they were authorized, are valid, and respondents are required to sign the bonds as demanded by petitioner.

It is ordered that a peremptory writ of mandate issue as prayed.

SHENK, CARTER, TRAYNOR,
SCHAUER and SPENCE, JJ., and McCOMB, J. pro tem., concur.

Jesse R. HUDSON, Plaintiff and Appellant,
v.

Patricia Y. RAINVILLE, Defendant and
Respondent.*

Civ. 8580.

District Court of Appeal, Third District,
California.

Dec. 8, 1955.

Rehearing Denied Jan. 6, 1956.

Hearing Granted Feb. 1, 1956.

Action by pedestrian against motorist for injuries sustained when he was struck by her automobile while walking along road pulling a toy wagon loaded with a bale of hay. The Superior Court, Sutter County, Arthur Coats, J., after a jury verdict for motorist entered judgment for her and pedestrian appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that evidence established as a matter of law that motorist was negligent in looking down road and not seeing pedestrian who was in plain sight, and that such negligence was a proximate cause of accident.

Judgment reversed.

1. Automobiles ⇨160(3), 201(1)

Where motorist looked down road, but did not see pedestrian who was in plain sight walking along the road pulling a toy wagon loaded with a bale of hay, and struck him, she was negligent, and such negligence was a proximate cause of the accident.

2. Automobiles ⇨160(1), 218

Where pedestrian assumed a position, and was progressing along a proper part of a street in a residence zone, he was not compelled to give way to automobile traffic, it was duty of vehicular traffic to recognize his right to be on and progress along the street and failure to do so was a violation of law.

3. Automobiles ⇨218

Municipal Corporations ⇨705(10)

The law does not set arbitrary standards as to what constitutes due care for his own concern for a pedestrian walking along a street and does not say pedestrian

must look back, nor that he need never do so, but it requires him to exercise due care and this means that he must use his faculties of sight and hearing for that purpose whenever a reasonably prudent man would do so.

4. Automobiles ⇨206, 218

Municipal Corporations ⇨705(10)

Pedestrian who assumed a position on, and progressed along, a proper part of a street in a residence zone had a right to be where he was and to travel as he traveled, and he had a right to assume, until circumstances indicated otherwise, that vehicular traffic upon the street would respect his right.

5. Automobiles ⇨245(72)

Municipal Corporations ⇨706(7)

A pedestrian may go upon the street, but whether or not, under the circumstances then existing, his conduct evinces a proper care for his own safety is generally a question of fact for the jury to determine.

6. Automobiles ⇨245(72)

In action by pedestrian against motorist for injuries sustained when he was struck by her automobile while walking along road pulling a toy wagon loaded with a bale of hay, evidence presented a question for the jury as to whether pedestrian was negligent in proceeding on the part of the street used for vehicular traffic and traversing it without looking back for a length of time sufficient for traffic coming from his rear to arrive at point where he was struck.

Clewe & Blade, Oroville, for appellant.
Peters & Peters, Chico, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff-appellant brought this action to recover damages for personal injuries which he claimed to have suffered as a result of respondent's negligence. A jury returned a verdict in favor of respondent and from the judgment which followed this appeal is taken.

The accident occurred on one of the main streets in Yuba City which runs gen-

* Opinion vacated 297 P.2d 434.

erally east and west. Appellant lives on the north side of the street about 300 feet east of the point on the street where the accident occurred. The accident occurred in a residential zone as defined in the Vehicle Code, § 90. The street past appellant's house is paved with concrete and is 56½ feet wide from curb to curb. Two hundred sixty-six and one-half feet west of the path which leads from appellant's house to the sidewalk the concrete pavement abruptly narrows down to twenty-five feet in width with earth and rock shoulders on either side of the strip. There is a concrete sidewalk on the north side of the street from a point east of appellant's home to a point about sixty feet west of it. The accident occurred a few minutes after 5 o'clock on the afternoon of the 6th of March. It had been a cloudy day with intermittent rain and sunshine and the street pavement was wet. At about 5 o'clock the sun was low on the horizon to the west, its elevation being slightly over eleven degrees above horizontal. For several years before the accident appellant had kept horses in a fenced pasture just west of his home and on his side of the street. It had been his custom to take baled hay down to the pasture to feed his horses and he hauled the hay on a little toy red wagon that belonged to his small son. On the day of the accident, and shortly before 5 o'clock P.M., he took a bale of hay out of his garage, put it on the little wagon and started for the pasture, pulling the wagon behind him. He followed the sidewalk on the north side of the street to the end thereof, and then went onto the street and proceeded along near the curb for about 200 feet to the point where the street pavement narrowed. Here he turned left and followed the pavement edge to the point where the narrow pavement began. There he looked in both directions. He saw a car approaching from the west several hundred feet away but saw nothing coming from the east. He turned right and proceeded to walk west, all four wheels of the wagon on the north edge of the 25-foot pavement. When he had gone about 33 feet west from the beginning of the narrow pavement he was struck from the rear by the automobile driven by

respondent. As he walked along the narrow pavement he had not looked back. Respondent had entered the street at a point east of appellant's home and proceeded west. Opposite appellant's home she saw two automobiles double parked along the curb. She was driving about 30 miles an hour. As she came up to the two parked cars she saw a car coming from the west. She swerved left to go around the parked cars and then pulled her car back to her own side of the road to avoid the oncoming car. During the moments preceding the accident the only vehicles moving on the street were the car coming from the west and the car driven by respondent. The car coming from the west was so far west of the point of the accident that its driver was able to see the collision as it happened. As respondent came close to the point where the pavement narrowed the sun suddenly emerged from behind the clouds and its direct light and its reflected light from the wet pavement blinded her. She immediately "slammed" on her brakes because she could not see and threw her hand up in front of her face. At nearly the same time she struck the appellant. She had not seen him until the moment she struck him. At the time of the impact she was still traveling about 30 miles per hour. We think it best at this point to quote her testimony. It was as follows:

"Q. * * * In addition to looking at this other car [the car coming from the west], whatever position it was, you then say that after you got on to your side of the street, you looked in the direction of your path? A. That's right.

"Q. Did you continue to look in that direction at all times from the time you got back to your side until the accident occurred? A. That's right.

"Q. You didn't look off to the right? A. No, there is nothing to see off to the right.

"Q. And you didn't look off to the left? A. No.

"Q. You didn't look at anything inside your car? A. No.

"Q. Nothing distracted your attention inside the car that made you take your eyes from the road? A. Not a bit.

"Q. And I understood you to say that as you got up to the point where Mr. Hudson has marked, or perhaps a few feet back, from the point where the accident occurred, the events that took place were like this, the sun came out from behind a cloud and had a blinding effect on your eyes? A. That's right.

"Q. You threw up your hand, applied the brakes and then you saw Mr. Hudson and your car struck him, and in that order? A. Yes.

"Q. And almost as fast as I have said it, is that right, or perhaps faster? A. Faster.

"Q. So that before the sun came out, the condition that it cause of tending to blind you was not in that condition until it did come out, was it? A. Didn't seem so.

"Q. Well, so that your ability to see was impaired because the sun came out, is that right? A. It seemed that way, yes.

"Q. And yet after the sun came out, you didn't see Mr. Hudson? A. Oh, when I was right on top of him. * * *

"Q. As you drove along that day, Miss Rainville, were you conscious of any obstruction in your windshield as far as any water or dirt or anything to impair your sight? A. No, I don't remember it being that way."

[1-2] Appellant asked the court to give the following instruction: "You are instructed that the evidence in this case has established as a matter of law that the defendant was guilty of negligence and that such negligence was the proximate cause of the accident here in question." The court refused, and on the contrary and under appropriate instructions submitted the issue of respondent's negligence to the jury. This was error. The accident occurred in a residence zone. Appellant had a right to be where he was. He was not compelled to give way to automobile traffic when he had assumed a position on, and was progressing along, a proper part of the street. On the contrary, it was the duty of vehicular traffic to recognize his right to be where he was and to progress as he did and the failure to do so was a violation of law.

We are not for the moment concerned with the contention of respondent that appellant was guilty of contributory negligence. We are concerned only with the conduct of respondent. Her own testimony discloses her negligence as a matter of law. For about 250 feet as she went westerly on the street toward appellant at 30 miles per hour, she was looking toward him with nothing to interfere with her vision. She saw the automobile approaching from the west farther down the street. She did not see the eye-catching spectacle of appellant drawing a toy red wagon loaded with a bale of hay, although these objects were all clearly visible to her. She continued on her unheeding way without diminution of her speed and without seeing these objects until so close thereto that, whether or not the sun came out and blinded her, she could not have stopped without running appellant down. Respondent's being blinded by the sudden emergence of the sun from behind the clouds is clearly shown by respondent's own testimony to have had nothing to do, as a causative factor, with the happening of the accident. She had not seen appellant up to that time, although he had been plainly within the range of her vision for 250 feet or thereabouts. When the sun blinded her she slammed on her brakes, as she put it, and she stopped, but not because she had seen the appellant. She did not see him until the very moment she struck him. If she had seen him when the sun blinded her she could not have stopped any more than she was able to stop when she put on her brakes because of the emergence of the sun. At that moment respondent was within less than one second of the point of impact. Perhaps if the sun had not blinded her she might have seen the appellant before she hit him and might have taken some evasive action even though she could not stop. But it was her neglect which placed her in that position, and if the sun's rays prevented her from taking evasive action, that does not excuse her from bringing herself into a point where such action became necessary. The jury should have been instructed by the court that the negligence of respondent had been shown as a matter of law, and that equally

as a matter of law it had been shown that such negligence was a proximate cause of the accident. *Huetter v. Andrews*, 91 Cal. App.2d 142, 204 P.2d 655.

[3-6] Appellant contends that it appeared from the evidence as a matter of law that he had not been guilty of contributory negligence, and that therefore this court should so declare and return the cause for further trial upon the issue of damages alone. We cannot agree with this contention. To be sure, since he was in a residence zone, appellant had a right to be on the street, where he was, and to travel as he traveled and he had a right to assume, until circumstances indicated otherwise, that other vehicular traffic upon the street would respect his right. But it appears that, although, according to his own testimony which is not in dispute, he looked behind him before going onto the narrow pavement, and though he could elect to travel there rather than on the shoulder, and though when he looked back there was no vehicular traffic approaching him from the east which was visible, nevertheless it equally appears that he knew he was going on a part of the street used for vehicular traffic, and that at that hour of the day traffic was generally heavy there, even though at that particular moment of time only one car to his knowledge was using that part of the street, which car was coming from the west. The jury could conclude that in entering upon the bottleneck of the narrow pavement and traversing it without looking back for a length of time sufficient for traffic coming from the east to arrive where he was, he was negligent in failing to exercise proper care for his own safety. The law does not set arbitrary standards as to what constitutes due care for his own concern when a pedestrian is situated as was appellant. It does not say he must look back, nor that he need never do so. It requires him to exercise due care, and this means that he must use his faculties of sight and hearing for that purpose whenever a reasonably prudent man would do so. He may go upon the street, but whether or not, under the circumstances then existing, his conduct evinces a proper care for his own safety is generally a question of

fact for the jury to determine and we think it was in this case.

The judgment appealed from is reversed, with instructions to the trial court to retry the case upon the issues of contributory negligence and of damages.

PEEK and SCHOTTKY, JJ., concur.



137 Cal.App.2d 636

Ward CHARTER and Joseph R. Schleich,
Plaintiffs and Appellants,

v.

Joseph Lawrence OLSON and Birdelle
Olson, Defendants and Respondents.

Civ. 8644.

District Court of Appeal, Third District,
California.

Dec. 8, 1955.

'Action for wrongful death and for damage to automobile arising from intersectional collision between deceased motorist who was traveling on inferior road and driver traveling on arterial highway during fog. The Superior Court, Sonoma County, Arthur Coats, J., entered judgment for driver and deceased's husband and vehicle owner appealed. The District Court of Appeal, Schottky, J., held that there was sufficient evidence to create a conflict with presumption of due care on part of deceased so as to make an issue of her contributory negligence for the jury, and evidence presented jury issues as to deceased's contributory negligence and alleged negligence of motorist as to speed, lookout and failure to sound horn or to avoid accident.

Affirmed.

1. Automobiles Ⓒ245(67)

In action for wrongful death of automobile driver, evidence of deceased's conduct which is sufficient to support a find-

ing of contributory negligence, creates a conflict with the presumption of due care on part of deceased, and determination of contributory negligence issue is for the jury.

2. Automobiles ⇨245(80)

In action for wrongful death of deceased arising from intersectional collision between deceased who was traveling on inferior road and motorist who was traveling on arterial highway during fog, evidence was sufficient to create a conflict with presumption of due care on part of deceased and to present a jury issue as to deceased's contributory negligence. Vehicle Code, §§ 510, 552.

3. Appeal and Error ⇨930(1)

Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party on appeal.

4. Automobiles ⇨245(39, 44, 80)

In action for wrongful death of deceased and for damage to automobile arising from intersectional collision between deceased who was traveling on inferior road and motorist traveling on arterial highway during fog, evidence presented jury issues as to deceased's contributory negligence and as to alleged negligence of motorist as to lookout, speed, failure to sound horn or avoid accident.

5. Appeal and Error ⇨1060(1)

In action for wrongful death of deceased motorist, statement of defendant's counsel in his argument to jury referring to fact that plaintiff's insurance adjuster had taken a statement from defendant, did not constitute prejudicial misconduct, where plaintiff's counsel first brought out the fact of insurance adjuster's statement on cross-examination of defendant.

Cooney & Littlejohn, Colusa, for appellants.

Russell A. Harris, Sacramento, for respondents.

SCHOTTKY, Justice.

Plaintiff Ward Charter filed an action to recover damages for the death of his wife,

Maud M. Charter, and plaintiff Joseph R. Schleich joined in said action to recover \$200 for the destruction of his automobile which was being operated by the deceased at the time of the accident upon which the complaint was based. Plaintiffs' complaint alleged the negligence of the defendants in the operation of the defendants' automobile, and the answer of the defendants denied negligence and damage and alleged contributory negligence on the part of the decedent. Judgment was entered in favor of defendants in accordance with the verdict of the jury, plaintiffs' motion for a new trial was denied, and they have appealed from the judgment.

Appellants make two major contentions upon this appeal: Insufficiency of the evidence as a matter of law to sustain the verdict, and prejudicial misconduct on the part of defendants' counsel.

Before discussing these contentions we deem it proper to quote what we said in *Scott v. Nevis*, 120 Cal.App.2d 619, at page 621, 261 P.2d 797, at page 798:

"It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

"* * * [T]his familiar rule, * * * we are constrained to state, is too often disregarded by counsel who pay lip service to the rule and then proceed to argue the weight of con-

flicting evidence before an appellate tribunal * * *."

end of the 35-mile zone for southbound traffic.

The record shows that at the time this accident occurred, the respondents were traveling south on U. S. Highway 99W, a through highway, in their 1952 Mercury coupe, accompanied by Lawrence W. Maginnis and Darlene Maginnis, husband and wife, and David R. Lewis, en route from Milwaukie, Oregon, to El Cajon, California. They left Milwaukie about 7:00 p. m. on February 2, 1953. Respondent Olson drove 200 miles to Roseburg, Oregon, and then another passenger took the wheel and drove to Ashland, Oregon, where another passenger took over and drove to a point between Dunsmuir and Redding. Then Olson again took the wheel in the morning of February 3rd and drove to the scene of the accident which occurred about 9:45 a. m. There is testimony that while not driving during the night Olson sat on the right hand side of the front seat and dozed part of the time. There is also testimony that Olson slept in the back seat.

The accident occurred on a foggy day; estimates as to the limit of visibility vary from a minimum of 150 feet up to a maximum of 1,000 feet, and the witness who originally estimated the distance at 1,000 feet modified his opinion as to visibility the day after the accident to 600 feet.

Olson was just picking up speed after leaving the end of the 35-mile zone south of Arbuckle, and was traveling approximately 40 to 50 miles per hour when he first observed the 1937 Chevrolet driven by Mrs. Charter. The Chevrolet was just pulling onto the east edge of the pavement of Highway 99W; the front of the car was on the east edge of the pavement and the rear of the car was on the gravel, and was 60 to 75 feet away. Mr. Olson did not see the Chevrolet approach the highway as he was watching the road ahead. He did not notice the crossroad at this intersection. There was no sign warning him of the fact that he was approaching an intersection. He did not observe the Union Oil plant on his left until after the accident.

The accident occurred at the intersection of U. S. Highway 99W, a north-south through highway, with College City Road, a county road running generally east and west; the intersecting road with U. S. Highway 99W is known as College City Road east of Highway 99W and as Hillgate Road west of Highway 99W. This intersection is located south of the town of Arbuckle. A Union Oil plant is located on the northeast corner of the intersection which obstructs cars traveling west on College City Road from the vision of a driver traveling south on Highway 99W for a point until within 30 or 40 feet of the highway. There is a very slight curve in 99W from the point of the intersection to the north. The visibility is not marred by anything for at least 700 feet north of the intersection. There is a stop sign on College City Road, just east of 99W and it was customary in this community to stop at the east edge of Highway 99W before going across that highway in a westerly direction towards Hillgate Road. Along the west side of Highway 99W, 220 feet north of the center of the intersection, there is a speed limit sign indicating the

Mrs. Charter was driving appellant Schleich's car to the beauty parlor in Arbuckle, and traveled east on College City Road to Highway 99W. It was apparently her intention to cross Highway 99W and continue on down Hillgate Road to the next northbound and southbound street and make a right turn there. She was driving 10 to 15 miles per hour at the time she entered the highway and crossed in front of the approaching Olson automobile.

Upon seeing the Charter car, Olson immediately applied his brakes and his car continued straight ahead and he was still applying his brakes when the front end of the Olson car struck the right portion of the Chevrolet in the vicinity of the gas tank, just behind the right door and between that point and the rear wheel. At the time of the impact the Chevrolet car was across the southbound lane, with the front end of the Chevrolet extending west onto the gravel and Hillgate Road, and the rest of her car was occupying the southbound lane. The Mercury automobile made 60 feet of skidmarks that started north of

the point of collision and extended to the point of collision and veered off in a south-westerly or westerly direction. The Charter car caught fire and was spun completely around, and then moved east along the south side of Hillgate Road a few feet and came to a stop on the southwest corner. After the impact, the rear of the Olson car swerved east and stopped, facing generally west, straddling the white center line of 99W.

Mrs. Maginnis testified that just before the accident occurred there were north-bound cars proceeding north on Highway 99W south of the intersection, and that she could see their headlights coming towards her.

The headlights of the Charter car and the parking lights of the Olson car were burning immediately after the accident. Olson did not sound his horn before the accident. He had his windshield wipers working in the fog before the accident but could not remember whether they were on and working at the time of the accident.

Mrs. Charter died three days after the accident as the result of personal injuries.

The only eyewitnesses to the accident were the occupants of the Olson automobile, although there were several arriving witnesses.

Appellants contend that Olson was negligent as a matter of law because, say appellants, he was driving at an excessive rate of speed while still within a town and while driving in fog and with limited vision, he failed to maintain a reasonable or proper lookout for approaching vehicles, he failed to keep his car under proper control while driving in fog and with limited vision, he failed to avoid the accident by turning off the highway to the left, he failed to sound his horn, and he had driven too many hours and miles without rest and was not in physical condition to be driving a car under the existing conditions.

In support of their contentions, appellants cite 6 Cal.Jur.2d, pages 665, 666, which states:

"It is the duty of a motorist to anticipate the presence of other drivers and travelers at any point in the street

or highway and to keep his automobile under such control as will enable him to avoid a collision with persons using ordinary care. He must keep a proper lookout for them and, if the situation requires, slow and stop his vehicle. Where the situation so requires, he must apply his brakes or change the course of his car. He has no right to assume that the road is clear, but must at all times anticipate and expect the presence of others on the highway."

Appellants also cite *Hill v. Peres*, 136 Cal.App. 132, at page 137, 28 P.2d 946, at page 948, where the court said:

"* * * The driver of an automobile is bound to use reasonable care to anticipate the presence on the highway of others who have equal right to be there and the fact that his vision is temporarily interfered with, either by the glaring sun or headlights, does not relieve him from that duty."

Appellant also quotes the following from *Dalzell v. County of Los Angeles*, 88 Cal. App.2d 271, at page 276, 198 P.2d 554, at page 556:

"* * * In driving an automobile in fog, the driver is required to exercise a degree of care that is to be expected of an ordinarily prudent person under the same or similar circumstances. In the case of *Salera v. Schroeder*, 183 Minn. 478 at page 480, 237 N.W. 180, wherein the defendant was driving in fog, the court said: 'Extreme caution was required by the circumstance of the moment—a degree of caution commensurate to the danger, which was great. * * * It is but ordinary prudence to exercise a high degree of care in the presence of imminent danger, when casualty is apt to come unless much care is exerted to avoid it.' In *Devoto v. United Auto Transportation Co.*, 128 Wash. 604, at pages 609-610, 223 P. 1050, 1052, it was said: '(T)hat in driving through a fog bank each driver must do so in a careful and prudent manner, with due regard for the safety of others, and what is careful and prudent under the par-

tical conditions shown will usually be a question for the jury.’”

Appellants argue that accepting the facts as being true, including the testimony of Olson that visibility was 600 feet, the Charter car must have been in Olson’s direct line of vision for 600 feet in approaching the intersection, and that Olson’s failure to keep a lookout and his failure to see Mrs. Charter under the circumstances constituted negligence as a matter of law.

Appellants argue further that if Olson’s statement taken two days after the accident by an adjuster to the effect that the visibility was only 150 feet and Olson’s testimony that he was driving between 40 and 50 miles per hour is accepted, then Olson could not have seen Mrs. Charter approach Highway 99W until the last second before the accident, and he could not have stopped his car in less than 188 feet, and was, therefore, under the circumstances of visibility, violating the basic speed law of the state. Vehicle Code, sec. 510. Likewise, if his statement of visibility as being 150 feet is accepted, Mrs. Charter could not have seen him except in the last second before the accident occurred.

Appellants argue further that in the present case the record reveals that it was very foggy, yet Olson was picking up speed as he left town, and under the circumstances respondent Olson was negligent as a matter of law in picking up speed and driving at 40 to 50 miles an hour.

Respondents, in reply, cite *Scott v. Nevis*, supra, and discuss at length the well recognized principles as to the power of the appellate court on appeal and point out that in order for the appellants to obtain a reversal of the judgment on the ground of insufficiency of the evidence, they must show that viewing the evidence most favorably to the respondents, the respondents were negligent as a matter of law; that Mrs. Charter was free from contributory negligence as a matter of law.

Respondents argue that the evidence viewed most favorably to the respondents showed that this accident occurred approximately 220 feet south of the 35 mile per hour speed zone; that the respondents’

car was just picking up speed and traveling 40 to 50 miles per hour when Olson first observed Mrs. Charter’s car just entering the east edge of the highway, 60 to 75 feet away; that Olson then applied his brakes as hard as he could; and that the visibility was 600 feet. They contend that whether Olson was negligent under these circumstances was a question of fact which the jury decided in respondents’ favor. *Furuta v. Randall*, 17 Cal.App.2d 384, 62 P.2d 157; *Mitchell v. Southern California Gas Co.*, 122 Cal.App.2d 692, 697, 265 P.2d 118.

Respondents maintain that it is a factual question for the jury as to whether Mr. Olson looked with proper care, and as to whether the Chevrolet was clearly visible so that he could have and should have seen it sooner than he did in order to have avoided the accident. They argue that the evidence warranted a finding that Mr. Olson was not negligent in failing to observe the Chevrolet sooner because of the fact that in the fog he was required to keep a careful lookout down the highway ahead; because the Union Oil plant blocked his vision of cars approaching the highway from the east until they got to a point near the easterly edge; and because there was no sign along the west edge of the highway warning Mr. Olson of a crossroad ahead, and he was unfamiliar with the fact that there was a crossroad at this point.

Respondents point out that there was testimony that there was oncoming traffic in the northbound lane, and argue that it was a question of fact whether Mr. Olson was negligent in failing to turn his car to the left to avoid this accident, and that it was also a question of fact whether Olson was too tired to be driving.

Respondents argue also that in considering section 552 of the California Vehicle Code, which regulates the conduct of drivers crossing a through highway and the conduct of drivers on a through highway approaching an intersection, the question as to whether Mrs. Charter negligently entered the highway when the respondents were approaching so closely as to constitute an immediate hazard, so that she should have yielded the right of way to the

respondents, or whether the respondents should have yielded the right of way to Mrs. Charter, is not a question of law, but was a question of fact for the jury to decide.

Respondents argue further that even if it could be held that the evidence is insufficient to support the implied finding of the jury that respondents were not negligent, the verdict can still be supported on the theory that the evidence is sufficient to support the implied finding of the jury that Mrs. Charter's contributory negligence proximately caused the accident. The question then arises whether the deceased, Mrs. Charter, was free of contributory negligence as a matter of law.

Appellants, however, contend that they were entitled to the benefit of the presumption that Mrs. Charter took all necessary precautions for her own safety and that there was no evidence produced at the trial to support a finding that Mrs. Charter was guilty of contributory negligence, nor was there any evidence produced that could be weighed against the presumption of care on her part.

[1] Appellants and respondents agree that it is the law of this state that in an action for the wrongful death of an automobile driver, evidence of the decedent's conduct which is sufficient to support a finding of contributory negligence, creates a conflict with the presumption of due care on the part of the decedent, the determination of which is for the jury.

[2] We are satisfied that there is sufficient evidence in the record to create a conflict with the presumption of due care on the part of Mrs. Charter and to make the issue of contributory negligence on her part one for the jury to determine. There was evidence that the Chevrolet Mrs. Charter was driving started onto and across through Highway 99W when respondents' automobile was from 60 to 75 feet north and approaching at a rate of speed between 40 and 50 miles per hour; that the respondent Joseph Lawrence Olson then applied his brakes as hard as he could, but struck the Chevrolet just behind the right door on the right side, when that part of the Chevrolet

was in the center of Olson's southbound lane. The evidence also showed that the Mercury, driven by Olson, made 60 feet of skidmarks leading up to the point of impact, and that the Chevrolet, driven by Mrs. Charter, was traveling from 10 to 15 miles per hour as it started onto and across Highway 99W. As against the presumption that Mrs. Charter exercised due care there is evidence that when the front of the Chevrolet was at the east edge of the pavement it was going 10 to 15 miles per hour; that the Chevrolet was a 1937 model automobile, with the old style gearshift; and that cars stopping to cross Highway 99W generally stopped at the east edge of the pavement. The jury could have inferred that because an automobile, especially an older one, does not start from a standing position and immediately accelerate to a speed of 10 to 15 miles per hour in a matter of a few feet, Mrs. Charter did not stop at the stop sign on the day of the accident. The jury could also have inferred from the evidence that Mrs. Charter misjudged the speed and distance of the Mercury, or that she didn't see it at all, or she would not have started onto the highway at a time when she would have to wait only a second for the Mercury to pass; that she violated section 552 of the California Vehicle Code in that she started onto the highway when the Mercury was so close as to constitute an immediate hazard; that she failed to exercise ordinary care in watching the Mercury or in looking back to the north as she got onto Highway 99W, or in stopping, swerving, or accelerating her car in order to avoid the accident.

[3,4] As hereinbefore pointed out, "every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party," and because of the evidence hereinbefore referred to and other evidence in the record, we are convinced that the questions of the negligence of respondents and the contributory negligence of the decedent were proper questions for determination by the jury. The jury was fully and correctly instructed as to the law applicable to these issues and their implied findings in favor of respondents on these

issues find substantial support in the record. Appellants have made an earnest and able argument in their effort to prove their contention that the record does not sustain the judgment. If the verdict of the jury had been in favor of appellants their argument would be very helpful in pointing evidence in support of such verdict, but in view of the adverse verdict of the jury upon the issues, the testimony relied upon by appellants merely accentuates the conflict in the testimony.

Appellants' second major contention is that the statements of defendants' counsel in his argument to the jury in reference to insurance constitute prejudicial misconduct.

Upon cross-examination of Olson, appellants introduced the extrajudicial signed statement of Olson as to the condition of visibility, which was prepared by the insurance adjuster representing the insurance company for the appellant Schleich. Olson testified: "Q. Did you make the statements that are set forth in the first two paragraphs? A. Yes, I did. That is the adjusters for the other insurance." No motion was made to strike this testimony. On redirect, counsel for respondents asked the following questions: "Q. And this statement that Mr. Cooney has introduced into evidence, where was that prepared? A. Where was that prepared? Q. Yes. A. In C. C. Thompson, Adjusters, office in Sacramento. Q. And did they hold themselves out to be the insurance investigators—" Whereupon appellants' objection was sustained as to that question.

Respondents' counsel was able to bring out the fact that the persons who took this statement persuaded Olson to accompany them back to their office in Sacramento where the statement was made. The insurance point was discussed with the court in the absence of the jury twice, and the court warned that any undue attempt to emphasize insurance would be error.

In his oral argument to the jury, referring to Olson's truthfulness in testimony, respondents' counsel stated:

"And to try to refute that, ladies and gentlemen, they bring in a statement

prepared by an insurance adjuster representing Mr. Schleich that was taken in Sacramento. He went all the way to Woodland and then took him back to Sacramento for the sole purpose of trying to lay a foundation so that the liability insurance carrier would not have to pay him for the damages to that automobile."

Whereupon appellants' objection was sustained and the jury was instructed to disregard the statement.

Appellants quote from *Fleming v. Flick*, 140 Cal.App. 14, at page 31, 35 P.2d 210, at page 218, as follows:

"The courts have frowned upon the unnecessary developing of the interest of a surety company in the trial of a damage case when the company is not a party to the suit. This is especially true when the question of negligence is so doubtful as to leave the reasonable inference that the evidence of the interest of the insurance company is likely to have prejudiced the jury, or when it appears that counsel for the plaintiff is not in good faith in presenting the evidence."

They also quote from *Freeman v. Nickerson*, 77 Cal.App.2d 40, at page 54, 174 P.2d 688, at page 696:

"It is well settled in California that gratuitous references, either in the evidence or the argument, to the fact that a defendant carries liability insurance is prejudicial misconduct justifying a reversal."

In the instant case it is to be noted that the first mention of insurance was brought out when appellants' counsel produced a written statement and, before introducing it in evidence, asked respondent Joseph Lawrence Olson if he had made it. Mr. Olson's response was: "Yes, I did. That is the adjuster for the other insurance." On redirect examination respondents' counsel asked where the statement was prepared, and after being told asked if the adjuster named had "held themselves out to be insurance investigators." Appellants' objection to the last question was sustained. In his argument to the jury respondents'

counsel referred to this testimony in the language hereinbefore quoted.

[5] We do not believe that upon the record here it can be held that respondents' counsel went beyond the bounds of legitimate argument, and certainly there is no indication that he was seeking to inject the issue of insurance into the case gratuitously or in bad faith.

In the case of *Walter v. England*, 133 Cal.App. 676, 24 P.2d 930, 934, cited with approval in *Freeman v. Nickerson*, supra, the patient of a dentist, who subsequently was sued in a malpractice action, went to the dentist and suggested that, inasmuch as all that plaintiff wanted was reimbursement for expenses, the dentist go to the insurance company, tell them he had made a mistake, and get the insurance company to make the desired reimbursement. Evidence that the defendant thanked the plaintiff and then stated, "I'll go down to my insurance company when I am in San Francisco and will tell them that I have made a mistake * * *" was held to be proper evidence. The court said, 133 Cal.App. at pages 688-689, 24 P.2d at page 935:

"It is a general rule that in this class of cases reference to the fact that a defendant is indemnified by a policy of insurance is prejudicial error, and the evil effect upon the jury of such a reference cannot be cured by striking out the testimony, nor by an admonition to the jury not to consider it in any way. *Rising v. Veatch*, supra [117 Cal.App. 404, 3 P.2d 1023]; *Squires v. Riffe*, 211 Cal. 370, 295 P. 517; *Citti v. Bava*, 204 Cal. 136, 266 P. 954. This rule, however, does not prevent such evidence being proper where the conversation involves an admission of responsibility. *King v. Wilson*, 116 Cal.App. 191, 2 P. 2d 833; *Harju v. Market St. Ry. Co.*, 114 Cal.App. 138, 299 P. 788; *McPhee v. Lavin*, 183 Cal. 264, 191 P. 23; *Lahti v. McMenamin*, 204 Cal. 415, 268 P. 644. In the case before us the conversation amounted to an admission that the appellant had made a mistake. We have heretofore held that this admission, when considered with all the testimony in the case, is subject to interpretation

as an admission of negligence, and the jury were the judges of its effect.

"The evidence having been properly admitted, we find no prejudicial error in referring to it in the argument to the jury."

In *Dullanty v. Smith*, 203 Cal. 621, at page 625, 265 P. 814, at page 816, the court said:

"The fact that this testimony contained, in addition to unobjectionable matter, references to the insurance of defendant did not necessarily make it inadmissible for all purposes. It is true that the court frowns upon any attempt to show that a defendant carries indemnity insurance, but where, as here, there is an entire absence of any indication whatsoever of lack of good faith on the part of plaintiff, evidence of this character, as an admission against interest, or for certain other purposes, may be received, notwithstanding the fact that it contains material which under other circumstances would be objectionable."

It appears from the record that appellants made the same contention as to misconduct on the part of respondents' counsel in support of their motion for a new trial, and the denial of said motion is an implied finding that respondents' counsel acted in good faith and that no prejudice resulted. It also appears that the court gave the following instruction:

"In the trial of this action questions have been asked and answers given in which a casualty insurance company is mentioned. No insurance company is a party to this action and whether any party is insured has no bearing whatsoever on any issue that you must decide. Therefore, the oath you took as jurors requires that you refrain from any inference, speculation or discussion about insurance."

We are unable to agree with appellants' contention that there was misconduct on the part of respondents' counsel but we are also of the opinion that upon the record as a whole, and in view of the court's instructions, no prejudice resulted to appellants

from the portion of the argument complained of.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



137 Cal.App.2d 610

**Lloyd A. FREDERICK, doing business as
Lloyd A. Frederick Company, Plaintiff
and Appellant,**
v.

George A. CURTRIGHT, Customcraft Chinchilla Equipment Corporation, a California corporation, and Customcraft Industries, Inc., a California corporation, Defendants and Respondents.

Civ. 20921.

District Court of Appeal, Second District,
Division 3, California.

Dec. 8, 1955.

Action to recover broker's commission. The Superior Court, Los Angeles County, James G. Whyte, J., sustained a demurrer to fifth amended complaint without leave to amend and entered a judgment for defendants, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that by producing a buyer, ready, willing and able to purchase substantially different property, broker could not earn commission which sellers by special contract had agreed to pay for sale of corporate stock and other personal property specifically described therein.

Judgment affirmed.

1. Brokers ⇨82(1)

Complaint failed to state a cause of action for recovery of commissions under contract giving business opportunity and securities broker exclusive right to sell specified corporate stock within stated period of time, in absence of allegation that broker had procured any person ready, able and willing to purchase the property within the

time specified in employment agreement or that term of broker's employment had been extended.

2. Corporations ⇨116

Sales ⇨23(1)

Written offer to purchase specified corporate stock and personal property subject to acceptance by buyers on or before specified date of further agreement to be drawn by sellers covering transfer of such property was conditional and not a firm offer to purchase the property and acceptance of offer by sellers did not preclude them from stipulating any terms they might seek to impose by the further agreement to be prepared and submitted to buyer.

3. Brokers ⇨60

Written agreement for purchase and sale of specified corporate stock and personal property, whereby sellers agreed to pay named business opportunity and securities broker specified commission, was a "special contract" in that it related solely to negotiations between sellers and buyer named therein, and broker's right to compensation thereunder depended upon a consummation of purchase by named buyer of the property described in contract upon terms and conditions substantially the same as those specified therein.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Contract".

4. Brokers ⇨49(1)

Execution of special contract for purchase and sale of corporate stock and personal property specifically described therein did not entitle business opportunity and securities broker to commission specified in contract for sale of such property, where contract expressly made sale of such property subject to acceptance by buyer of further agreement to be prepared by sellers covering numerous terms and conditions of sale.

5. Brokers ⇨56(3)

Business and securities broker was not entitled to commission on sale of corporate stock and other personal property under special contract for sale of substantially different property by which sellers had

agreed to pay broker specified commission for sale of such property.

6. Brokers ⇨56(3)

Where owner, having agreed to pay broker a commission for selling property specifically described in agreement, contracts to sell or sells substantially different property to buyer procured by broker, broker does not thereby earn commission under agreement.

7. Brokers ⇨46

In order to earn a commission, broker must render the service which is the sole consideration for the promise of compensation.

8. Pleading ⇨225(1)

Where amended complaint alleged that property sold was substantially different from that specifically described in special contract by which sellers had agreed to pay specified commission for sale of corporate stock and other personal property, it affirmatively appeared that complaint could not be further amended to state a cause of action for recovery of broker's commission, and demurrer to complaint was properly sustained without leave to amend.

William Strong, Beverly Hills, for appellant.

Sylvester Hoffmann, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff brought this action against defendant Curtright and two corporations to recover the sum of \$6,000 allegedly earned as a licensed business opportunity and securities broker for negotiating the sale of certain property of the defendants. To plaintiff's fifth amended complaint a demurrer was sustained without leave to amend; judgment was entered for defendants and plaintiff appeals.

The complaint set out as exhibits three contracts. The first was dated May 8, 1953. It gave plaintiff the exclusive right to sell "stock as listed above, for the 60 day period from May 8, 1953 to July 8, 1953 and within

30 days thereafter to parties with whom said Broker negotiated during said period, provided said Broker notifies me in writing of said negotiation." It provided "If a sale or exchange is effected during their agency for the above described stock, I agree to pay them 10 per cent of the selling price, as commission for their services, and to furnish satisfactory title to said stock." Typed on the face of the writing was "This Exclusive Extended to August 8, 1953." Above was written "Price \$60,000, Terms Cash." The second agreement was dated September 30, 1953 and was in the form of an offer by Robert A. Rub to defendants, accepted by them, to purchase all stock of the two corporations owned by Curtright "plus all of the machinery and equipment used in connection with said businesses now owned by George A. Curtright * * *." 1 The named price was \$60,000 of which \$25,000 was down payment, \$5,000 to be paid within a year plus \$1,000 per month or more until paid. It provided "This purchase and sale agreement is contingent upon the following conditions: 1. An agreement shall be drawn by Axelrod & Sevilla * * * Attorneys at Law, covering the transfer of stock and all assets, patents, beneficial business agreements now in use and owned by Customcraft Chinchilla Equipment Corporation and Customcraft Industries, Inc., and/or George A. Curtright. 2. This aforementioned agreement to be drawn by Stanley Sevilla is subject to acceptance by the purchasers on or before October 5, 1953. Furthermore, in the event that the aforementioned Agreement is not approved by the purchaser, it is expressly understood that the One Thousand Dollars (\$1,000.00) listed in this agreement will be returned to the purchaser forthwith by the LLOYD A. FREDERICK COMPANY." Over the signatures of defendant corporations was the following: "I hereby agree to pay to LLOYD A. FREDERICK COMPANY as commission ten percent (10%) of the selling price for the sale of the above stock." The third agreement was between defendants and Robert A. Rub and Saul Rub; it was signed by them and by defendants October 22, 1953. It was a contract for the

1. The "stock" was the stock of Curtright in the two corporations.

sale of other property of the defendants, as hereinafter explained. It contained no provision for the payment of a commission to plaintiff. It was alleged in the earlier complaints, but not in the fifth amended complaint, that the sale was never consummated.

[1] It was not alleged in the complaint that plaintiff procured Rub or any other person ready, able and willing to purchase the property within the time specified in the employment agreement nor was it alleged there was any extension of the term of plaintiff's employment. In the absence of such allegations the complaint failed to state a cause of action on the contract of employment. *Augustine v. Trucco*, 124 Cal.App. 2d 229, 237, 268 P.2d 780; *Ford v. Palisades Corp.*, 101 Cal.App.2d 491, 497, 225 P.2d 545; *Lisle v. E. B. & A. L. Stone Co.*, 103 Cal.App. 409, 284 P. 680; 9 Cal.Jur.2d 256, 267.

If plaintiff earned a commission it was under the second contract which provided for the payment of a commission for a sale of the property. It was alleged that although the term of the agreement of employment had expired, plaintiff procured Robert A. Rub to purchase the shares of stock and other personal property by the agreement of September 30 and that Rub continued ready, able and willing to purchase in accordance with the October 22nd agreement, but that defendants refused to consummate the sale or to pay a commission.

[2] As we have seen, the offer made by Rub September 30th was conditional: It provided for a further agreement to be drawn and accepted by the purchaser by October 5th and it left it optional with him to approve or disapprove the contract when it should be drawn. It was not a firm offer to purchase the property and it did not preclude defendants from stipulating any terms they sought to impose by the agreement which they were to prepare and submit to Rub. It was an agreement to enter into an agreement by October 5th if there should be a meeting of the minds of the parties as to all matters that had not been settled. Inspection of the October

22nd agreement discloses that there were many conditions imposed by each of the parties as to which the September 30th agreement was silent. The deferred payments were to bear 6 per cent interest; accounts receivable were to be assigned to the sellers as security; promissory notes were to be given by the sellers to the purchasers in adjustment of income tax liabilities; the purchasers assumed a liability of the corporations to Curtright, to be included in their promissory note; certain other liabilities of the sellers were to be assumed in an amount shown on a balance sheet, and any excess thereof was to be credited on the purchase money note. The agreement referred to schedules of accounts and assets as shown upon certain attached exhibits but the agreement pleaded had no such exhibits attached and the same were not identified in any manner. An inventory was to be taken of accounts receivable, physical assets and cash which must show a value of not less than 80 per cent of the book value of the inventory; there were certain warranties by the sellers with respect to assets and liabilities and the verity of balance sheets, and a provision for offsets against the purchase price; leases held by the defendants were to be assigned; there were provisions for the purchase of certain accounts receivable and a guarantee of the payment of 95 per cent of the amount of all accounts receivable within 120 days after close of escrow; there was a license to exclusive use of the custom-craft trademark by the purchasers for 10 years with certain exceptions, and also for the use of the corporate names of defendant corporations; the sellers were to cause certain third parties to continue to do business with the purchasers at prices no greater than defendants had been charged; defendants were to refrain for 5 years from engaging in any competing business; defendants were not to induce any employees to leave their employment and Curtright was to assist the purchasers in the business for two weeks, without compensation.

In addition to the mentioned terms and conditions which were not stated in the September 30th agreement, it was alleged in the complaint that by the October 22nd

agreement defendants agreed to sell and Rub to buy "substantially different assets and personal property belonging to said defendants than those mentioned in the agreement cited hereinabove as Exhibits 'A' and 'B'" (the May 8th and the September 30th agreements). Plaintiff does not mention in what respects the assets and personal property were "substantially different" but it may be noted that the first agreement referred only to corporate stock, the second was for the purchase of stock "plus all of the machinery and equipment used in connection with said businesses now owned by George A. Curtright individually" and the October 22nd agreement, as pleaded, did not contain a complete description of the property to which it related.

[3-5]. The contract of September 30th to which plaintiff was not a party was a special contract in that it related solely to the negotiations between defendants and Rub. Plaintiff's claim to compensation depended upon a consummation of a purchase by Rub of the property described in the contract upon terms and conditions substantially the same as those specified in the agreement. If such a sale was not made the agreement to pay a commission was of no efficacy and created no obligation on the part of defendants. Plaintiff cannot claim that the September 30th contract established that the minds of the parties had met with respect to the property to be sold, the price and terms and conditions of the sale; in fact he does not make that claim. It is clear from the agreement that it was only a memorandum covering the general features of the negotiations and leaving to future arrangement phases of the transaction upon which the parties might or might not agree. They could very well have been in disagreement as to many of the particulars covered by the October 22nd agreement. Manifestly, inasmuch as there were numerous terms and conditions left to future agreement plaintiff did not earn a commission even if he brought the parties together and induced them to sign the September 30th agreement. It may not be doubted that if it had been a firm, enforceable agreement a commission would have

been earned even if the sellers had wrongfully refused to perform it, but such is not the case. Plaintiff did not produce a buyer ready, able and willing to buy on terms and conditions specified by the seller. In material respects the terms and conditions of a sale were not specified nor agreed to. Plaintiff does not contend that he earned a commission by producing a buyer ready, able and willing to purchase the property described in the September 30th agreement upon the terms and conditions therein stated, yet he relies upon the promise of that agreement to pay him a commission for producing purchasers for property under the October 22nd agreement, in which there was no promise to pay a commission. If the property covered by the latter agreement had been the same as that described in the September 30th agreement, and if the terms had been substantially the same, a different question respecting plaintiff's right to a commission would have been presented; but far from alleging that it was the same property it was alleged that the agreement related to "substantially different assets and personal property belonging to said defendants."

[6] It seems self-evident that if an owner by special contract promises to pay a broker a commission for selling property specifically described in the agreement, and if the owner contracts to sell or sells substantially different property to one produced by the broker, a commission has not been earned. Plaintiff's brief makes no mention of the allegation of the complaint that the property was substantially different from that mentioned in the first and second agreements and he advances no theory under which a broker employed to effect the sale of one property would earn a commission by producing a buyer for entirely different property.

[7,8] It is elementary that in order to earn a commission, a broker must render the service which is the sole consideration for the promise of compensation. *Backman v. Guadalupe Realty Co.*, 78 Cal.App. 347, 248 P. 296. Since it affirmatively appears from the fifth amended complaint that it could not be further amended to state a

cause of action, it was not error to sustain the demurrer without leave to amend.

The judgment is affirmed.

PARKER WOOD, J., and NOURSE,
Justice pro tem., concur.



137 Cal.App.2d 684

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Harry William COGHLAN, Defendant and
Appellant.

Cr. 5406.

District Court of Appeal, Second District,
Division 1, California.
Dec. 9, 1955.

Defendant was convicted of abortion. The Superior Court, Los Angeles County, Clement D. Nye, J., after trial without jury entered judgment and defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain judgment, and no prejudicial error occurred during trial.

Judgment and order affirmed.

1. Criminal Law Ⓒ260(11)

It is a function of trial judge to interpret testimony of witnesses.

2. Arrest Ⓒ63(4), 71

Where defendant, in prosecution for abortion, was visited by officer who arrested defendant and searched his office for instruments, after defendant had admitted a "treatment," such arrest and search was proper. Pen.Code, § 836.

3. Abortion Ⓒ11

Evidence was sufficient to corroborate testimony of prosecuting witness, to show corpus delicti, and to sustain conviction for abortion. Pen.Code, § 274.

Walter Gould Lincoln, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged by information with the violation of Section 274 of the Penal Code. The abortion was performed on Dorothy Kwiatt. A jury was duly waived and following the trial defendant was adjudged guilty. Sentence was suspended and defendant placed on probation for five years, the first six months thereof to be served in the county jail.

It is contended on appeal that the corpus delicti was not proven; that the testimony of the complaining witness was not corroborated; that "the decision is against law for the reason that no intent on the part of the defendant was proven".

It is also contended that "Search of defendant's house was made without any warrant having been issued. An arrest was made by a peace officer who neither saw the offense committed, nor could then have had reasonable cause for believing the person arrested to have committed it. Penal Code 836".

Other contentions relate to the trial court's rulings on objections and motions relating to the admissibility or inadmissibility of evidence.

As recited in respondent's brief, "On August 5, 1954, after she had missed two periods, but was in the best of health, she talked to the appellant at his office, which was in his home on Rimpau. She gave the name 'Judy Steele', which was a pet name and her maiden name. She told the appellant that she was pregnant and wanted him to help her." Appellant quoted a price of \$25 for an examination and \$10 for each treatment. From August 9 to the 14th inclusive the alleged victim visited appellant's office daily and received treatments. "On Sunday, the 15th, Mrs. Kwiatt went to the appellant's house on South Rimpau and was shown into the treatment room by the receptionist. Mrs. Kwiatt showed the appellant that her dress was soaking wet. She felt as though she was running a very high

fever. The appellant said, "Don't become panicky now. If you have any pains or undue or excess cramps, take a shot of brandy," and told her if she bled excessively, to drink jello. Then the appellant gave her a treatment which was the same in every respect, and was with the same instruments, as those she had received on the previous six days. * * * "On Monday she called another physician, who prescribed terramycin, but she did not order it. She was bleeding from her vagina. She was taken to the Los Angeles County General Hospital on Monday at about 8:00 p. m." There the miscarriage occurred.

On August 19th Officer Zander visited appellant. "There he told the appellant that his name was Fletcher Longstaff and that he wanted to talk to him about his girl friend."

[1] In the conversation that followed appellant admitted the "treatment" but did not admit literally that any violation of the law was involved. However, from a reading of Officer Zander's testimony it is evident that the trial judge reached the conclusion that appellant, in effect, admitted to the officer the true purpose of the treatments. It is the function of the trial judge to interpret the testimony of the witness and in the light of the record the conclusion of the trial judge as noted above was not unwarranted as a matter of law. The record therefore supports appellant's contention that the testimony of Mrs. Kwiatt was corroborated.

[2] Other contentions of appellant, as above noted, lack support in the record. That the corpus delicti was proven there is no question and the contention that Officer Zander's search of appellant's house is also without merit. As the record discloses at the time the officer visited appellant and following the conversation with appellant as above noted, appellant was placed under arrest. The officer then searched the office for instruments, etc. These articles were introduced in evidence and incidentally there was no objection to their introduction.

Without going into detail it is sufficient that no prejudice resulted from the court's rulings with regard to the admission and

exclusion of evidence or the examination of the witnesses.

[3] A review of the record reveals that the evidence is sufficient as a matter of law to support the judgment and that no prejudicial errors occurred during the trial. The judgment and order are therefore affirmed.

WHITE, P. J., and ASHBURN, J. pro tem., concur.



187 CalApp.2d 633

C. R. OLLER and Alleen Oiler, his wife,
Plaintiffs and Appellants,

v.

SONOMA COUNTY LAND TITLE COMPANY, a corporation, Angelo Pieroni, a widower, John Chalmers and Edna Chalmers, his wife, Defendants and Respondents.

Civ. 8626.

District Court of Appeal, Third District,
California.

Dec. 8, 1955.

Action to set aside sale under trust deed. The Superior Court, Sonoma County, McGoldrick, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Peek, J., held, inter alia, that where foreclosure sale under trust deed was not irregular, and there was no unfairness on part of trustee or injury to trustors by wrongful act of trustee, and trustee, under terms of trust, was under a duty to sell property upon default, inadequacy of sale price, if any, was no ground for setting aside the sale.

Judgment affirmed.

1. Mortgages ⇐357

Where trust deed authorized trustee to postpone sale by oral proclamation, oral proclamation of postponement was sufficient, and no other notice of postponed sale

was necessary. West's Ann.Code Civ. Proc. § 694.

2. Mortgages ⇨357

Where six months had elapsed from date of notice of default to date of final sale under trust deed, and trustor had requested prior continuances and, at time of last request, admitted that he did not know whether he could produce money or not, trustee's refusal to continue sale upon trustor's assurance that he would have sufficient money within a couple of days to pay indebtedness did not constitute bad faith.

3. Mortgages ⇨369(3)

Inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made, and there must be additional proof of some element of fraud, unfairness or oppression accounting for and bringing about the inadequacy.

4. Mortgages ⇨369(3)

Where foreclosure sale under trust deed was not irregular, and there was no unfairness on part of trustee or injury to trustors by wrongful act of trustee, and trustee, under terms of trust, was under a duty to sell property upon default, inadequacy of sale price, if any, was no ground for setting aside the sale.

George E. Dilley, Santa Rosa, for appellants.

Edward T. Koford, Santa Rosa, for respondent John Chalmers.

Barrett & McConnell, Santa Rosa, for respondent Sonoma County Land Title Co.

PEEK, Justice.

Plaintiffs instituted this action to set aside a sale under a deed of trust. By the terms of the instrument, plaintiffs as trustors transferred to defendant Sonoma County Land Title Company, as trustee, certain land in Sonoma County to secure money loaned to plaintiffs by defendant Pieroni, the beneficiary. The defendant John Chalmers was the purchaser at the sale. Defendant Edna Chalmers filed a

disclaimer and the defendant Pieroni was not served with process. From a judgment in favor of defendants the plaintiffs now appeal, contending that the foreclosure proceedings were improper; that the trustee was guilty of bad faith; and that the property was sold for a grossly inadequate price. We conclude that none of such contentions can be sustained.

[1] Plaintiffs first attack the foreclosure proceedings under the deed of trust, arguing that they were irregular in that the oral announcement of postponement made by an officer of the trustee was made when no one was present and hence was insufficient notice of the time and place of the postponed sale. The record however discloses additional evidence that the defendants Chalmers and one Poulsen were present and heard the announcement, and that the plaintiff C. R. Oller was not present. Here the deed of trust expressly authorized the trustee to postpone the sale by oral proclamation. Thus when the defendants' officer, at the time and place fixed in the original notice of sale and without further publication and posting by oral proclamation, postponed the sale to a definite future date, he was acting validly within the express provisions of the deed of trust. *Mack v. Golino*, 95 Cal.App.2d 731, 734, 213 P.2d 760. "No other notice of postponed sale need be given." Code of Civil Procedure, § 694. Since the rule in this state is so well established, any discussion of the cases from other jurisdictions cited and relied upon by plaintiffs' counsel would appear unnecessary.

[2] Plaintiffs' second contention is that the defendant trustee was guilty of bad faith in refusing plaintiffs' request for a continuance of the sale. From the record it appears that such request was predicated upon the assurance of plaintiff C. R. Oller that he would have sufficient money within "a couple of days" to pay the amount of the indebtedness. Under like circumstances the court, in *Galusha v. Meserve*, 58 Cal.App. 174, 178, 208 P. 348, 350, held that,

"The fact that at the time of the sale appellant informed the trustee

that he was making arrangements to obtain money with which to pay the debt did not obligate the trustee to grant a further postponement of the sale. The creditor having become entitled to enforce payment of the note, the debtor has no valid ground on which to attack the validity of the sale merely because he was not allowed further time in which to pay his debt."

The record in the present case shows that the notice of default was filed and a copy mailed to plaintiffs by registered mail on March 31, 1952; that notice of sale was published on August 5, 1952; that on September 18, 1952, the sale was continued to September 30, 1952. In other words, six months elapsed from the date of notice of default to the date of final sale. Additionally it appears from the testimony of Oller himself that he had requested prior continuances from the trustee and at the time the trustee refused his final request for a continuance stated, "* * * he didn't know whether I could produce the money or not." The case of *Winbigler v. Sherman*, 175 Cal. 270, 165 P. 943, upon which plaintiffs place sole reliance, is not in point. There the debtor had no actual notice of the sale, and a letter written by the creditor to the debtor was couched in such terms as to convey the meaning that proceedings had not been commenced, although the date for the sale had actually been set. In addition, the machinery for which the debt was incurred was not operating satisfactorily, and lastly the debt was only approximately 10 per cent of the value of the property.

[3, 4] The final contention of the plaintiffs is that the property was sold for a grossly inadequate consideration. However, even assuming that the price was inadequate, that fact standing alone would not justify setting aside the trustee's sale. "In California, it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a

trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." *Stevens v. Plumas Eureka Annex Mining Co.*, 2 Cal.2d 493, 496, 41 P.2d 927, 928; see also *Engelbertson v. Loan & Bldg. Ass'n*, 6 Cal.2d 477, 479, 58 P.2d 647, 648. The record in this regard shows that at the time of trial and before submission of the cause, the trial court allowed plaintiffs to amend their first amended complaint which was verified by changing the allegation as to value from \$16,000 to \$25,000; that at the hearing conflicting testimony was given as to the value as follows: Oller testified to \$25,000; a witness for plaintiffs testified to \$16,000; and the defendant Chalmers testified that if he had been buying the property direct from plaintiffs he would have been willing to have paid \$6,250. At the sale after 24 bids were made by three bidders, the property was sold to defendant Chalmers, the highest bidder, for \$5,025. The surplus proceeds of the sale in the sum of \$384.48 were ultimately transferred to plaintiffs some months after the sale. As the court noted in the *Engelbertson* case, "Since inadequacy of price is not alone ground for setting aside the sale, the failure of the court to find upon the value of the property is immaterial." Necessarily, therefore, since the record discloses no irregularity in the foreclosure sale nor any unfairness on the part of the trustee or injury to plaintiffs by any wrongful act of the trustee; and since under the terms of the trust, the trustee was under a duty to sell the property, the alleged inadequacy in the selling price, if any, could not have resulted from any irregularity in the conduct of the sale or unfairness on the part of the trustee.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

137 Cal.App.2d 681

Kenneth M. KIRK, Plaintiff and Appellant,
v.

Bert A. RUTHERFORD, Ronald B. Rutherford, by his Guardian ad litem, Richard P. B. Tyson, Defendants and Respondents.
Civ. 21223.

District Court of Appeal, Second District,
Division 1, California.

Dec. 9, 1955.

Rehearing Denied Dec. 30, 1955.

Hearing Denied Feb. 1, 1956.

Action against father and guardian ad litem of minor son for personal injuries and property damage sustained in automobile collision with automobile driven by minor son. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered judgment and plaintiff appealed. The District Court of Appeal, White, P. J., held that where plaintiff relied upon minute order of trial court, requiring plaintiff to pay fee of guardian ad litem appointed for minor defendant at plaintiff's request, as a basis for procuring inclusion in his cost bill and judgment of a recognition of a right to collect guardian's fee from defendant, plaintiff was estopped from thereafter taking an inconsistent position and denying his obligation to pay fee of guardian ad litem.

Appeal dismissed.

1. Estoppel §91(1)

Where plaintiff relied upon minute order of trial court, requiring plaintiff to pay fee of guardian ad litem appointed for minor defendant at plaintiff's request, as a basis for procuring inclusion in his cost bill and judgment of a recognition of a right to collect guardian's fee from defendant, plaintiff was estopped from thereafter taking an inconsistent position and denying his obligation to pay fee of guardian ad litem.

2. Election of Remedies §3(1)

One to whom two inconsistent courses of action are open and who elects to pursue one of them, is afterward precluded from pursuing the other.

3. Appeal and Error §153

Where plaintiff moved to have fee of guardian ad litem included in plaintiff's memorandum of costs and in judgment as corrected, plaintiff effectively waived his right to appeal from minute order of trial court requiring him to pay the fee of guardian ad litem.

Snyder & Fletcher, Owen E. O'Neil, So. Pasadena, for appellant.

Robert M. Fisk, Pasadena, for respondents.

WHITE, Presiding Justice.

Plaintiff was awarded judgment for personal injuries and property damages incurred in a collision of plaintiff's automobile with one owned by one of the defendants and driven by the other defendant, his minor son. After service of summons on the minor defendant, who was then over 14 years old, and no appearance by him, on plaintiff's motion Richard P. B. Tyson was appointed guardian ad litem of said minor defendant. Tyson's motion to be relieved of the guardianship was opposed by plaintiff and denied by the court. He appeared and defended. No appeal has been taken from the judgment. It is not in the record on the instant appeal, nor does the date of its entry appear.

A minute order, made February 24, entered February 28, 1955, and reading as follows: "In the matter of the manner or method of paying the fee of the Guardian ad Litem herein, heretofore fixed in the sum of \$225.00 on January 20, 1955, plaintiff is ordered to pay said fees as follows: \$50.00 forthwith, \$50.00 on March 15, 1955, and the balance on or before April 1, 1955". is the order from which the instant appeal was taken.

On March 4, 1955, the guardian ad litem's motion to tax costs was heard and, pursuant to stipulation between the parties in open court, a \$25 fee for an expert witness was stricken therefrom and "fees of Guardian ad Litem in the sum of \$225.00" was added to plaintiff's cost bill. The court then made its order to that effect and correcting the

judgment theretofore entered so that plaintiff's costs taxed therein be \$283.20 instead of \$83.20. Written order was made and filed March 9, 1955 and entered March 28, 1955. No appeal has been taken from that order.

Respondent's contention is that, when plaintiff moved on March 4th that his cost bill and the judgment be amended to include the fee required to be paid by him under the provisions of the minute order of February 24th, he sought and accepted the only benefit that could accrue to him under that order, and thereby he waived his right to appeal therefrom. There having been no appeal from the judgment as corrected to include the amount of such fee, it is obvious that, if the minute order from which the instant appeal was taken should be reversed, plaintiff's said judgment would then include \$225 costs not paid by him.

[1-3] We agree, for slightly different reasons, that appellant has estopped himself to appeal from the order of February 24th. When he relied upon it as a basis for procuring the inclusion in his cost bill and judgment of a recognition of a right to collect the guardian's fee from defendant he precluded himself from thereafter taking an inconsistent position and denying his obligation to pay the taxed item. To quote *Schulze v. Schulze*, 121 Cal.App.2d 75, 83, 262 P.2d 646, 650: "The defendant may not play fast and loose with the court in this fashion. He cannot in one breath say the judgment is valid,—obtain relief thereby; and in the next, say it is invalid. * * * One to whom two inconsistent courses of action are open and who elects to pursue one of them, is afterward precluded from pursuing the other." And to quote from *Alexander v. Hammarberg*, 103 Cal.App.2d 872, 879, 230 P.2d 399, 404: "These two positions are entirely inconsistent. The courts will not recognize or tolerate such tactics. A party cannot thus 'blow both hot and cold.' *McDanels v. General Ins. Co.*, 1 Cal.App.2d 454, 459, 36 P. 2d 829, 832; *Chaquette v. Ortet*, 60 Cal. 594, 600. The courts would be impotent indeed if they were compelled to approve such duplicity. Under elementary principles, even if the point were sound which it

is not, *Hammarberg* has waived or is estopped from successfully urging it." By his motion to have the \$225 included in his memorandum of costs and in the judgment as corrected, plaintiff effectively waived his right to appeal from the minute order requiring him to pay the fee of the guardian ad litem.

Appellant's statement in his Reply Brief that "* * * if the court's order should be reversed * * * he would not even hope to support any attempt to collect it from respondent" does not alter the situation. *Schubert v. Reich*, 36 Cal.2d 298, 300, 223 P.2d 242.

Because appellant's right to prosecute this appeal had been waived, we have not considered the questions raised by him as to the court's right to assess the fees due the guardian ad litem of a minor defendant (possibly insolvent and whereabouts unknown) against a successful plaintiff, at whose instance the guardian was appointed and retained.

The appeal is dismissed.

DORAN, J., and ASHBURN, J., pro tem., concur.



137 Cal.App.2d 725

Dorothy B. TUTTLE, Administratrix of the Estate of Florence Evelyn Powell, Deceased, Plaintiff and Appellant,

v.

Francis Marion BESSEY and Pearl Bessey, Defendants and Respondents.

Civ. 8656.

District Court of Appeal, Third District, California.

Dec. 12, 1955.

Action by administratrix against decedent's son and his wife to set aside deed from decedent to herself and son as joint tenants, and deed from decedent and son to son and wife as joint tenants on grounds

that decedent was of unsound mind at time of execution of the deeds, that son and wife did not pay consideration therefor, and that execution had been procured by fraud and undue influence. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment for son and wife, and administratrix appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain judgment.

Judgment affirmed.

1. Deeds §§210, 211(1, 3, 4)

In action by administratrix against decedent's son and his wife to set aside deed from decedent to herself and her son as joint tenants and deed from decedent and son to son and wife as joint tenants on grounds that decedent was of unsound mind at time of execution of the deeds, that son and wife did not pay consideration therefor, and that execution had been procured by fraud and undue influence, evidence was sufficient to sustain judgment for son and wife.

2. Deeds §§68(1½)

Rules governing capacity to execute a deed are, in general, the same as those governing testamentary capacity.

Otis D. Babcock, Sacramento, for appellant.

Frank H. McAuliffe and Walter C. Frame, Sacramento, for respondents.

PEEK, Justice.

[1] The present controversy arises out of two deeds; the first from the decedent to herself and her son, Francis Marion Bessey, as joint tenants; and the second from herself and her son to himself and his wife, Pearl Bessey, as joint tenants. The plaintiff administratrix, who is a granddaughter of the deceased, filed her action to set aside both deeds upon the ground that decedent was of unsound mind at the time of the execution thereof; that defendants paid no consideration therefor; and that the execution was procured by fraud and undue influence. Defendants denied generally the

specific allegations of plaintiff's complaint. At the conclusion of the trial on the issues so joined, the court found in favor of defendants. Plaintiff's appeal from the judgment is essentially an attack upon the sufficiency of the evidence and appears to be without merit.

The record shows that when the deeds were executed, the decedent was 85 years of age. Her eyesight was poor, and she wore a hearing aid. She remembered anniversaries and birthdays, wrote letters to friends and relatives until her last illness, kept her appointments, was active and attended church regularly. A neighbor, Rior-dan Hayer, testified that decedent visited him about once a month; that her memory was better than average for her age; that in his opinion she knew the effect of a deed; and that she told him in 1942 that the property in question was to go to her son, Francis, when she died. A grandnephew, Richard Bessey, testified he saw her for several hours at a time once or twice a week; that her memory was good and that she knew the effect of a deed; that she had told him on several occasions that she was going to arrange matters so that the property in question would not be willed, because wills could be broken, and that the property would go to her son. A neighbor, Mrs. Russell, testified that decedent was alert to her last illness and she believed her to be competent. Mrs. Russell's husband, LeRoy, testified that he had known her for several years, saw her daily and talked with her approximately twice a week. To him her memory seemed about the same as that of many older persons, and in his opinion she knew what she was doing. She told him that she originally owned 10 acres; that a daughter, Mrs. Cory, had received five acres; that a stepson, Jimmy, had received three acres; and on several occasions she had told him that the defendant, her son, would get the house and the two acres which were left. The witness further testified that decedent asked him if he knew where a deed could be prepared, and together they went to a realtor's office where the second deed was prepared and signed; that the realtor asked decedent, following

the preparation of the deed, if that was what she wanted, and she replied that it was.

The plaintiff now argues that the summarized evidence is insufficient to support the judgment, because defendants failed to sustain the burden imposed upon them to prove good faith, adequate consideration and independent advice in procuring the property.

[2] As the court noted in *Brunoni v. Brunoni*, 93 Cal.App.2d 215, 218, 208 P.2d 1028, 1030, "The rules governing capacity to execute a deed are in general the same as those governing testamentary capacity." Examining the record in light of this rule, we find no evidence other than the conflicting evidence given by plaintiff that the decedent at the time of executing the conveyances was not of sufficient mental capacity to understand the nature of her act, the extent and character of her property and the relationship to persons who were the natural objects of her bounty. She had stated on numerous occasions that she intended to give the property in question to her son, the defendant; she knew the extent of her property; she did convey this property to her son and his wife; she asked of a neighbor where the deed could be prepared, and when asked by the realtor if that was what she wanted, she replied in the affirmative; she had recognized her other children; she knew what she was doing and she knew the effect of a deed. This evidence was more than ample to sustain the findings of the trial court.

Although the complaint alleged that defendants procured the execution of the deeds with the intention of cheating and defrauding Francis' brothers and sisters, it does not appear from the settled statement that any brother or sister was in fact excluded or was in any way injured by defendants receiving the deeds in question from Francis' mother. All of them had previously received property from her. Even if the facts were as plaintiff contends, the record shows no evidence of solicitation, inducement or influence to support an inference of undue influence on the part of defendants in obtaining the deeds from decedent. No showing is made that respond-

ents exercised any pressure whatsoever on the mind of decedent; in fact all of the evidence is to the contrary. The voluntary character of her acts in executing the deeds is amply shown by the statements made by her to her neighbors and to her grandnephew. *Goldman v. Goldman*, 116 Cal.App.2d 227, 253 P.2d 474.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



137 Cal.App.2d 786

Josephine I. MOWREY, Plaintiff and Respondent,

v.

MARINA CORPORATION, Defendant and Appellant.

Civ. 5219.

**District Court of Appeal, Fourth District,
California.**

Dec. 14, 1955.

Action by waitress against employer for damages for burns allegedly sustained while assisting fellow waitress in carrying a large tray of steaming lobster. The employer was not covered by workmen's compensation insurance. The Superior Court, Orange County, Raymond Thompson, J., entered judgment for defendant, but granted plaintiff's motion for new trial. Defendant appealed from this order. The District Court of Appeal, Griffin, J., held that where waitress' counsel offered his own affidavit to effect that fellow waitress, who had denied incident at trial, had testified in contradiction of statements she had previously made to him, and contrary to understanding of parties during hearing before Industrial Commission, and at time of pretrial conference, and, in view of statutory presumption of negligence of em-

ployer, trial court did not abuse its discretion in granting a new trial.

Order affirmed.

1. New Trial ⇨163(2)

Where motion for new trial was made on all statutory grounds, and trial court entered minute order granting motion upon ground of insufficiency of evidence to support judgment, and later, court signed written order reciting the fact of insufficiency of evidence, though somewhat vague, order was construed to grant new trial on the statutory grounds, including the insufficiency of the evidence to support the judgment. West's Ann.Code Civ.Proc. § 657, subd. 7.

2. New Trial ⇨90

In action by waitress against employer for damages for burns allegedly sustained while assisting fellow waitress in carrying a large tray of steaming lobster, where, upon motion for new trial, waitress' counsel offered his own affidavit to effect that fellow waitress, who had denied incident at trial, had testified in contradiction of statements she had previously made to him, and contrary to understanding of parties during hearing before Industrial Commission, and at time of pretrial conference, and, in view of statutory presumption of negligence of employer, trial court did not abuse its discretion in granting a new trial. West's Ann.Labor Code, § 3708; West's Ann.Code Civ.Proc. § 657, subd. 7.

3. Appeal and Error ⇨977(3)

The granting of new trial rests so completely within the discretion of the trial judge that an appellate court will not ordinarily interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. West's Ann.Code Civ.Proc. § 657, subd. 7.

Hurwitz & Hurwitz, by Robert R. Hurwitz, Newport Beach, for appellant.

Otto K. Paulus, Laguna Beach, for respondent.

GRIFFIN, Justice.

Josephine I. Mowrey, a waitress for defendant and appellant, Marina Corporation, brought this action for damages against defendant alleging that she was injured on December 14, 1952, while waiting on customers; that one Mildred Stockton, another waitress, was carrying a heavy tray in the dining room and she called plaintiff to assist her because the tray was too heavy and she was afraid she would drop it. The complaint further alleged that plaintiff immediately placed her hands under the edge of the tray to keep it from falling or tipping; that Mildred negligently and carelessly permitted the tray to tip and caused the casserole thereon to skid; and that by reason of the careless act of Mildred the steaming liquid from the casserole, containing steaming lobster, spilled over and upon the hands of plaintiff and badly scalded and burned them, to her detriment and damage in the sum of \$10,000. Special damage in the sum of \$2,811.95 was also claimed. Defendant corporation appeared by answer and denied generally these allegations, admitted that plaintiff sustained injuries while employed by it; alleged that her injuries were the result of an unavoidable accident; and that she was adequately compensated therefor by virtue of an award by the Industrial Accident Commission in the sum of \$796.80, plus medical expenses, etc.

It appears that a pretrial conference was held on May 12, 1954, and as a result of an order of the judge, approved by counsel for the several parties, it was "agreed" that plaintiff "was asked to assist another employee to prevent a tray containing food from tipping while the other employee was carrying. Thereafter, the tray did tip and the food thereon was upset and spilled over and upon the hands of the plaintiff causing the injuries complained of * * that at the time of this injury the defendant was not covered by Workmen's Compensation Insurance * * *"; that the satisfaction of the award received in evidence sets forth the items of such award; that "It is admitted by the defendant that the plaintiff was an employee, that at the

time of the injury she was acting in the scope of her employment, that she was injured, and that the defendant was not covered by Industrial Accident Insurance"; "that there is a presumption that the injury sustained by the plaintiff was proximately caused by the negligence of the defendant"; and that the principal issues will be: "1. Whether or not there was any negligence on the part of the defendant. 2. Whether or not it was an avoidable accident. 3. Nature and extent of the plaintiff's injuries. 4. Amount of plaintiff's damages, if any, including loss of earnings. 5. The extent to which any award made to the plaintiff by the Industrial Accident Commission shall be credited to any judgment recovered in this action. 6. Amount of plaintiff's attorney's fees, if any."

Subsequently, on September 15, 1954, the case came on for trial. At that time counsel for defendant stated to the court that he did not agree with a part of the statement in the pretrial order because his evidence would show that the alleged accident did not happen in the manner set forth and that he did not believe it amounted to a stipulation as to that fact. The court stated it would relieve him from the effect of it, if it did amount to a stipulation. Counsel for plaintiff stated he expected to show that plaintiff was called to the rescue of Mildred Stockton when a tray containing a heavy tureen of lobster began to tip and slide and endanger the safety of certain patrons, and that as plaintiff reached for the tray the contents of the tureen spilled over and the hot liquid from the lobster spilled upon her hands and seriously burned her.

Medical testimony was then presented as to the extent of the injuries and plaintiff testified that Mildred Stockton (now Donovan) was carrying a very heavy tray on this Sunday; that it started to slip and Mildred asked for help so she reached up under the tray to help her when the tray tilted, causing the liquid to splash on her hands.

Mildred testified for the defendant that she was carrying the tray and asked plaintiff to help her lower the tray to the serving stand and she did; that plaintiff grasped

the edge of the tray and helped her lower it; that no food spilled or dropped from it; that neither the tray nor any of the dishes dropped or skidded, and no containers thereon lost any of their contents at any time; that she completed serving the customers and took the tray back to the kitchen; that she believed plaintiff touched a silver serving dish in which broiled lobster was served and which had been heated in the oven; that there were no juices on the broiled lobster except the melted butter; and that plaintiff continued working that day and worked other days thereafter with her hand bandaged. She testified that the day before this occasion she noticed plaintiff already had a bad-looking burn on the palm of one of her hands; that they discussed it at that time and plaintiff told her she knew about it; and that she got it at home and hated to work with such an unsightly burn.

By way of impeachment plaintiff testified that Mildred said in the hall at the Industrial Accident Commission hearing that juice did spill out of the tray and the tray tipped because it was too heavy. It was subsequently stipulated that at the hearing before the Industrial Accident Commission the following took place, according to the report of the hearing officer:

"Mildred Stockham Donovan was called as a witness by employer and it was stipulated that if she were called she would testify that before this injury she saw a burn on the palm of one of applicant's hands and she suggested that applicant go to the doctor. That later she saw applicant with 'new skin' on it. That later applicant got the lobster burn on her hand. That she does not know just when applicant got the lobster burns. That she believed applicant worked some after she got the burns from the lobster. That they served lobster and all types of dinners from noon on. That she believes the lobster did not spill out of the tray but only the juice."

The witness said she did not testify at the hearing and this was only the attorneys' stipulation as to what her testimony

would be. The case was submitted on this evidence and judgment was rendered for the defendant. On the motion for new trial, on all statutory grounds, plaintiff's counsel filed an affidavit reciting that before the Industrial Accident Commission hearing he talked with Mildred about the accident; that she stated to him that the tray she was carrying tipped and spilled hot liquid on the fingers and hands of the plaintiff; that the reason the tray slipped was because it was too heavy for her to carry; that she underestimated her ability and strength to carry it; that if a new trial was granted he would so testify; that a doctor, who examined plaintiff's hand shortly after the incident, found the burns appeared to be the result of scalds which were greatest between her fingers and on the back of her fingers and hands; that he would so testify at a new trial; that this evidence was now proffered because of "surprise" when Mildred testified as she did at the trial; and that he was without previous notice of such change of testimony.

An affidavit of the doctor was filed in support of the motion. The court took the matter under advisement and by minute order of December 8th the motion was "granted upon grounds of insufficiency of the evidence to support the judgment". Subsequently the judge signed a written order reciting that the motion had been submitted to the court "And it appearing to the Court that there is insufficient evidence to sustain or justify the Court's decision, it is therefore ordered and adjudged that the judgment heretofore entered in the above entitled matter be vacated and set aside, and that a new trial be granted to plaintiff."

[1] Defendant's counsel first contends that the orders are confusing as to whether the court granted the motion on all grounds stated in the notice or only on the one ground of insufficiency of the evidence, and also contends that the written order is not sufficient because the ground of insufficiency of the evidence is only contained in the recital of the order and not in the body of the order granting the new trial and therefore insufficiency of the evidence cannot be considered as one of the grounds.

Section 657, subd. 7, Code Civ.Proc. There is some merit to the argument as to the confusion but, construed as a whole, we believe the manifest intent of the order was that a new trial was granted on the grounds stated, including insufficiency of the evidence.

In considering the motion for new trial the trial judge signed a memorandum opinion in which he recites that after more thought he was brought to the conclusion that perhaps the evidence was not sufficient to dispel the presumption of negligence on the part of defendant, and if it was true that liquid was spilled on both of plaintiff's hands, and since it was assumed and almost agreed at the Industrial Accident Commission hearing and also at the time of the pretrial that it was so spilled, no doubt the plaintiff was surprised when defendant took a contrary position at the time of trial. He stated that this evidence might well be a turning point in another trial.

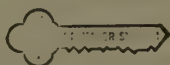
Appellant argues that there was no substantial conflict in the evidence which would authorize the granting of a new trial by the court; that the evidence, when considered as a whole, would not support a verdict for plaintiff; that the trial court abused its discretion in ordering a new trial and that there was no evidence of any error authorizing a new trial on any other ground set forth in the notice of motion.

[2, 3] It does appear that there was a substantial conflict between the testimony of plaintiff and that of the witness Mildred Donovan. Plaintiff's evidence, when considered in conjunction with the presumption afforded by Labor Code, § 3708, if believed by the trier of fact, might well support a contrary judgment. Accordingly, the order granting a new trial was authorized. The granting of a motion for new trial rests so completely within the discretion of the trial judge that an appellate court will not ordinarily interfere with his action unless manifest and unmistakable abuse of discretion clearly appears. *Quinn v. Oil Fields Trucking Co.*, 130 Cal. App.2d 720, 279 P.2d 775; *Kroiss v. Butler*, 129 Cal.App.2d 550, 277 P.2d 873. It is true that very little showing was made by plaintiff as to why a continuance could not

have been sought in the original trial to produce the evidence indicated, if necessary, or why counsel for plaintiff could not have testified at that time as to the facts indicated in his affidavit. Since the granting of a new trial was otherwise authorized we will not labor this question.

Order granting new trial affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



137 Cal.App.2d 733

James Alexander TRINGHAM, Petitioner
and Appellant,
v.

STATE BOARD OF EDUCATION et al.,
Respondents.
Civ. 5206.

District Court of Appeal, Fourth District,
California.
Dec. 12, 1955.

Mandamus proceeding to compel State Board of Education to set aside its revocation of petitioner's school credentials. The Superior Court, Orange County, Kenneth E. Morrison, J., entered order denying peremptory writ of mandate. Petitioner appealed. The District Court of Appeal, Griffin, J., held that there was no apparent reason why the petition could not be amended to set forth sufficient facts, if true, to fully state a ground for relief, and hence it was an abuse of discretion to sustain demurrer without leave to amend.

Reversed and attempted appeal from order sustaining demurrer without leave to amend dismissed.

1. Appeal and Error $\S$ 78(3), 870(5)

Order sustaining demurrer without leave to amend was not appealable but was reviewable on appeal from final judgment. West's Ann.Code Civ.Proc. $\S$ 963.

2. Mandamus $\S$ 187(7)

Where demurrer to mandamus petition to compel State Board of Education to set aside order revoking petitioner's school credentials was sustained without leave to amend and transcript of proceedings before Board was not made a part of record on appeal, the contents of transcript were not before District Court of Appeal, and therefore the Court would examine allegations of the petition and demurrer thereto and test it under general rules applicable, to see if trial court was justified in sustaining demurrer without leave to amend.

3. Mandamus $\S$ 167

As a general rule, in a hearing upon a verified mandamus petition which respondent has failed to answer, the truth of all facts alleged must be conceded, excluding conclusions of the pleader. West's Ann. Code Civ.Proc. $\S$ 1094.

4. Mandamus $\S$ 154(10)

In mandamus proceeding to compel State Board of Education to set aside order revoking petitioner's school credentials, if transcript of proceeding before Board had not been made a part of the petition, the petition could be amended to include transcript or to set forth substance of evidence received by Board and to aver in particular wherein such evidence, considered in light of petitioner's contentions, supported conclusion that Board abused its discretion. West's Ann. Education Code, $\S$ 12752.

5. Mandamus $\S$ 168(3)

In mandamus proceeding to compel State Board of Education to set aside order revoking petitioner's school credentials, court may admit relevant evidence which was not produced at hearing before Board if court finds that such evidence could not have been produced in exercise of due diligence. West's Ann.Code Civ.Proc., $\S$ 1094.5(d, e).

6. Mandamus $\S$ 173

If credibility of witnesses before State Board of Education is brought into question at mandamus proceeding to compel Board to set aside order revoking petitioner's school credentials, opportunity to contradict or impeach their testimony is to

be afforded at the trial. West's Ann.Code Civ.Proc. § 1094.5(d).

7. Mandamus ☞ 163

To sustain without leave to amend a demurrer to mandamus petition is an abuse of discretion unless petition shows on its face that it is incapable of amendment.

8. Mandamus ☞ 163

When ruling upon an issue of pleading raised by demurrer to mandamus petition, it is error to make written findings of fact and conclusions of law and to enter judgment on the merits.

Joseph Scott, A. H. Risse, and G. L. McFarland, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

An accusation and also an amended accusation were filed by respondent State Board of Education, charging this petitioner with certain acts alleged to constitute immoral conduct. After hearing, his credentials consisting of a General Elementary Credential, an Elementary School Administration Credential, and a General Secondary School Credential, were revoked.

[1] Petitioner and appellant herein brought this petition in mandate to compel respondents to cancel and set aside the order revoking his credentials above mentioned, and sought an order to show cause why such writ of mandate should not issue. He asked that a hearing be had before the court to adjudicate the issues according to the court's independent judgment and in accordance with the proceedings described in *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 136 P.2d 304. Petitioner filed therewith a copy of the accusation and amended accusation, referred to therein as Exhibits A and B. It was alleged as part of the petition "That a copy of the reporter's transcript of the proceedings had, including the pleadings filed and the testimony taken at the hearings before said aforementioned Hearing Officer will be filed concurrently with the filing of this

petition." Apparently a complete transcript of the proceedings at the hearing before the Board of Education was left with or filed with the court at the time of the filing of the petition or subsequent to that time. By ex parte application, an alternative writ was issued returnable on July 9, 1954. Respondents filed a demurrer, both general and special, to the petition and therewith filed points and authorities. On July 30, the demurrer came on for hearing, and after argument the ruling thereon was taken under advisement and on August 19th it was sustained without leave to amend. On December 10th the court signed voluminous findings reciting generally that "after careful consideration of all the evidence and in the exercise of its independent judgment on said evidence, finds that the weight of the evidence in the light of the whole record sustains the finding of the State Board of Education that Petitioner herein had violated the provisions of Section 12752 of the Education Code", and described in particular the acts charged, which were found to be true; that the allegations of the petition that are in "conflict with these findings of fact" are not true; that the board did not act arbitrarily or commit any abuse of discretion; that there was no additional relevant evidence that could not have been produced or was improperly excluded at the hearing before the state board; and that its order should not be set aside. Judgment was entered accordingly. The appeal is taken from the order sustaining the demurrer without leave to amend and from the order denying the peremptory writ of mandate and quashing the alternative writ theretofore issued. Since there is no appeal from an order sustaining a demurrer without leave to amend, the attempted appeal from such order must be dismissed. *Evans v. Dabney*, 37 Cal.2d 758, 235 P.2d 604; *Goodwill Industries v. County of Los Angeles*, 117 Cal.App.2d 19, 28, 254 P.2d 877; Code Civ.Proc. § 963. However, this order is reviewable on appeal from the final judgment. *Smith v. City of Los Angeles*, 84 Cal.App.2d 297, 190 P.2d 943.

[2] On this appeal the petitioner makes the following contentions: that the court

erred (1) In making the transcript of the proceedings before the administrative agency a part of the record in said cause for the purpose of passing upon the respondents' demurrer; (2) In considering and passing upon matters contained in the transcript in ruling upon the demurrer; (3) In sustaining the demurrer without leave to amend; and (4) In making written findings of fact, conclusions of law, and a judgment upon the merits of the case in ruling upon an issue of pleading raised by the demurrer.

A close question presents itself as to whether or not the complete transcript of the proceedings taken before the State Board of Education was made a part of petitioner's petition for mandate. The transcript was not made a part of the record on this appeal and accordingly its contents are not before us. We will therefore examine the allegations of the petition and the demurrer thereto and test it under the general rules applicable, to see if the trial court was justified in sustaining it without leave to amend. *Kleiner v. Garrison*, 82 Cal.App.2d 442, 187 P.2d 57.

[3] The general rule is that in a hearing upon a verified petition which respondent has failed to answer, the truth of all the facts alleged must be conceded. However, this does not include conclusions of the pleader. *Town of Hayward v. Pimental*, 107 Cal. 386, 40 P. 545; *Kleiner v. Garrison*, supra; 16 Cal.Jur. 870, sec. 68.

Section 1094 of the Code of Civil Procedure requires that if no answer be made, the case must be heard on the papers of the applicant; and Section 1094.5 recites that where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal or board, the case shall be heard by the court sitting without a jury; and that all or part of the record of the proceedings before the inferior board *may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court.*

It further provides that the inquiry in such a case shall extend to questions whether respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. Where the court finds that there is relevant evidence which in the exercise of reasonable diligence could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) thereof.

In *Kleiner v. Garrison*, supra, the proceedings before the administrative agency could not be considered for the purpose of passing on the demurrer when *the court* ordered it to be prepared and filed.

In *Faulkner v. California Toll Bridge Authority*, 40 Cal.2d 317, 329, 253 P.2d 659, the court said that in reviewing the acts of a State Board it has been held that a petition which alleges an abuse of discretion and also incorporates a transcript by reference will be examined in the light of the evidence contained in the transcript to determine whether a cause of action is stated.

[4] It rather appears from the petition here in question that petitioner did make sufficient reference to those proceedings permitting the court to consider it in respect to its ruling on the demurrer as to some of the claims presented. However, since we are not in possession of that record, we have no way of reviewing the correctness of the ruling. Assuming, however, that we may be in error in this conclusion, it is quite apparent from the record and the allegations of the petition that the trial court erred in sustaining the demurrer without leave to amend. It is true that naked conclusions of such averments add nothing to their force. If the transcript could not be considered a part of the petition for this purpose there is no reason why the petition could not be amended to include it or to set forth the substance of all the evidence received by the Board

and aver in particular wherein such evidence, considered in the light of petitioner's contentions, supports the conclusion that the Board abused its discretion. However, there is no indication that the petition could not be accordingly amended. It has been held that where the petition does not properly incorporate the transcript as a part of the petition the transcript thus filed may not be considered as contradicting any of the repugnant allegations of the petition in ruling on a demurrer. *Kleiner v. Garrison*, supra.

We will therefore set forth generally some of the allegations of the petition. It alleged that petitioner was mailed a copy of the amended accusation which copy was undated, unsigned, and not verified by a public officer authorized to act; that the amended accusation was not thus executed or so signed until the middle of the proceedings had before the hearing officer of the Board on December 14, 1953, at which time, over objection of petitioner, and due to the death of the administrative advisor, the name of the dead man was signed to the original by one Malcolm Peattie, Assistant Administrative Advisor, on suggestion of the hearing officer. It is therefore claimed that the subsequent proceedings had on the amended accusation, as well as any order based thereon, were null, void and of no effect. It is then alleged that the judgment rendered was harsh, arbitrary and unreasonable, not sustained by the evidence, contrary to law, and in violation of the due process clause; that respondents were without jurisdiction to take the proceedings; that evidence was admitted which was inadmissible as a matter of law; that competent evidence was offered during the hearing which the hearing officer refused to admit, thereby preventing petitioner from having a fair and impartial hearing; that there was no substantial evidence received to support the finding of the Board; and that petitioner is possessed of additional relevant evidence by way of defense, which in the exercise of reasonable diligence could not have been discovered and introduced at the hearing before the Board, and which he desired to introduce at the trial de novo.

[5, 6] Under Section 1094.5 of the Code of Civil Procedure the court may admit relevant evidence at the trial which was not produced at the administrative hearing if it finds that such evidence could not have been produced in the exercise of reasonable diligence. Additional evidence may be admitted if the showing required by subdivision (d) thereof is made. If the credibility of witnesses before the Board is brought into question at the mandamus proceeding, opportunity to contradict or impeach their testimony is to be afforded at the trial. *Sautter v. Contractors' State License Board*, 124 Cal.App.2d 149, 154, 268 P.2d 139.

In *Ashdown v. Department of Employment, State of California*, 135 Cal.App.2d 291, 297, 287 P.2d 176, 180, it was said, quoting from *Dare v. Board of Medical Examiners*, supra, that

"* * * 'the court is not confined to the record of the proceedings before the board. * * * Since the record before the board is competent evidence it should be considered and weighed along with other evidence in the cause'; that 'If it should appear from that record that incompetent evidence had been received by the board, the complaining party should not be foreclosed from objecting on the trial to its admissibility. Also if the board had improperly refused to entertain admissible evidence the litigant should not be foreclosed from offering it at the trial'; and 'that the trial court is authorized to exercise its independent judgment on the evidence.'"

[7] While many of the allegations mentioned in the petition may well constitute conclusions of the pleader, we see no apparent reason why the petition could not be amended to set forth sufficient facts, if true, to fully state a ground for relief, to entitle petitioner to a review of the evidence taken before the Board and to authorize the trial court to consider any claimed competent evidence subsequently discovered and to review all of these claims on their merit. The cases well establish the general rule that it is an abuse of discretion to sustain without leave to amend

a demurrer to the original petition unless the petition shows on its face that it is incapable of amendment. *Temescal Water Co. v. Department of Public Works*, 44 Cal.2d 90, 280 P.2d 1; *King v. Mortimer*, 83 Cal.App.2d 153, 158, 188 P.2d 502.

[8] We must conclude, on the record before us, that the trial court thus erred in sustaining the demurrer without leave to amend, in making written findings of fact and conclusions of law, and in entering judgment upon the merits of the case when ruling upon an issue of pleading raised by demurrer. *Flynn v. Flynn*, 103 Cal.App.2d 91, 229 P.2d 5.

The orders denying peremptory writ of mandate, quashing alternative writ, and sustaining demurrer without leave to amend are reversed. The attempted appeal from order sustaining demurrer without leave to amend is dismissed.

BARNARD, P. J., and MUSSELL, J.,
concur.



137 Cal.App.2d 589

Evelyn B. SHERMAN, Plaintiff and
Appellant,

v.

Rodney B. HARTMAN and John K. Taylor,
individually and doing business as San
Rafael General Hospital, Defendants and
Respondents.

No. 16461.

District Court of Appeal, First District,
Division 1, California.

Dec. 8, 1955.

Hearing Denied Feb. 1, 1956.

Malpractice action by patient against doctor and hospital operator for alleged negligence in permitting infusion of blood into patient's arm during a blood transfusion. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment of nonsuit as to operator and judgment on

verdict for doctor, and patient appealed. The District Court of Appeal, Bray, J., held that, where exclusive control of patient and of blood transfusion apparatus was in nurse and orderly, both of whom were hospital employees, and, while such control existed there occurred in patient condition which ordinarily did not occur unless someone was negligent, there was sufficient evidence of negligence to go to jury under doctrine of *res ipsa loquitur* and to require hospital to explain how patient's condition occurred without negligence on hospital's part.

Judgment in favor of doctor affirmed, and that in favor of operator reversed.

1. Physicians and Surgeons ⇨18(6)

Negligence on part of a physician or surgeon will not be presumed but must be affirmatively proved.

2. Physicians and Surgeons ⇨18(6)

Doctrine of *res ipsa loquitur* is applied in malpractice cases if it appears, either as matter of common experience or from evidence in the case, that accident is of a type which probably would not happen unless someone was negligent.

3. Negligence ⇨121(2)

For doctrine of *res ipsa loquitur* to be applicable, accident must be one which ordinarily does not occur in the absence of someone's negligence, must not be due to any voluntary action or contribution on part of plaintiff, and must be caused by agency or instrumentality within defendant's exclusive control.

4. Physicians and Surgeons ⇨18(6)

In malpractice action by patient against doctor and another for alleged negligence in permitting infusion of blood into patient's arm during blood transfusion, doctrine of *res ipsa loquitur* was not applicable as against doctor, in view of fact that, at time doctor left patient in hands of registered nurse provided by hospital, transfusion was working properly in accordance with good medical practice.

5. Physicians and Surgeons ⇨16

Doctor was in charge of patient and generally of nurses who attended her at hospital but would not be held responsible

for routine matters performed in his absence by a nurse not selected by him but provided by the hospital.

6. Physicians and Surgeons ⇨16

Physician is not liable for negligence of hospital or other nurses, attendants, or interns who are not his employees if physician does not have knowledge of such negligence or connection therewith or if such negligence is not discoverable by him in exercise of ordinary care, unless physician is negligent in permitting such persons to attend patient, but surgeon is liable, under doctrine of respondeat superior, for negligence of hospital nurse, who, although not in regular employ of surgeon, is under his special supervision and control during the operation.

7. Negligence ⇨121(2)

Generally, doctrine of res ipsa loquitur is not applicable unless negligence is pleaded generally.

8. Negligence ⇨108(1), 111(1)

Test between allegations of general and specific negligence seems to be whether the allegations show that plaintiff knows the specific or underlying cause of the accident or is ignorant thereof, and, if plaintiff is ignorant of the specific cause of the accident, allegations are held to allege general negligence even though they may refer to specific matters in connection with the accident.

9. Negligence ⇨121(2)

If defendant is advised by the pleading that he must meet an inference of negligence (res ipsa loquitur) whatever may be the acts or omissions charged, charge is general enough to allow application of the doctrine of res ipsa loquitur.

10. Hospitals ⇨8

Physicians and Surgeons ⇨18(6)

Complaint, which alleged that needle was inserted in plaintiff's arm for purpose of blood transfusion, that doctor and hospital operator carelessly and negligently left plaintiff alone and unattended, and that, because of negligent manner in which needle was inserted, needle became disengaged while plaintiff was unconscious and unattended and discharged blood into tis-

sues of plaintiff's arm, thereby causing plaintiff's injuries, was sufficient to permit application of doctrine of res ipsa loquitur.

11. Negligence ⇨121(2)

Where complaint contained sufficient allegations of general negligence to make doctrine of res ipsa loquitur applicable, fact that plaintiff proved specific acts of negligence did not prevent application of the doctrine.

12. Negligence ⇨121(2)

Proof of specific acts of negligence does not preclude application of doctrine of res ipsa loquitur except where proof dispels the inference of negligence as a matter of law.

13. Appeal and Error ⇨927(3)

Where nonsuit has been granted, evidence must be viewed by the District Court of Appeal in light of rule that nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from such evidence, result is a determination that there is not evidence of sufficient substantiality to support verdict in favor of plaintiff if such verdict were given.

14. Hospitals ⇨8

Where exclusive control of patient and of blood transfusion apparatus was in nurse and orderly, both of whom were hospital employees, and, while such control existed, condition of patient resulted which ordinarily did not occur unless someone was negligent, there was sufficient evidence of negligence to go to jury under doctrine of res ipsa loquitur and to require hospital to explain how patient's condition occurred without negligence on hospital's part.

15. Trial ⇨105(2)

In malpractice action by patient against doctor and hospital operator for alleged negligence in permitting infusion of blood into patient's arm during blood transfusion, patient's testimony that doctor had stated to her that her injury was due to pure carelessness was hearsay and would not have been binding upon hospital had it objected or moved to strike out such

testimony, but, upon hospital's failure to do so, such testimony was binding upon hospital for whatever the statement might have been worth.

Carroll F. Jacoby, Jack Flinn, San Francisco, for appellant.

George A. Smith, Peart, Baraty & Harsard, San Francisco, for respondent Hartman.

Lamb, Hoge & Killion, San Francisco, for respondent Taylor.

BRAY, Justice.

In a malpractice action, defendant Taylor, individually and doing business as San Rafael General Hospital,¹ was granted a judgment of nonsuit. The jury rendered a verdict in favor of defendant Hartman,² and judgment was entered thereon. Plaintiff appeals from both judgments.

Questions Presented.

1. Should the court have instructed the jury on *res ipsa loquitur* (a) under the facts; (b) under the pleadings?

2. Was there evidence of the hospital's negligence to go to the jury? Included in this question is that of whether *res ipsa loquitur* applies.

Evidence.

February 18, 1953, plaintiff entered the hospital for the purpose of a hysterectomy, an abdominal operation to be performed by defendant, a physician and surgeon. She had been under his care for some time. The next morning defendant operated. He was assisted by Dr. Robinson, Dr. Miller (anesthetist) and the usual scrub and surgical nurses. The pulse, blood pressure and general condition of the patient were in charge of Dr. Miller, who administered the anesthetic. Because of blood loss and shock Dr. Miller started transfusion of one pint of whole blood (500 c.c.'s). To do this he inserted a needle into the vein of the right arm, fixed it in place by pieces of adhesive tape, then placed the arm on a board and held it there by use of adhesive tape or a towel. The

operation started about 10:20 a. m. and about 12 noon plaintiff was moved to her room, defendant and Dr. Miller accompanying her. Dr. Miller in defendant's presence checked and found the transfusion still running. The two doctors then went to change their clothes. On returning to her room defendant "didn't care too much for her condition." He brought Dr. Miller into the room, and after checking the transfusion the latter assured him her paleness and clamminess was the condition she had been in for some time, and he was not alarmed; her blood pressure came back up and her pulse was good and "we both felt a whole lot better about it." Dr. Miller testified that the reason he checked the transfusion twice was "We felt she was in a state of shock and we were concerned about her." Defendant instructed the nurse whom they left in charge "to watch the blood pressure as I was a little worried about her condition." Defendant expected the nurse to remain there as long as the blood was dripping, although plaintiff's condition was not critical and she could have been left alone as he did not expect her to come out of the anesthetic for a couple of hours. At this time she probably had received about half of the blood in the bottle. Defendant did not specifically tell the nurse to remain. He took it for granted that she would, as that was normal hospital procedure. The doctors left. From then on plaintiff was under the care of hospital personnel. According to the hospital records the needle came out of the vein about 12:30 p. m. According to a Mrs. Barker, a patient in the same room, after the doctor (which one does not appear) had put up the bottle after bringing plaintiff in the room, and saw that it was working, and had left, the nurse said it was dripping slowly, almost stopped, and she shook it a couple of times. Plaintiff started coming out of the anesthetic "a little bit" and started moving her head "a little bit" and was vomiting "a little bit." The nurse stayed about half an hour and then a male nurse or orderly came in. The female nurse said that she had to go to lunch and

1. Hereafter referred to as "the hospital."

2. Defendant Hartman will be referred to as "defendant."

asked him to watch plaintiff until she came back. She asked him if he was a registered nurse. He replied "uh-huh, or kind of shook his head, kind of mumbled. She said, 'You know about the blood transfusion, watch her for me' * * *" He watched plaintiff a couple of times; she got restless "a little bit" and he told her to keep quiet. After he had watched her about a half hour he said, "The needle seems to be coming out," and asked the witness to ring the bell. She rang twice and called once, and it seemed a long time before a nurse came. The male nurse said, "Look, look it is coming out." A little while afterwards one of the doctors came and they started the dripping again. All the time that plaintiff was in the room someone was watching her, first the female and then the male nurse. Defendant was not called when the needle came out. He returned about 3 p. m. and found that plaintiff's arm was "swollen and discolored from needle getting out of vein probably when she began to arise and come to." She had a "Painful infusion of blood into right arm from leaking blood." These were his entries in the hospital record, although he testified it never was determined how the needle happened to come out of the vein. The needle coming out of the vein caused about 200 c.c.'s of blood to go into the soft tissues.

Plaintiff testified that after coming out of the anesthetic her arm was black, swollen and painful. The condition started at the wrist and went up her arm. When she asked defendant what happened he said that "the blood from the transfusion had gone into the tissues and that as far as he was concerned, it was pure carelessness." He did not say who was careless. Defendant denied this conversation.

1. Instruction on Res Ipsa Loquitur.

(a) Under the facts.

This action is solely for the injury to plaintiff's arm caused by the alleged negligence in connection with the transfusion. Should the court have given plaintiff's offered instruction on *res ipsa loquitur*?⁴

Defendant, Dr. Miller and Dr. Goddard testified that it was standard practice for the surgeon to leave a patient with blood transfusion running and in charge of a nurse. All three doctors testified that it is a frequent occurrence for a needle to come out of the vein during a transfusion. They had seen it occur on many occasions. Dr. Miller testified it can occur even though the patient is getting the best of care. Usually when the needle comes out of the vein the blood does not flow into the tissues. It is rare when it does so and then it only flows from 10 to 25 c.c.'s. Defendant testified that in his 15 years of experience, although the needle had come out of the vein in transfusions many times, this was the first time there was any residual; the blood in the tissues generally left in two or three days. There is no testimony to the contrary of these statements of the three doctors.

[1-5] Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. However, the doctrine of *res ipsa loquitur* is applied in malpractice cases if it appears "either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." *Costa v. Regents of Univ. of California*, 116 Cal. App.2d 445, 254 P.2d 85, 97. It is unnecessary to determine here whether the common experience of a layman in blood transfusion cases is that the results here do not occur without negligence, for the reason that the expert testimony of all the doctors, in addition to plaintiff's testimony that defendant told her someone had been negligent, was that, while in transfusions the needle frequently comes out of the vein causing a small amount of blood to get into the soft tissues, it does not cause the condition of plaintiff's arm. Thus, the first element required for the application of the doctrine was present, namely, the accident is one which ordinarily does not occur in the absence of someone's negligence. See *Milias v. Wheeler Hospital*, 109 Cal. App.2d 759, 764, 241 P.2d 684, for this re-

4. The doctrine as applicable to the case against the hospital will be discussed later.

quirement. Two other elements are necessary: (1) that the accident is not due to any voluntary action or contribution on plaintiff's part. This element was present as plaintiff was under the influence of the anesthetic administered by direction of defendant and her involuntary movements while coming out were usual and expected. (2) The accident was caused by an agency or instrumentality within the exclusive control of defendant. This is the missing element. Defendant, finding that the transfusion was working properly in accordance with good medical practice, left the patient in the hands of a registered nurse provided by the hospital. He had the right to assume that being a registered nurse and provided by the hospital she had the requisite training and knowledge to perform the simple act of watching the transfusion and seeing that if the needle slipped as needles frequently did, the dripping of blood was stopped and a doctor called to again insert the needle.⁵ Thus, at the time of the injury, defendant did not have exclusive or any control of the instrumentality. It is true that defendant was in charge of the patient and generally of the nurses who attended her, but not to the extent of responsibility for routine matters performed in his absence by a nurse not selected by him but provided by the hospital. To hold him so responsible would require him to remain with the patient until the transfusion was complete in order to make sure that the nurse, whom he did not select, properly performed her duties. To require a surgeon to do this, a matter which did not require the skill of a physician or surgeon, would be so time-consuming as to make the already burdensome cost of medical treatment almost prohibitive.

Plaintiff contends that defendant is responsible for the acts of the nurse, basing her contention on the following language from *Ales v. Ryan*, 8 Cal.2d 82, 105, 64 P.2d 409, 420: "A physician is answerable for the acts of another, operating jointly, for the acts and omissions of the other which, exercising reasonable diligence, he

should have observed. *Wynne v. Harvey*, supra [96 Wash. 379, 165 P. 67]. The same rule would apply to nurses working under his direction." There, however, the failure of the nurses to count the sponges was during the operation and in the very presence of the surgeon operating. Certainly the operator has exclusive control of the nurses in the surgery and while he is there. The same is true while the nurses are with the patient in his presence. In *Ybarra v. Spangard*, 25 Cal.2d 486, at page 492, 154 P.2d 687, at page 690, 162 A.L.R. 1258, the court refers to the *Ales* case, supra, and states that the nurses "become the temporary servants or agents of the surgeon in charge *while the operation is in progress* * * *." (Emphasis added.)

[6] The true rule in this respect is set forth in *Hallinan v. Prindle*, 17 Cal.App.2d 656, 661-662, 62 P.2d 1075, 1077: "The rule is thus laid down in 48 Corpus Juris, Physicians and Surgeons, § 144, page 1137: 'A physician is not liable for the negligence of hospital or other nurses, attendants or internes who are not his employees if he has no knowledge thereof, or has no connection therewith, or if it is not discoverable by him in the exercise of ordinary care, or unless he is negligent in permitting them to attend the patient.' [Citations.] 'But it has been held that where a hospital nurse, although not in the regular employ of an operating surgeon, is under his special supervision and control during the operation the relation of master and servant exists, and that the surgeon is liable under the doctrine of *respondeat superior* for the nurse's negligence.' Citing *Aderhold v. Bishop*, 94 Okl. 203, 221 P. 752, 60 A.L.R. 137."

The latter exception to the general rule is the one which was applied in the *Ales* case. In the *Hallinan* case the nurse in charge of the hospital operating room had been requested by the defendant surgeon to prepare the room for a minor operation and to prepare a 1 per cent solution of novocaine which the surgeon intended to use as a local anesthetic. By mistake, she

5. That this watching of the patient does not require great skill is attested by the uncontradicted testimony that on occasion

a patient's husband or friend does it rather than a nurse.

placed on the tray to be used at the operation a 4 per cent solution of formalin, which the surgeon injected in the patient, assuming it to be the novocaine he had ordered. The court held that the evidence showed that it was the custom of physicians and surgeons to accept from graduate trained nurses medicines, instruments and drugs without making an examination thereof themselves, and that the nurse in preparing the tray's contents for the operation was not the servant, employee or agent of the doctor and that he was not liable for her negligence.

The court properly refused to instruct on *res ipsa loquitur*.

(b) Under the pleadings.⁶

The complaint alleged the insertion of the needle in plaintiff's arm for the purpose of blood transfusion, that then defendants carelessly and negligently left plaintiff alone and unattended; that by reason of the negligent manner in which the needle was inserted, and while plaintiff was unconscious, alone and unattended the needle became disengaged discharging blood into the tissues of plaintiff's arm, and that the aforesaid negligence caused plaintiff's injuries.

[7] The general rule is that unless negligence is pleaded generally the doctrine of *res ipsa loquitur* is not applicable. See *Leet v. Union Pac. R. R. Co.*, 25 Cal.2d 605, 617, 155 P.2d 42, 158 A.L.R. 1008, and the many cases there cited. However, there is considerable confusion in the cases as to what constitutes the pleading of special acts of negligence so as to deny the application of the doctrine. See *Freitas v. Peerless Stages, Inc.*, 108 Cal.App.2d 749, 239 P.2d 671, 33 A.L.R.2d 778 and cases collected by Prosser, *Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183, 214. In the following cases it was claimed that the complaint pleaded specific rather than general acts of negligence and that therefore the doctrine was not applicable, yet the court held that it was: *Jianou v. Pickwick Stages System*, 111 Cal.App. 754, at page 757, 296 P. 108, at page 109, where the complaint alleged that the defendant

"so carelessly and negligently operated and conducted its said automobile stage that a wheel broke or collapsed thereon." *Lawrence v. Pickwick Stages, N.D.*, 68 Cal. App. 494, at page 497, 229 P. 885, at page 886, where the complaint alleged that the defendant "so carelessly and negligently operated said bus thereby causing said bus to leave the highway and turn into a ditch with great force and violence". *Damgaard v. Oakland High School Dist.*, 212 Cal. 316, at page 319, 298 P. 983, where the complaint at considerable length specified the defendant's acts of negligence. In fact, the court referred to the complaint as "unnecessarily prolix." *Radisich v. Franco-Italian Packing Co.*, 68 Cal.App.2d 825, at page 838, 158 P.2d 435, at page 441, where the complaint pleaded negligence both generally and specifically. There the court said that the allegation that the plaintiff's "'apron was caught * * * and drawn into the drum of the ship's winch throwing * * * [him] against the deck of said vessel * * *'" is but a general allegation of negligence on the part of the defendant for it does not attempt to set out or explain in any manner the 'underlying cause' of the accident or the specific manner in which it occurred. [Citing cases.]" *Vertson v. City of Los Angeles*, 116 Cal.App. 114, at page 122, 2 P.2d 411, at page 414, where the complaint alleged that the defendant "'carelessly * * * constructed and maintained said power line and the fastenings of the wires thereto to the cross-bars, and the cross-bars to the poles upon which the said power line was suspended, and * * * the wires thereof, a short distance from the cross-bars on the said described Pole 3, broke and fell on,'" the plaintiff. *Mintzer v. Wilson*, 21 Cal.App.2d 85, at page 89, 68 P.2d 370, at page 373, where the complaint alleged that the ceiling which fell on the plaintiff "'was of a faulty construction and its condition had been allowed to become defective and unsafe by the defendants through their failure to properly operate, manage, control and maintain said building in which said hotel was conducted.'" The court said: "As

6. This question applies to the cases against both defendant and the hospital.

will be noted, the foregoing allegations do not attempt to explain or set out in detail wherein the construction of the ceiling was faulty, nor to state specifically the reason why it fell. The allegations are therefore nothing more than general allegations of negligence." In *Freitas v. Peerless Stages, Inc.*, supra, 108 Cal.App.2d 749, at page 753, 239 P.2d 671, at page 674, the complaint charged that the defendant "so negligently and carelessly drove and operated said Peerless bus that the same was caused suddenly and violently to jerk, bump and stop; that as the proximate result of the negligent and careless operation of said bus by defendant" the plaintiff was knocked to the floor. We there held that such an allegation within the meaning of the cases there cited was either a general allegation or a mixture of general and specific, and that in either event the doctrine was applicable. *Ybarra v. Spangard*, supra, 25 Cal.2d 486, 493, 154 P.2d 687, 691, pointed out that there has been a liberalization of the tests for *res ipsa loquitur* and that the doctrine "of *res ipsa loquitur* 'should apply with equal force in cases wherein medical and nursing staffs take the place of machinery and may, through carelessness or lack of skill, inflict, or permit the infliction of injury upon a patient who is thereafter in no position to say how he received his injuries.'"

[8-10] The test between allegations of general and specific negligence seems to be whether the allegations show that the plaintiff knows the specific or underlying cause of the accident or is ignorant thereof. In the latter event the allegations, although they may refer to specific matters in connection with the accident, are held to allege general negligence. Another way of stating the test appears in *Leet v. Union Pac. R. R. Co.*, supra, 25 Cal.2d 605, at page 618, 155 P.2d 42, at page 49, 158 A.L.R. 1008, where after citing cases in this state which hold that the doctrine may be invoked "even though plaintiff specifically pleads the acts of negligence and does not allege negligence generally" the court said that if the defendant is advised by the pleading that he must meet an inference

of negligence (*res ipsa loquitur*) whatever may be the acts or omissions charged, then the charge is general enough to allow the application of the doctrine. The court further stated that allegations in the complaint of facts from which it appeared that the defendant was in a better position to explain what occurred than the plaintiff, such allegations were a factor in determining whether the doctrine should be available or would be one of the reasons for applying it. 25 Cal.2d at page 619, 155 P.2d 42. All of the elements of these tests are present in our case.

In our case the complaint, like the complaint in *Radisich v. Franco-Italian Packing Co.*, supra, 68 Cal.App.2d 825, 838, 158 P.2d 435, does not attempt to set out or explain in any manner the "underlying cause" of the accident or the specific manner in which it occurred. Here, too, the language in *Jianou v. Pickwick Stages System*, 111 Cal.App. 754, 757, 296 P. 108, 109, is applicable: "It is inferred from the language employed that the plaintiff was ignorant of the specific acts of negligence which caused the accident." It is alleged that while she was unconscious and due to negligence the needle came out causing the injury; thus the plaintiff was unaware of the specific cause of the accident. There were sufficient allegations of general negligence to make the doctrine applicable.

[11,12] Nor did the fact that plaintiff proved specific acts of negligence prevent the application of the doctrine. "The more recent and better reasoned cases hold that proof of specific acts of negligence does not preclude the application of the doctrine except where the proof dispels the inference of negligence as a matter of law." *Freitas v. Peerless Stages, Inc.*, supra, 108 Cal.App.2d at page 756, 239 P.2d at page 676; see also *Leet v. Union Pac. R. R. Co.*, supra, 25 Cal.2d 605, 621, 155 P.2d 42.

2. Hospital's Negligence.

[13] A different situation from that in the case against defendant is found in that against the hospital because (a) the doctrine of *res ipsa loquitur* would apply

against it and (b) there was evidence of negligence on the part of its employees.⁷

(a) *Res ipsa loquitur*.

[14] What we have said before concerning the presence of two of the elements of the doctrine applies to the hospital's case. The third element, that of exclusive control, is also present. At the time the nonsuit was granted neither Dr. Miller nor Dr. Goddard had testified. However, the before mentioned testimony of defendant and of plaintiff and Mrs. Barker had been given. From it there was evidence that the exclusive control of the patient and the transfusion apparatus was in the nurse and then the orderly, both of whom were employees of the hospital. The hospital would be liable of course under the doctrine of *respondeat superior* for their negligence, if any. See *Ware v. Culp*, 24 Cal.App.2d 22, 74 P.2d 283. While that control existed a condition of the patient resulted which ordinarily does not occur unless someone was negligent. Thus there was sufficient evidence of negligence to go to the jury and to require the hospital to explain how the condition of the plaintiff's arm occurred without any negligence on its part. In our case, as in *Ybarra v. Spangard*, supra, 25 Cal.2d 486, 154 P.2d 687, the patient on recovering consciousness finds herself injured in a manner which ordinarily would not occur unless those in charge of her at the time were negligent. She, of course, does not and could not know what happened. An explanation is due from those who knew or should have known what occurred. As said in the *Ybarra* case, quoting from *Maki v. Murray Hospital*, 91 Mont. 251, 7 P.2d 228, 231 (25 Cal.2d at page 490, 154 P.2d at page 689): " * * * without the doctrine the maxim that for every wrong there is a remedy would be rendered nugatory, 'by denying one, patently entitled to damages, satisfaction merely because he is ignorant

of facts peculiarly within the knowledge of the party who should, in all justice, pay them.' "

(b) Negligence.

Moreover, at this point there was direct evidence of negligence on the part of the nurse. Mrs. Barker testified that the nurse, after the doctors left, felt that the blood was flowing too slowly so the nurse shook the bottle a couple of times to make it flow faster. As no explanation was given of this action a reasonable inference therefrom could be that this was the reason such an unusual quantity of blood entered the soft tissue after the needle came out of the vein. Again, when the needle came out, the orderly requested Mrs. Barker to ring the bell as he hated to ring. There was considerable delay and Mrs. Barker had to ring twice, the orderly saying he wished they would hurry. Mrs. Barker in addition to ringing twice had to call also. Finally a nurse arrived and a little while afterwards a doctor came. A reasonable inference is that during this long delay the blood was continuing to drip into the soft tissue causing the unusual damage, and that the delay was a negligent one. The hospital takes the position that because it is quite a common occurrence for transfusion needles to come out of the veins, *res ipsa loquitur* cannot apply here. Such contention overlooks the evidence that such a common occurrence does not result in the condition of plaintiff's arm. It is that unusual result that causes the doctrine to apply and to require explanation, an explanation which does not appear in the case. At least, these matters were for the determination of the jury. It cannot be said as a matter of law that there was no evidence of negligence.

[15] While it is true that the statement which plaintiff testified defendant made to her to the effect that her injury was

7. A nonsuit having been granted, we must view the evidence in the light of the rule stated in *Thomsen v. Burgeson*, 26 Cal. App.2d 235, 239, 79 P.2d 136, 138: "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally

entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' " (Emphasis omitted.)

due to pure carelessness was hearsay, see *People v. One 1950 Mercury Sedan*, 116 Cal.App.2d 746, 751, 254 P.2d 666, and therefore would not be binding on the hospital had it objected or moved to strike it out, the hospital's failure to do it makes it binding on it for whatever the statement may be worth. (See 19 Cal.Jur.2d 123.) However, the results herein set forth would not be changed even though the statement were completely disregarded.

The judgment in favor of defendant Hartman is affirmed; that in favor of defendant Taylor individually and doing business as San Rafael General Hospital is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



137 Cal.App.2d 615

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Paul George HORNER et al., Defendants,
Paul George Horner, Betty Butler and
Jean Lewis, Defendants and Appellants.
Cr. 5381.

District Court of Appeal, Second District,
Division 3, California.
Dec. 8, 1955.

Rehearing Denied Dec. 23, 1955.

Hearing Denied Jan. 5, 1956.

Defendants were convicted of pandering, conspiracy to pander, and rape. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., rendered judgments and denied motions for new trial, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained convictions.

Judgment affirmed.

1. Indictment and Information ⇨176

Where defendant in rape prosecution denied that he had ever had intercourse

with victim, that there allegedly was no evidence that act took place on date alleged in information was not a fatal variance.

2. Indictment and Information ⇨171

A variance is not regarded as material unless it is of such a substantive character as to mislead accused in preparing his defense, or is likely to place him in second jeopardy for the same offense.

3. Criminal Law ⇨553

Alleged inconsistencies or contradictions in testimony of victim in rape prosecution did not require that her testimony be rejected as unworthy of belief.

4. Statutes ⇨118(1)

That act penalizing pandering was entitled an act relating to "crimes and the punishment thereof", satisfied constitutional requirement that subject of each act be expressed in its title. Pen.Code, § 266i; West's Ann.Const. art. 4, § 24.

5. Statutes ⇨109.3

Constitution does not demand that title of an act be a catalogue or abstract of its provisions, but merely that it contain a reasonably intelligent reference to subject of legislation. West's Ann.Const. art. 4, § 24.

6. Criminal Law ⇨422(6), 427(5)

In prosecution for pandering and conspiracy to pander, testimony that one defendant had asked another to permit victim to go to work as a prostitute in home of codefendant, followed by codefendant's transporting victim to her home without purpose, established a prima facie conspiracy between defendants to place victim in a house of prostitution, and warranted admission, as against codefendant, of acts and conversations of other defendants outside codefendant's presence.

7. Criminal Law ⇨421(1)

Where conspiracy is established prima facie, additional evidence of acts and statements of parties made thereafter during life of conspiracy is admissible against all conspirators.

8. Criminal Law ⇨1169(2)

In prosecution for pandering and conspiracy to pander, wherein there was con-

vincing and uncontradicted evidence that one defendant's home was a house of prostitution, admission of testimony as to conditions in home when officers forced door was, if error, harmless.

9. Conspiracy ⚡47

Prostitution ⚡4

Evidence sustained conviction for pandering and conspiracy to pander. Pen. Code, § 266i.

Paul K. Duffy, Los Angeles, for appellant Horner.

Alexander H. Schullman and Abe Mutchnik, Los Angeles, for appellant Butler.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Paul George Horner, Harry Jackson Legge, Betty Butler and Jean Lewis were charged with the offense of pandering, § 266i Pen.Code, for procuring for Bonnie, a female, a place as an inmate in a house of prostitution and, separately, of conspiring to commit the crime of pandering by procuring for said Bonnie a place as an inmate of a house of prostitution. Horner was separately charged with rape of said Bonnie, a female, 16 years of age; the defendants waived trial by jury and the case was submitted on testimony taken at the preliminary hearing and additional evidence taken at the trial. Defendants were found guilty as charged. Horner was sentenced to state prison upon the conviction of pandering and conspiracy to commit pandering, the sentences to run concurrently, and upon a conviction of rape, to the county jail, the sentence to run concurrently with the other two sentences. Horner and Betty Butler made motions for new trial which were denied. They appeal from the judgments and the orders.

Pursuant to leave granted at the time of the argument when Horner's attorney failed to appear, new counsel was engaged and a supplemental brief has been filed by Mr. Duffy.

[1,2] We will consider first the appeal of Horner and the conviction of rape. Bonnie's age was established by competent evidence at 16 years. She testified that she had been employed by appellant and had had sexual intercourse with him 6 or 7 times during the preceding two years. Phillip Barnes, Los Angeles city police officer, testified to a conversation had with Horner at the police station in which Horner stated that Bonnie had worked for him, he loaned her \$5; that she allowed him to have intercourse with her as a courtesy for the loan of the money; thereafter there were 3 or 4 similar occasions. Horner testified that Bonnie had worked for him and that he had known her for about a year and one-half. He denied having had intercourse with her.

It is contended that the information charged the commission of the offense on or about July 7, 1954 and that there was no evidence that the act took place on or about that date or on any other specific date. The prosecutrix testified that she probably saw appellant on or about July 7, 1954; she had intercourse with him 6 or 7 times over a period of two years and one of the times may have been on July 7. Appellant admitted having been with her on that date. His defense was that he had never had intercourse with her. In view of his denial, the date July 7, or any other specific date, was of no significance. "Under the generally accepted rule in criminal law a variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in second jeopardy for the same offense." *People v. Williams*, 27 Cal.2d 220, 226, 163 P.2d 692, 695. In addition to the testimony of the prosecutrix and the testimony as to Horner's admissions to Officer Barnes, there was evidence of the close relationship between Bonnie and appellant, to be hereinafter related, which rendered it highly improbable that there was any truth in appellant's denials. From the entire evidence the trial court was fully justified in finding that the offense was committed on or about July 7, 1954.

The following is a summary of the evidence addressed to the charges of pandering

and conspiracy to commit pandering. Bonnie testified that she asked Horner to help her and Legge, her paramour, raise money in order that they might get married. Horner called a person he addressed as "Jean" and asked her to call some of her friends in an effort to help Bonnie and Legge. Later, after a second telephone call, Horner told Bonnie that Jean Lewis had suggested that she might go out to "Betty's" to work and make some money. The "Betty" was defendant Betty Butler. The matter discussed was that Bonnie would work as a prostitute and receive \$10 or more per customer. Horner drove Bonnie to a drive-in restaurant where they waited until Betty Butler came. Bonnie was driven by Butler to the latter's home. Butler made a telephone call, a man came in, was introduced to Bonnie, Butler directed Bonnie where to take him; they went into a bedroom, had an act of sexual intercourse and the man paid Bonnie \$20. Two other men came in, another woman in the house took one of the men to a bedroom and Bonnie took the other. She spent the night in the bedroom with the man and engaged in sexual intercourse; Butler gave her \$15. The following morning Bonnie told Horner of these occurrences. She asked Horner to arrange with Jean for her to return to Butler's which Horner promised to do. Later Horner told her she could not return that night because all the girls who worked for Butler were there. The next day Bonnie asked Horner to arrange for her to return to Butler's. Horner called Jean who came to Horner's apartment with a woman known as "Connie." Horner told Bonnie that Connie would pick her up, which she did, and drove her to the Butler house where she engaged in intercourse with another man. Another witness, Bonita Holetz, an employee of Horner's, testified to having heard Jean make an arrangement with Betty for a little girl to go to work. Connie Armstrong testified to a statement made either by or in the presence of Horner to Bonnie that she should go to work at Betty's in prostitution. Police officers visited the Butler house, forced a door open and found Bonnie and another girl there; forcing open another door they found a man and a woman on a bed in compromising attire. The officers had extensive conversations

with Butler in which she admitted two previous arrests by one of the officers and asked him not to arrest the girls. Another officer testified she told him she was going to send Bonnie home, that it was no kind of a place for her. Horner testified that he knew that Bonnie had been in trouble, was on probation and was only 16 years old. He had introduced her to Harry Legge. Horner admitted on the stand there was a discussion with Legge and Bonnie as to Bonnie's working as a prostitute in the home of Betty Butler; there was a discussion about his calling Jean Lewis to contact Butler; shortly thereafter there was a conversation between himself, Jean, Legge and Bonnie concerning Bonnie's working for Butler; that Bonnie told him that she had earned \$35 and asked him to arrange with Butler for her to work another night. Upon cross-examination Horner admitted that he had discussed with Jean Lewis something to the effect that the latter would ask Butler to provide work for Bonnie. He testified that he had never met Butler.

Officer Kalkiewicz of the Juvenile Division testified that he talked with Horner who admitted that Legge and Bonnie were present at his residence one evening when they discussed Bonnie's working as a prostitute; that he called Jean and when she and Connie came to his residence that evening they arranged that Bonnie should go to a drive-in where she would be picked up.

[3] When first questioned by the People, Bonnie was a reluctant witness. She testified to the principal facts above related but omitted some of the important details of her conduct. It is claimed that on the second day of her testimony, after she had spent a night at Juvenile Hall, she testified more freely and in greater detail than on the previous day, having spoken with the deputy district attorney before resuming the stand. It is argued that she was in some manner discredited as a witness because there were inconsistencies in her testimony and there was more willingness to testify on the second day. We find no such inconsistencies or contradictions as would have justified the trial court in rejecting her testimony as unworthy of belief. Upon the contrary her reluctance to go into details is

understandable and although there were some contradictions in minor particulars there were none with respect to the acts and statements of the defendants which, if proved, were sufficient to establish commission of the offenses charged. The trial court believed her testimony as to the material facts and since her testimony, if true, was sufficient to establish those facts it is futile to ask a reviewing court to rejudge her credibility and reweigh her testimony.

[4,5] It is argued in Horner's supplemental brief that the title of the act by which § 266i of the Penal Code was enacted was defective for noncompliance with the mandate of § 24 of Article IV of the Constitution that "Every act shall embrace but one subject, which subject shall be expressed in its title." The title, Stats.1953, Ch. 32, p. 633, reads as set out in the margin.¹ The subject of the act, not only in the title, but in the body, is "crimes and the punishment thereof". That is a sufficient title. "The constitution does not demand that the title of an act be a catalogue or abstract of its provisions, but merely that it contain a reasonably intelligent reference to the subject of the legislation." *Ikuta v. Ikuta*. 97 Cal.App.2d 787, 218 P.2d 854, 857.

The appeal of Betty Butler.

On behalf of this defendant it is argued that as to each count "there is no substantial evidence beyond a reasonable doubt" that Bonnie did commit an act of prostitution or that the house of this appellant was a house of prostitution. With respect to the sufficiency of the evidence to prove the offense of pandering, appellant argues, as we have related, that the testimony of Bonnie was unworthy of belief. It is insinuated that the witness was coached by the deputy district attorney before she resumed the stand on the second day. The testimony of the witness was to the contrary and the insinuation is unjustified. Her account of her conduct in the Butler home was contradicted.

It was a reasonable inference that Horner, through the intermediary Jean Lewis, prevailed upon defendant Butler to receive Bonnie into her house for the purpose of earning money which she needed. There was evidence that telephone calls were made and that thereafter Butler picked up Bonnie and took her to her home. Upon her visit to the house Bonnie received \$20 from one man and \$15 from Butler, who presumably had made a collection from another customer whom Bonnie entertained. Defendant Butler did not take the stand. There was ample evidence that the premises were used for the purposes of prostitution.

[6,7] Appellant argues that the testimony concerning the telephone calls made through Jean Lewis and the conversations respecting the scheme between Bonnie and the other defendants were hearsay and inadmissible against her, for the reason that no evidence had been introduced of the existence of a conspiracy at the time the conversations were had and statements made. The testimony as to the initial request by telephone to Lewis that Bonnie be permitted to go to work as a prostitute in the home of Butler, followed by Butler's transporting Bonnie to her home for that purpose, established prima facie a conspiracy between Horner, Lewis and Butler to place Bonnie in a house of prostitution. Additional evidence of the acts and statements of these parties made thereafter during the life of the conspiracy was admissible against all the conspirators. *People v. Griffin*, 98 Cal. App.2d 1-44, 219 P.2d 519; 11 Cal.Jur.2d 258. The contention that the evidence as to the acts and conversations of Horner and Lewis outside the presence of Butler was hearsay and inadmissible against her is untenable.

[8] It is contended further that the testimony of the police officers respecting conditions found in the Butler home when the officers forced the door of the house and later the bedroom door was inadmissible under

1. "An act to codify certain acts, relating to crimes and the punishment thereof, by amending Section 182 of, by adding Chapter 12 to Title 13 of Part 1 of, by adding Article 4 to Chapter 3 of Title 1 of Part 4 of, by adding Article 5 to

Chapter 3 of Title 1 of Part 4 of, and by adding Sections 217.1, 266h, 266i, 310, 337h, 487b, 487c, 487d, 597k, 643, 643a, 643b, 646, 649, 649a, and 650a to, the Penal Code, and by repealing certain statutes specified herein."

the doctrine of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. No objection was made to this testimony, but in disposing of the point reliance need not be placed on this omission. Without the testimony of the officers there was convincing and uncontradicted evidence that the Butler home was a house of prostitution. If there was error it was harmless.

[9] The evidence to which we have alluded was sufficient to establish defendant Butler's guilt not only of the offense of procuring for Bonnie a place as an inmate of a house of prostitution but also of conspiracy with the other defendants to commit the offense of pandering. Defendants were accorded a fair trial; there was convincing evidence of their guilt and no reason appears for disturbing the judgments or orders.

The judgments and orders denying motions for new trial are affirmed.

PARKER WOOD, J., and NOURSE,
Justice pro tem., concur.



137 Cal.App.2d 623

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Mrs. Mildred Frances MASSEY and Paul
George Horner, Defendants,

Paul George Horner, Defendant and
Appellant.

Cr. 5394.

District Court of Appeal, Second District,
Division 3, California.

Dec. 8, 1955.

Rehearing Denied Dec. 23, 1955.

Hearing Denied Jan. 5, 1956.

Defendants were convicted of violations of Penal Code, § 288a, and conspiracy to violate this statute. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., rendered judgments and denied motion

for new trial, and a defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence supported finding that acts charged had been committed with criminal intent in violation of Section 288a, rather than for sole purpose of obtaining photographs, and sustained convictions.

Judgments and order affirmed.

1. Conspiracy $\hookrightarrow$ 47 **Sodomy** $\hookrightarrow$ 6

Evidence in criminal prosecution supported finding that acts charged had been committed with criminal intent in violation of Penal Code, § 288a, rather than for sole purpose of obtaining photographs, and sustained convictions for violation of section and for conspiracy to violate section. Pen.Code, § 288a.

2. Sodomy $\hookrightarrow$ 1

"Copulating", within Penal Code, § 288a, means "coupling".

See publication Words and Phrases, for other judicial constructions and definitions of "Copulating".

3. Attorney and Client $\hookrightarrow$ 76(1)

An attorney for defendant in a criminal case must continue with his services until he is released by client or by court for good cause shown, and he may not abandon his representation at will, nor for considerations personal to himself. West's Ann.Bus. & Prof.Code, § 6068.

Paul K. Duffy, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Paul George Horner appeals from judgments adjudging him guilty of several felonies and from an order denying his motion for a new trial.

The charges were (1) participating with one Mildred, a co-defendant, in violation of section 288a of the Penal Code on June 15, 1954, (2) participating with said Mildred, a co-defendant, in another violation of the section on the same day, (3) violation of

the section committed with one Bonnie on the same day, and (4) conspiracy with said Mildred to commit violations of said section.

The case of Horner and his co-defendant was tried upon testimony given at the preliminary examination and additional testimony received at the trial. Both defendants were convicted of the first three offenses charged and acquitted of the fourth. On behalf of Horner an opening brief was filed by Mr. Dunham, who represented Horner at the trial. He did not appear when the appeal was set for argument. In that brief the only ground urged for reversal was that there was "no competent or substantial evidence beyond a reasonable doubt to establish the crime." And the entire argument of the point reads as follows: "With respect to the charges set forth in the aforementioned three Counts of the second case, the entire record of the Trial evidences conclusively that the essential elements of the crime alleged were not committed (Reporter's Transcript pp. 111-163; 178). Here again the attention of the Court is directed to the Case of *People v. Kennedy*, 21 Cal.App.2d 185 [69 P.2d 224]." At the time of the argument Horner was given leave to obtain new counsel and to file an additional brief. This has been done; a brief has been filed by Mr. Duffy.

[1] As to charges 1 and 3 above, appellant on the stand admitted acts of physical contact which were elements of the offenses charged. Bonnie testified to similar acts committed by appellant as evidence of the commission of the second offense above mentioned. In addition there were photographs received in evidence taken at the time of the commission of the several acts charged. These were explained by the witnesses; the subjects of the pictures, appellant and Mildred, were identified and the acts were described. Understandably, it has not been suggested by the appellant that these pictures be brought up and considered as a part of the record on appeal. Defendant's explanation on the stand was that the acts were committed for the sole purpose of obtaining the pictures, but this, even if true, would not necessarily have constituted a valid defense. There was am-

Cal.Rep. 289-290 P.2d-65

ple evidence of physical contact as a means of committing the offenses, and even if the trial court could have believed it was not the purpose of the participants to gratify sexual desires, that was not a conclusion which the court was required to reach as the only reasonable deduction from the evidence. From the evidence given concerning the actions of the parties and the nature of the pictures we have no reason to doubt that the evidence justified the court in determining that the offenses charged had been committed. It does not appear from the record, as a matter of law, that defendant had no criminal intent.

The arrangements which preceded the taking of the pictures, together with the carrying out of the plan, amounted to a conspiracy to violate the law, as charged.

[2] Appellant argues that the acts proven are not embraced within a correct definition of "copulating" and that the meaning of the word as used in the statute is obscure and uncertain. If the word is understood as implying "coupling," which is permissible, there is no uncertainty as to the legislative intent. The word as used in the statute has a well understood meaning. *People v. Harris*, 108 Cal.App.2d 84, 238 P.2d 158. A further contention is that the acts denounced are not such deviations from ordinary human behavior as to warrant their proscription. The arguments are based upon writings of students of the psychology of sex and are for the lawmakers, not the courts. The judgments are not subject to any of the infirmities urged by appellant.

[3] When the cause was called for argument and the attorney who represented appellant at the trial and filed a brief did not appear we permitted argument by appellant. We feel impelled to remark upon the failure of the attorney to make an appearance or to offer any excuse for his absence. Desertion of a client is inexcusable. As long as the relationship exists it is the duty of an attorney to speak for his client at every stage of the proceedings and not leave him to his own devices and helpless in a maze of legal procedure. Having undertaken the defense of a criminal case an attorney must continue with

his services until he is released by the client or by the court. He may apply to the court for release from further service and for good cause shown may be released, but he may not abandon his representation at will, nor for considerations personal to himself. Bus. & Prof. Code § 6058. He is an officer of the court and as such owes a duty of respect for the court as well as fidelity to his client. When an appeal is calendared for argument the court expects counsel to make an appearance or to advise the court of a reason for nonappearance.

The judgments and order appealed from are affirmed.

PARKER WOOD, J., and NOURSE, Justice pro tem., concur.



137 Cal.App.2d 808

A. PIVARDIERE and Marle Pivardiere, husband and wife, Alyce Galloway, doing business as Galloway Company, and Liberty Escrow Company, Plaintiffs and Respondents,

v.

Ruby MERCURIO, Defendant and Appellant.
Civ. 21140.

District Court of Appeal, Second District,
Division 1, California.

Dec. 16, 1955.

Rehearing Denied Jan. 11, 1956.

Hearing Denied Feb. 8, 1956.

Action for specific performance of agreement and escrow instructions to exchange plaintiffs' property for defendant's property, wherein defendant filed cross-complaint for fraud, money had and received, cancellation and damages, and defendant named escrow holder and real estate broker as cross-defendants. The Superior Court of Los Angeles County, Jerold E. Weil, J., rendered judgment for plaintiffs, and appeal was taken. The District Court of Appeal, Doran, J., held that fail-

ure of real estate broker to deliver copy of exchange agreement to defendant at time her signature was obtained, as required by Business and Professions Code, did not render agreement invalid and unenforceable where there was no showing that defendant was misled or prejudiced in any way by such failure, and where neither plaintiffs nor defendant asked broker for copy of such agreement until defendant decided to attempt to rescind, at which time broker promptly delivered copies.

Judgment affirmed.

1. Appeal and Error ☞169

Appellate court would not consider issue raised for first time on appeal.

2. Exchange of Property ☞3(1)

Failure of real estate broker in property exchange transaction to deliver copy of exchange agreement to one of parties at time her signature was obtained, as required by Business and Professions Code, did not render agreement invalid and unenforceable where there was no showing that such party was misled or prejudiced in any way by such failure and where neither of parties asked broker for copy of such agreement until one of them decided to attempt to rescind, at which time broker promptly delivered copies. West's Ann. Bus. & Prof. Code, § 10142.

3. Appeal and Error ☞991, 1010(1)

Issues of fact are for trier of fact to decide, and unless there is lack of evidence to support them, appellate court is without power to intervene.

Albert A. Albeck, Max Albeck, Los Angeles, for appellant.

Frye & Yudelsohn, North Hollywood, for respondents.

DORAN, Justice.

This is an appeal from the judgment.

As recited in appellant's brief, "Plaintiffs brought an action against defendant for specific performance of an agreement and escrow instructions to exchange their property for defendant's property.

"The complaint alleged the execution of the exchange agreement on September 17, 1953, and the exchange escrow instructions on the following day.

"The exchange agreement provided for the exchange of plaintiffs' 4-unit apartment house located on Riverside Drive, North Hollywood, California, together with certain furnishings, for defendant's 20-unit motel, known as the Santa Fe Motel, located on Firestone Boulevard in South Gate, California, together with all furnishings except for those in the manager's apartment. The agreement further provided that plaintiffs' property was priced at \$37,900.00 and was subject to a trust deed in the sum of \$13,704.39, payable \$145.00 per month 'at 5½%', leaving an equity of \$24,195.61 as of September 1, 1953; that defendant's property was priced at \$95,000.00 subject to a loan of record of \$47,150.00 (a superimposed figure) payable \$530.00 per month at 6% interest, leaving an equity of '\$47,150.00' (also a corrected figure). In addition to the exchange of these properties, the agreement further provided for the transfer by plaintiffs to defendant of a trust deed on a parcel of property in Laguna Beach in the sum of \$19,474.00 payable \$125.00 per month at 5% interest and for the payment of \$3,480.00 (a superimposed figure) by plaintiffs to defendant. Provision was made for termite clearance to be furnished by both parties and payment of real estate commissions in the sum of \$1,895.00 by plaintiffs and \$2,850.00 by defendant.

"The exchange escrow instructions executed the following day similarly provided for the exchange of the properties and transfer of the Laguna Beach trust deed. However, in this document it was provided that defendant was to pay to plaintiffs \$4,180.39 in addition to the transfer of her motel to them, and that the assignment of the Laguna Beach trust deed was to be 'without recourse.'

"Plaintiffs alleged that the escrow instruction carried out the exchange agreement.

"The complaint further alleged performance of the agreement and escrow instructions by plaintiffs except for the deposit of

\$1,680.39 in the escrow. As an excuse for such default in performance, it was alleged that the deposit of this sum was not required 'except upon a certain date and pursuant to the performance of certain conditions by defendant Ruby Mercurio', and that prior to the time 'of said performance by the plaintiffs', defendant rescinded and repudiated the agreement. It was further alleged that the value of defendant's equity in her property was substantially equal to the value of the property to be transferred to her by plaintiffs, that the agreement and escrow instructions were fair, just and reasonable to each of the parties and that defendant's repudiation of the agreement was without justification."

The \$1,680.39 above mentioned was paid later. Other incidental questions such as real estate commissions, accounting, etc., referred to in other causes of actions need not be detailed.

"Plaintiffs prayed for specific performance of both, the exchange agreement and the exchange escrow instructions, or in the alternative, for the damages alleged in the Second Cause of Action, and for an accounting of the rents as set forth in the Third Cause of Action."

As recited in appellant's opening brief, "An answer and cross-complaint was filed by defendant. In her answer, defendant alleged general and specific denials of the allegations of the complaint except that she admitted the execution of the exchange agreement and the exchange escrow instructions, but alleged that they were procured by mistake, fraud and misrepresentation, that she rescinded and repudiated the agreements on those grounds, and that she has continuously remained in possession of the motel and collected the rents therefrom. As a second defense, defendant alleged the lack of plaintiffs' right to maintain the action by reason of their default.

"Defendant's cross-complaint was for fraud, money had and received, cancellation and damages. In addition to the plaintiffs, the escrow holder Liberty Escrow Company and the real estate broker Alyce Galloway, doing business as Galloway Company, were named as cross-defendants."

The trial judge following a lengthy trial, rendered judgment in favor of plaintiff.

It is contended on appeal,

"(1) That the exchange agreement and exchange escrow instructions are not sufficiently certain to warrant specific performance;

"(2) That the failure of intervenor to deliver a copy of the exchange agreement to defendant at the time her signature was obtained as required by Section 10142 of the Business and Professions Code, rendered the agreement invalid and unenforceable;

"(3) That defendant had no mutually enforceable remedy of specific performance against the plaintiffs;

"(4) That the findings of fact are insufficient to support the judgment;

"(5) That the finding that plaintiffs and defendant entered into the exchange agreement and exchange escrow agreement is contradictory and inconsistent with the finding that plaintiffs were required to pay defendant the sum of \$4,180.39;

"(6) That there is no substantial evidence to support certain specified findings of fact;

"(7) That the exclusion and admission of evidence as specified was error;

"(8) That there was a fatal variance between the pleading, proof and the judgment;

"(9) That the complaint for specific performance does not state a cause of action."

With regard to Item I, respondent points out that, "The pleadings of the defendant and the transcript of the lengthy trial had in this matter are completely devoid of any contention by the defendant that her contract with plaintiffs was uncertain in any particular as to the price to be paid or which of the parties was to pay to the other the \$4,180.39."

[1] Appellant's reply is as follows: "Respondents then argue that defendant never raised the question of the uncertainty of the contract in the pleadings or at the trial. The answer to this argument is that if the contract pleaded is uncertain then the complaint fails to state a cause of action for specific performance." Thus this issue is

raised for the first time on appeal. The record supports respondents' contention with relation to this issue.

[2] With regard to Item II, this contention is highly technical. As pointed out by respondent, "there is no evidence that defendant was misled or prejudiced in any way by the failure to give defendant a copy of the Exchange Agreement. Said Exchange Agreement was signed by defendant the evening of September 15, 1953, the very next morning, all of the parties met and the escrow instructions were prepared and executed. Certainly, the terms of the Agreement were at that time still fresh in the minds of all of the parties. Also, neither plaintiffs nor the defendant asked intervenor for a copy of said Exchange Agreement until defendant decided to attempt to rescind, at which time intervenor promptly delivered copies."

As to Item IV, it too is technical. The argument on this subject relates to the insufficiency of the findings. Without going into detail, it is noted that a review of the record reveals no prejudicial error in this regard.

Intervenor respondent, the broker in the transaction, points out that, "After the Exchange Agreement was signed, it was agreed between the parties that they would go to escrow the following morning. It was Appellant who suggested the Liberty Escrow Company. The parties all met again the following morning at the Liberty Escrow Company. Each of the parties brought numerous documents, which were subsequently introduced in evidence, and which were left with the escrow. The escrow instructions were signed after being prepared by June Connelly, the Escrow Clerk, and after each of the parties had an opportunity to read them.

"Subsequent to the escrow, there appeared to be no dissatisfaction with this transaction until shortly before September 30, 1953, when Mrs. Mercurio had a conversation with Intervenor in which Appellant stated that she could not go through with the deal if she had to pay the termite bill which was approximately \$1,200.00. Thereafter, Mrs. Mercurio, accompanied by a woman then unknown to the parties but

identified as a Mrs. Gellerman, a broker, spoke with the Intervenor and stated, in Mrs. Mercurio's presence, that she, Mrs. Gellerman, thought that this was a bad deal, and that she could sell Appellant's property and that her sale would be a better transaction. After this conversation, Appellant sent a Notice of Rescission and Cancellation on September 30, 1953.

"Subsequently, Respondents brought this action."

[3] The issues are largely questions of fact. These issues of course are for the trial judge to decide. Unless there is a lack of evidence to support them the appellate court is without power to intervene. A review of record reveals that the evidence is sufficient to support the findings.

The record reveals no prejudice as to the court's rulings on the admissibility and inadmissibility of evidence and appellant's contention "that there was a fatal variance between the pleadings, proof and the judgment", lacks support in the record.

A review of the record reveals no prejudicial errors. The judgment is affirmed.

WHITE, P. J., and NOURSE, Justice pro tem., concur.



137 Cal.App.2d 547

Kaylin Teresa HARLOW et al., Plaintiffs
and Respondents,

v.

Max VAN DUSEN et al., Defendants.

Gladys Oxford, Administratrix, etc.,
Appellant.

Civ. 20976.

District Court of Appeal, Second District,
Division 1, California.

Dec. 6, 1955.

Rehearing Denied Dec. 30, 1955.

Action against administratrix of estate of automobile host and driver of other automobile for death of guests. The Superior

Court, Los Angeles County, Wilbur C. Curtis, J., granted nonsuit to driver of other automobile and entered judgment in favor of plaintiffs, and defendant appealed. The District Court of Appeal, Doran, J., held that where deceased host was approaching a curve and hill crest on slippery, wet, dark night and passed another automobile at speed between 65 and 70 miles per hour, heedless of warning signs and oncoming automobile, host was guilty of wilful misconduct.

Judgment affirmed.

1. Automobiles ⇨181(1)

The terms "reckless driving" and "wilful misconduct" as used in automobile guest statute are synonymous. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Reckless Driving" and "Wilful Misconduct".

2. Automobiles ⇨245(24)

Question of reckless driving or wilful misconduct within automobile guest statute is essentially one of fact for determination by fact finder. Vehicle Code, § 403.

3. Automobiles ⇨181(7)

Excessive speed alone is not necessarily wilful misconduct within automobile guest statute, nevertheless speed is an important element to be considered since it, coupled with other circumstances, may constitute wilful misconduct. Vehicle Code, § 403.

4. Appeal and Error ⇨989

Where a verdict is attacked as being unsupported, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

5. Automobiles ⇨244(20)

In action against administratrix of estate of automobile host for death of guests, evidence that host was approaching a curve and hill crest on slippery, wet, dark night and passed another automobile at a speed of between 65 to 70 miles per hour, heedless of warning signs and oncoming auto-

mobile, supported finding of wilful misconduct of host. Vehicle Code, § 403.

6. Automobiles ⇨181(1)

One who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, takes a chance on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of wilful misconduct, within automobile guest statute. Vehicle Code, § 403.

7. Trial ⇨252(8)

In action against administratrix of estate of host driver for death of guests, where there was no evidence to support affirmative defense of contributory negligence or assumption of risk, trial court properly refused to instruct jury on those subjects. Vehicle Code, § 403; West's Ann.Code Civ.Proc. § 1963, subd. 4.

8. Trial ⇨252(1)

It is not error to refuse to give a proposed instruction where there is no evidence to support the theory upon which it is drawn.

Early, Maslach, Foran & Williams, Los Angeles, and Victor E. Williams and Donald J. Pierr, Los Angeles, for appellant.

Toxey H. Smith, Los Angeles, for respondents.

DORAN, Justice.

The administratrix of the Estate of Neal Calvin Oxford, Deceased, is here appealing from a judgment, after trial by jury, in favor of the respondents, awarding damages for the deaths of respondents' husbands and fathers, respectively, which occurred while the latter were riding as guests in a Studebaker automobile driven by Neal Oxford, deceased. The action herein is based upon the theory of wilful misconduct on the part of Neal Oxford who, along with the two guests Francis Harlow and Marco Piscitelli, died as a result of the accident.

The accident happened when the car, of which the three decedents were the sole occupants, traveling west along Highway 99 near Pomona, went into a spinning skid

onto the wrong side of the highway, colliding with another car traveling in the opposite direction. Max Van Dusen, driver of the other car, named as a defendant, is not a party to this appeal, a nonsuit having been granted at the conclusion of the plaintiffs' case.

Francis Harlow, Marco Piscitelli and Neal Calvin Oxford were friends working together at the Pomona Convair plant, and on the afternoon of March 19, 1953, Harlow and Piscitelli, accompanied by several other men, "played a few games of ping pong at the plant, and then, as they had done on previous occasions, set out on an evening of social *relaxation*", to quote from appellant's brief. "They first went to a place called the French Village, where they were joined by Neal Oxford * * *. At the French Village they had a few beers and played shuffle board. Later on, five of them went to another resort called the Alibi Supper Club * * * (where) the men conversed and listened to the orchestra and apparently had one or more drinks. According to Wesley West, one of those on the party, no one was intoxicated when he left the Alibi at about midnight. * * * West, * * * was the last of the party to see his three friends alive.

As disclosed by the record, the three decedents, Oxford, Harlow and Piscitelli, were next observed after midnight riding in Oxford's car, with Oxford driving, a few seconds before the crash. The three men were sitting in the front seat. The Oxford car was proceeding west on United States Highway 99, in an area known as Kellogg Hill. Witness Gerald Murphy, who was also proceeding west, by means of the rear view mirror, observed the Oxford car directly behind and in the righthand lane, just before Oxford passed Murphy's car.

According to Murphy's testimony, summarized in respondents' brief, "The night was dark, a light rain or mist was falling and the highway was slick all over. Murphy's car was traveling about 50 miles an hour when Oxford's car swung into the left lane to pass him. * * * a conservative estimate of its speed would be 65 to 70 miles an hour. About two or three seconds after Oxford passed Murphy, his

car went into a spin, swung around twice in a clockwise direction, crossed over the double line and crashed into the eastbound Van Dusen automobile on the other side of the road. At no time before the accident did the red brake lights of Oxford's car go on."

It appears that the Kellogg Hill, a four-lane highway, proceeds in a series of 3 to 4 curves to the crest of the hill towards which the Oxford car was proceeding. State Highway Patrol Officer McArthur roughly estimated the grade at "from 5 to 7 percent, maybe 10 percent", and testified, "We consider them rather sharp curves so far as an accident hazard is concerned".

The road in the accident area has warning signs reading, "Slippery When Wet", also "Slow", "Downgrade", and signs indicating curves in the road. The accident occurred between two of the curves, about 100 to 150 feet west of one curve and just before the road bent into the succeeding curve. The night was dark, and the road had no lights or other illumination. The officer found no skidmarks, and did not smell alcohol on any of the parties. Oxford had frequently used the Kellogg Hill highway.

The jury found a verdict of \$55,336.25 in favor of the Harlow heirs, and \$33,866.47 for the Piscitelli heirs. Defendant's motion for a new trial was denied, followed by the present appeal from the judgment against the Oxford estate.

It is appellant's contention that, at most, Oxford's conduct did not amount to wilful misconduct but was no more than negligence, under the guest law. Appellant also urges that the questions whether the guests, Harlow and Piscitelli, were guilty of contributory negligence, or assumed the risk attendant upon the ride, should have been submitted to the jury, and that it was reversible error for the trial court to refuse to give instructions on such issues.

Under the provisions of Section 403 of the Vehicle Code, there can be no recovery for the injury or death of a guest riding in a vehicle "unless the plaintiff in any such action establishes that such injury or death proximately resulted from the in-

toxication or wilful misconduct of said driver".

[1,2] As pointed out in respondents' brief, the term "wilful misconduct" has been given a broad interpretation. In some cases it has been defined as the intentional doing of an act either with a knowledge that serious injury is a probable result or "the intentional doing of an act with a wanton and reckless disregard of its possible result". Jones v. Harris, 104 Cal. App.2d 347, 231 P.2d 561, 564. Reckless driving and wilful misconduct are held to be synonymous terms, and as said in Hastings v. Serleto, 61 Cal.App.2d 672, 143 P.2d 956, 961, such reckless driving or wilful misconduct "is essentially one of fact for determination by the fact finder".

[3] Although, as stated by appellant, excessive speed alone is not necessarily wilful misconduct, nevertheless, as pointed out in respondents' brief, "speed is an important element to be considered since it, coupled with other circumstances, may constitute wilful misconduct". In several reported cases, a speed of 60 miles per hour has been held to constitute wilful misconduct when conjoined with such facts as a damp highway, a misty night requiring windshield wipers, etc. Hallman v. Richards, 123 Cal. App.2d 274, 266 P.2d 812 is an example of such holdings, involving a factual situation not dissimilar from that here presented.

[4] It is unnecessary to cite authorities in support of the well established rule that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

[5] In the instant case, the record discloses substantial evidence of wilful misconduct as defined by the authorities. As summarized in respondents' brief, "Oxford was a driver familiar with the road and its hazards—the fact that it was curving and winding, that he was approaching another curve and the crest of a hill and that the road was slippery when wet. Yet, on a dark, wet, slippery night, he proceeded to

pass a car at a speed between 65 to 70 miles an hour, heedless of warning signs and the approach of an oncoming car".

[6] From such evidence the jury could well believe that the case was one coming within the purview of *Francesconi v. Belluomini*, 28 Cal.App.2d 701, 705, 83 P.2d 298, 300, where it is said: "To us it seems clear that one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, 'takes a chance' on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of willful misconduct". The question whether Oxford's conduct, under existing circumstances, was such as to constitute wilful negligence, was essentially one of fact which a jury has resolved in favor of the respondents.

[7,8] The appellant's contention that the trial court erred in not instructing the jury on the subjects of contributory negligence and assumption of risk on the part of Oxford's guests, is without merit. As pointed out in the respondents' brief, there was no evidence to support the affirmative defenses of contributory negligence or assumption of risk, matters as to which the appellant had the burden of proof. "Concerning the conduct of Harlow and Piscitelli, nothing is shown except that in the fleeting glimpse of them caught by witness Murphy, a few seconds before the accident, they were seated in the front seat of Oxford's car. Nothing more. Under the circumstances the only evidence of their conduct was the rebuttable presumption of due care provided for in Section 1963(4) of the Code of Civil Procedure". It is not error to refuse to give a proposed instruction where there is no evidence to support the theory upon which it is drawn. *Davenport v. Stratton*, 24 Cal.2d 232, 149 P.2d 4.

As before indicated, there is substantial evidence in support of the verdict and judgment, and the record reflects no reversible error.

The judgment is affirmed.

WHITE, P. J., and NOURSE, J. pro tem., concur.

137 Cal.App.2d 672

Sol COOPER and Fidel Sanchez, doing business as the Wonder Bar, Appellants,

v.

The STATE BOARD OF EQUALIZATION
of the State of California, Respondent.
Civ. 16706.

District Court of Appeal, First District,
Division 1, California.

Dec. 9, 1955.

Proceeding for a writ of mandate to review the State Board's decision in revoking the liquor license of petitioners on the ground that they permitted the solicitation of patrons to buy alcoholic beverages. The Superior Court for the City and County of San Francisco, Harry J. Neubarth, J., entered judgment denying application for the writ and the petitioners appealed. The District Court of Appeal, Peters, P. J., held that revocation was proper on the ground that the licensees permitted girls to solicit drinks on the premises, that the statutes prohibiting such solicitation were not invalid, and that the penalty of revocation was not excessive.

Judgment affirmed.

1. Intoxicating Liquors $\S$ 108(5)

In proceeding to set aside revocation of a liquor license on ground that girls in a bar solicited drinks from patrons, once it was proved that the bartender, hired by licensee, knew that soliciting was going on, not only by girls but by two employees of licensees, and that such solicitation was open, obvious and frequent, and that a tally was kept of the drinks solicited, the Board was justified in inferring that the owners and operators of the bar had the specific intent to hire the employees for solicitation purposes, and to encourage the other girls to solicit drinks. *West's Ann. Bus. & Prof. Code*, §§ 24200, 25657; *Pen. Code*, § 303.

2. Intoxicating Liquors 108(5)

In proceeding to set aside revocation of a liquor license, evidence was sufficient to support a finding that the licensees personally hired or permitted girls at the bar to

solicit drinks on the premises. West's Ann. Bus. & Prof.Code, §§ 24200, 25657; Pen. Code, § 303.

3. Intoxicating Liquors ⇨116

The statutes prohibiting the employment on licensed premises of persons for purpose of soliciting patrons to purchase alcoholic beverages do not require that the accused licensees personally hire or permit the solicitation in order to invoke the penalties of the statutes. West's Ann. Bus. & Prof.Code, § 25657; Pen.Code, § 303.

4. Statutes ⇨220

That the statute providing that every licensee or agent of a licensee keeping in conjunction with licensed premises, any disorderly house, expressly provides for the vicarious liability of principal for the acts of his agent, did not establish that the omission of similar language in the statute making it unlawful in any licensed on sale premises to employ persons to solicit patrons to purchase alcoholic beverages meant that the accused licensees could not be held responsible, unless they personally hired or permitted the solicitation. West's Ann.Bus. & Prof.Code, §§ 25657, 25607, 25632.

5. Intoxicating Liquors ⇨106(1)

A licensed employer on a licensed on sale premises may be disciplined to the extent of revocation of his license for the acts of his employees.

6. Principal and Agent ⇨189(4)

A pleading alleging that defendant committed a certain act is an allegation that in legal effect the defendant was responsible for the act, that is, that defendant through his agent committed the act, or defendant personally committed it, and either can be proved, under an allegation that "defendant" committed the act.

7. Intoxicating Liquors ⇨108(4)

That accusation seeking revocation of an on sale license charged licensees with violations of the pertinent statutes, but did not refer to vicarious liability of the licensees for acts of employees in soliciting patrons to buy drinks, did not require Board to prove personal violations by the

licensees. West's Ann.Bus. & Prof.Code, § 25657; Pen.Code, § 303.

8. Intoxicating Liquors ⇨99

A liquor license has certain attributes of property, but it is a type of property which the state, under the police power, has the power to control and regulate.

9. Constitutional Law ⇨287

As long as the State Board of Equalization acts within its jurisdiction in revoking an on sale liquor license, and as long as its proceedings comply with the Administrative Procedure Act, and there is no abuse of discretion and its findings are supported by substantial evidence, a revocation of the license cannot be assailed as deprivation of property without due process. West's Ann. Bus. & Prof.Code, §§ 24200, 25657; West's Ann.Gov.Code, § 11370 et seq.; Pen.Code, § 303.

10. Constitutional Law ⇨296(1)

Intoxicating Liquors ⇨15

The statutes prohibiting the employment on licensed premises of persons for the purpose of solicitation of patrons to buy drinks are not unconstitutional as depriving the licensees of a valuable property right without due process. West's Ann.Bus. & Prof.Code, § 25657; Pen.Code, § 303.

11. Constitutional Law ⇨318

The type of hearing involved in revocation of an on sale liquor license for acts of the licensees in permitting the solicitation of patrons to buy drinks complies with constitutional requirements.

12. Criminal Law ⇨13

Penal statutes may not be uncertain or vague, and must fairly apprise the public of the conduct prohibited.

13. Criminal Law ⇨13

The statutes prohibiting the employment upon licensed premises of persons for solicitation of patrons to buy drinks are not void for want of certainty required by law on the ground that the language of the statute is so broad as to apply to legitimate entertainers. West's Ann.Bus. & Prof. Code, § 25657; Pen.Code, § 303.

14. Intoxicating Liquors ⇨116

The statutes prohibiting the employment upon licensed on sale premises and

places where alcoholic beverages are sold to be consumed on the premises of persons soliciting patrons to purchase beverages only prohibits direct solicitation of drinks, and does not prohibit the purchase of drinks by patrons of their own initiative while watching entertainment or when asked by a waitress if they desire service. West's Ann.Bus. & Prof.Code, § 25657; Pen.Code, § 303.

15. Constitutional Law ☞70(3)

Where the Legislature has seen fit to prohibit the soliciting or begging of drinks or the hiring or permitting of persons in a bar to do so on the ground that such acts were morally reprehensible, matter was within the legislative orbit and was not a judicial question, but one of legislative policy. West's Ann.Bus. & Prof.Code, §§ 24200, 25657; Pen.Code, § 303.

16. Intoxicating Liquors ☞106(4)

Revocation of an on sale liquor license on the ground that licensees knowingly permitted girls to solicit patrons to buy alcoholic beverages was not improper on the ground that penalty of revocation was excessive. West's Ann.Bus. & Prof.Code, §§ 24200, 25657; Pen.Code, § 303.

James C. Purcell, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Carl W. Wyncoop, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Cooper and Sanchez, as the licensees, owners and operators of a bar in San Francisco, were duly charged by the State Board of Equalization, the body then having constitutional authority to enforce the terms of the Alcoholic Beverage Act, with having violated sections 24200 and 25657 of the Business and Professions Code, and Penal Code, section 303. The hearing officer found that the charged offenses had been committed and recommended revocation of the license. The Board approved this recommendation, and ordered the license revoked. The petitioners, thereupon, sought a writ of mandate in the Superior

Court to review the Board's decision. The Superior Court, on appropriate findings and conclusions, entered its judgment denying the application for the writ. Petitioners appeal from that judgment.

There is no need to review the evidence in detail. Suffice it to say that four enforcement officers testified that they visited the licensed premises on several occasions; that to the knowledge of the bartender, waitresses employed by the petitioners, or girls loitering at the bar, solicited the officers to buy drinks for them; that many such drinks were purchased for the girls by the officers at the solicitation of the girls; that each time the waitresses or girls solicited a drink, when the drink was served, the bartender, in a separate glass, furnished them with a small wooden or plastic stirring rod which they immediately placed in their hand bags; that this procedure was followed whether the waitresses or girls ordered straight whiskey, a mixed drink or wine. The officers observed this procedure as to drinks purchased for the waitresses or girls by other patrons of the bar. The officers also observed that when, on occasion, the girls bought drinks for themselves, no separate glass with a stirring rod was furnished. One of the officers observed one of the girls, at about closing time, present the stirring rods to the bartender, who counted them, and then handed the girl some money. Several of the officers testified to seeing one or the other of the appellants on the premises on several occasions while they were present and while the procedures in reference to the stirring rods were being carried on by the bartender and the waitresses and the girls. When the officers finally arrested the participants they found that all of the girls in question, including two waitresses employed by the bar, had many of these stirring rods in their possession.

The two petitioners, the owners of the liquor license involved, admitted that the bartender was employed by them, as were two of the girls, who were employed as waitresses. They denied that they ever allowed the waitresses or any girls to beg or solicit drinks in their establishment. They testified that the waitresses were

paid a straight salary by check, and received no other compensation; that they had no knowledge that any girl ever solicited drinks on the premises; that it was the custom in their bar, when the patrons purchased a whiskey mixed drink, to serve the whiskey separate from the mix, together with a stirring rod, so that the patron could mix his own drink. The stirring rods are not reused. Sanchez, one of the petitioners, admitted that he was familiar with the law involved in these proceedings because in 1951 he had been charged, in connection with another bar he then operated, with the employment of persons to procure the sale of alcoholic beverages in violation of section 303 of the Penal Code, and his license was then suspended for 30 days.

On this evidence the hearing officer found, and the Board adopted the findings, that on three specified dates the petitioners employed two named persons for the purpose of procuring or encouraging the purchase and sale of alcoholic beverages, and on certain specified dates knowingly permitted certain named girls to loiter on the premises for the purpose of begging or soliciting patrons of the bar to purchase them alcoholic beverages. The first charge is a violation of section 303 of the Penal Code and section 25657(a) of the Business and Professions Code, while the second charge is a violation of section 25657(b) of that code. The basic conclusion was that continuance of the license "would be contrary to public welfare and morals."

There can be no doubt that the evidence overwhelmingly supports the findings that employees of the bar, and the girls in the bar, solicited drinks from patrons, and that the bartender knew of and participated in this activity. Appellants make no contention to the contrary. Their basic argument is that neither of the appellants personally hired or permitted these women to solicit drinks. Without such personal participation, it is claimed, the revocation was improper.

[1] There are several answers to this contention. The first is that the officers testified that Cooper was present on the premises on at least one occasion, for sev-

eral hours, during which time the officers were solicited to buy drinks, and during which time several of the girls solicited service men patrons to buy drinks. During this period one of the officers observed the bartender pay off one of the girls when she delivered to him her stirring rods. The officers also placed Sanchez on the premises on two occasions when similar solicitation occurred. Once it was proved that the bartender, hired by appellants, knew that soliciting was going on, not only by girls in the bar but by two employees of appellants, and that such solicitation was open, obvious and frequent, and that a tally was kept of the drinks solicited, the Board was justified in inferring that appellants, as the owners and operators of the bar, had the specific intent (if one is required) to hire the employees for solicitation purposes, and to permit and encourage the other girls to solicit drinks. This was the precise holding of this court in *Cornell v. Reilly*, 127 Cal. App.2d 178, at page 186, 273 P.2d 572, at page 578, where it was stated: "The fact that the girls were employed by appellant is conceded. The fact that they, on numerous occasions, solicited drinks from patrons of the bar was established by substantial evidence, and is not denied. The fact that the bartender-manager Andrews knew of such solicitation was established by the record kept by the bar of all drinks consumed by the entertainers, even though paid for by a patron. Under such a state of facts the inference that such solicitation was an integral part of the employment of the entertainers is not only reasonable, but almost inevitable. Thus, even if it was necessary to establish that appellant had a specific intent to hire the employees for solicitation purposes, such fact was established by clear evidence and the reasonable inferences therefrom."

[2] Thus, the evidence is sufficient to support a finding that appellants personally hired or permitted these girls to solicit drinks on the premises. But even if the evidence were insufficient in this respect, this would not help appellants. No such finding is required under the law. The appellants as the owners and operators of the bar, and as licensees, are responsible

for the acts of the bartender, and of their other employees.

[3] Appellants contend that the statutes involved require that the accused licensees cannot be held responsible unless they personally hired or permitted the solicitation. This contention is not supported by either the language of the pertinent statutes or by the cases interpreting those sections.

Penal Code section 303 reads: "It shall be unlawful for any person engaged in the sale of alcoholic beverages, other than in the original package, to employ upon the premises where the alcoholic beverages are sold any person for the purpose of procuring or encouraging the purchase or sale of such beverages * * *."

Business and Professions Code section 25657 states: "It is unlawful:

"(a) For any person to employ, upon any licensed on-sale premises, any hostess or entertainer for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages * * *.

"(b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting. * * *"

[4] Appellants call attention to the fact that the sections do not expressly provide for the vicarious liability of the principal for the acts of his agent, and urge that other sections of the same act do so provide. For example, section 25601 of the Business and Professions Code provides: "Every licensee, or agent or employee of a licensee, who keeps * * * in conjunction with a licensed premises, any disorderly house * * *." See also §§ 25632, 25607, and 25661 of the Bus. & Prof. Code. The omission of similar language in section 25657 is found significant by appellants.

Appellants' interpretation of the language referring to employees in these other statutes is clearly unsound. The quoted language was not used to impose a vicari-

ous liability upon the employer for the acts of his employee, but was inserted to add the personal liability of the employee to that of the employer. No such language was necessary in section 25657.

[5] The cases are uniform in holding that a licensed employer may be disciplined to the extent of revocation of his license for the acts of his employees. In *Mantzoros v. State Bd. of Equalization*, 87 Cal. App.2d 140, 144, 196 P.2d 657, 660, Justice Dooling had the following to say, about another section of the statute, in reference to the very contention here made: "It is to be noticed that the question in their case is not whether they are criminally liable for their employee's act, a question which we need not decide, but whether they can be subjected to discipline by the Board of Equalization because their employee made a sale of liquor at an hour forbidden by that section. The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature. Even in the case of criminal statutes vicarious liability for the acts of employees is not unknown."

In *Cornell v. Reilly*, 127 Cal.App.2d 178, 187, 273 P.2d 572, 578, this court, in regard to the question of vicarious liability for the very conduct involved in the instant case, after quoting with approval from the *Mantzoros* case, stated: "By virtue of the ownership of a liquor license such owner has a responsibility to see to it that the license is not used in violation of law. Obviously, the economic benefits of the solicitation of drinks by the entertainers with Andrews' knowledge and participation redounded to the benefit of appellant. The responsibility for Andrews' acts in the operation of the license can and should be imputed to appellant." See also *Swegle v. State Board of Equalization*, 125 Cal.App.2d 432, 270 P.2d 518.

Appellants suggest that these cases erroneously interpret the statutes involved and should be overruled. We were not impressed by this argument when we wrote the Cornell case, *supra*, and are not impressed with the argument now. We think that the statutes were correctly interpreted in the two cases last quoted from, and are content to rely upon them, without further elaboration.

[6,7] Appellants make a somewhat related argument, and that is that since the accusation charged the *licensees* with violations of the pertinent statutes, and did not refer to vicarious liability, it was incumbent on the Board to prove personal violation by the licensees, and since the Board did not (so it is contended) prove this, there was a fatal variance. This is, of course, a question of pleading. It is well settled that a pleading alleging that defendant committed a certain act is simply an allegation that in legal effect the defendant is responsible for the act—i. e., that defendant through his agent committed the act or that defendant personally committed it. Either can be proved under an allegation that “defendant” committed the act. *Golceff v. Sugarman*, 36 Cal.2d 152, 154, 222 P.2d 665.

[8] Appellants next contend that the statutes involved are unconstitutional in that they permit the deprivation of a valuable property right without due process. Of course a liquor license has certain attributes of property. It certainly has value and is sold commercially. But it is a type of property which the state, under the police power, has the power to control and regulate. The proper rule was stated in *Tokaji v. State Board of Equalization*, 20 Cal.App.2d 612, 614, 67 P.2d 1082, 1083, as follows: “It is well settled that the right to possess, make or deal in intoxicating liquor is not a privilege, nor such a property right that state legislation prohibiting, restricting, or regulating its manufacture, use, possession, distribution, or sale violates the Fourteenth Amendment of the Federal Constitution. [Citations.] Regarding this subject it was recently declared: ‘Unlike

the rule with respect to the right to deal in ordinary commodities * * * there is no inherent right in a citizen to sell intoxicants * * * and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution; * * * it is but a permit to do what would otherwise be unlawful, and consequently a statute authorizing its revocation does not violate the due process clause * * *.’” Citing *State Board of Equalization v. Superior Court*, 5 Cal.App.2d 374, 377, 42 P.2d 1076. See also *People v. Jemnez*, 49 Cal. App.2d Supp. 739, 121 P.2d 543.

[9–11] As long as the Board acted within its jurisdiction, and as long as its proceedings complied with the Administrative Procedure Act, Gov. Code, § 11370 et seq., and as long as there was no abuse of discretion, and as long as its findings are supported by substantial evidence, a revocation of a license cannot be successfully assailed as a deprivation of property without due process. All procedural requirements were met in this case. Appellants admit that this is so. App.Op.Br. 11. Certainly the type of hearing here involved complies with constitutional requirements. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 173 P.2d 545.

[12–14] Appellants next assail the two statutes on the ground that they are void for the want of the certainty required by law. It is, of course, the law that penal statutes may not be uncertain or vague, and must fairly apprise the public of the conduct prohibited. Do these statutes fail to meet that test? We think not. Appellants argue that the language of the statutes “to employ * * * any person for the purpose of procuring or encouraging the purchase or sale of such beverages” is so broad as to apply to legitimate entertainers, who by providing entertainment necessarily encourage the sale of drinks or to a waitress who asks a patron if he desires a drink. The contention requires but scant consideration. The Legislature obviously intended to prohibit the direct “procuring or encouraging the purchase” of alcoholic beverages, and not the incidental increase of con-

sumption of liquor by persons watching entertainment furnished by the management. We have no difficulty in holding that the statute clearly and without ambiguity only prohibits direct solicitation of drinks, and does not prohibit the purchase of drinks by patrons of their own initiative and volition while watching entertainment or when asked by a waitress if they desire service. The courts have had no difficulty in ascertaining what these statutes prohibit. See *Chosick v. Reilly*, 125 Cal.App.2d 334, 270 P.2d 547; *Cornell v. Reilly*, 127 Cal.App.2d 178, 273 P.2d 572; *Hobson v. Reilly*, 132 Cal.App.2d 275, 281 P.2d 877.

[15] Appellants make frequent reference in their briefs to the fact that there was no evidence that the girls involved solicited any of the patrons for purposes of prostitution, and seem to contend that without such solicitation the mere solicitation of drinks is not immoral. There is no merit to this contention. The Legislature has seen fit to prohibit the soliciting or begging of drinks, or the hiring or permitting of persons in the bar to do so. The Legislature did so because it felt that such acts were morally reprehensible. This was within the legislative orbit. It is not a judicial question at all, but one of legislative policy.

[16] The last mentioned argument leads to the next contention of appellants, and that is that the penalty of revocation was excessive. In at least three prior cases, being the three cases last cited, the revocation of licenses was affirmed for conduct similar to that involved here. Obviously, the Board did not abuse its discretionary powers in revoking the license for the conduct here involved.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

GUARANTEE INSURANCE COMPANY,
Petitioner,
v.
INDUSTRIAL ACCIDENT COMMISSION
OF the State of CALIFORNIA, and
J. A. McCleskey, Respondents.
Civ. 8886.

District Court of Appeal, Third District,
California.
Dec 9, 1955.

Hearing Denied Feb. 1, 1956.

Proceeding by compensation carrier against Industrial Accident Commission and claimant to review a workmen's compensation award on ground that claimant, who was injured while operating alfalfa chopper, was employee of lessees, with whom claimant and his father, as lessors, engaged in a dairy business, and who paid claimant to chop alfalfa rather than hire full time employee at higher rate. The District Court of Appeal, Schottky, J., held that evidence was sufficient to sustain finding that claimant was an employee, not an independent contractor or joint venturer.

Award affirmed.

1. Workmen's Compensation $\Rightarrow$ 1939

Where Industrial Accident Commission's findings are supported by substantial evidence or by inferences which may fairly be drawn from the evidence, even though evidence may be susceptible of opposing inferences, such findings will not be disturbed by an appellate tribunal.

2. Workmen's Compensation $\Rightarrow$ 1939

Question whether worker is an employee within meaning of Workmen's Compensation Act is question of mixed law and fact to be proved like any other question and is question on which Industrial Accident Commission's judgment is conclusive if the facts are in dispute.

3. Workmen's Compensation $\Rightarrow$ 1705

Question whether worker is an employee within meaning of the Workmen's Compensation Act becomes one of law only when but one inference can reasonably be drawn from the facts.

4. Workmen's Compensation ⇨1939

Where, two opposing inferences may be drawn from the evidence in workmen's compensation proceeding, and inference accepted by Industrial Accident Commission is reasonable and is supported by evidence in the record, such inference must be sustained.

5. Workmen's Compensation ⇨1344, 1349

In workmen's compensation proceeding, alleged employer has burden of establishing that injured person, who claims to be an employee, is an independent contractor or otherwise excluded from protection of the Workmen's Compensation Act if there is proof that the injured person was, at time of his injury, actually performing services for the alleged employer.

6. Workmen's Compensation ⇨1443, 1452

In proceeding by compensation carrier against Industrial Accident Commission and claimant to review and annul workmen's compensation award on ground that claimant, who was injured while operating alfalfa chopper, was employee of lessees, with whom claimant and his father, as lessors, engaged in a dairy business, and who paid claimant to chop alfalfa rather than hire full time employee at higher rate, evidence was sufficient to sustain finding that claimant was an employee, not an independent contractor or joint venturer. West's Ann.Labor Code, §§ 3351, 3353, 3357, 5705(a).

7. Workmen's Compensation ⇨1615

In workmen's compensation proceeding, evidence, which revealed that the \$150 a month paid claimant was arrived at by taking one-half of wages that employers would have had to pay to farm hand for full time work and that claimant would have to work approximately half time to do the job involved, was sufficient to sustain Industrial Accident Commission's finding that claimant's earnings were at rate of \$150 per month.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent Industrial Accident Comm.

Frank B. Collier, Modesto, for respondent J. A. McCleskey.

SCHOTTKY, Justice.

This is a proceeding to review and annul an award of workmen's compensation benefits to J. A. McCleskey which is based on a finding that McCleskey was injured while acting as an employee of petitioner's assured, and not as an independent contractor or joint venturer.

The facts, which are not in substantial dispute, may be summarized as follows: Respondent McCleskey and his father had a life interest in 690 acres of agricultural land. On May 12, 1953, they entered into a three year agreement with Verne B. LaCross and Manuel Matizo whereby the lessees would supply at least 150 cows and certain equipment for the purpose of carrying on a dairy business upon the lessors' land. Among other things, the lease provided that the lessors would furnish suitable pasturage and/or necessary and proper feed for the milk cows at such time and in such quantity as should be determined by the parties. The lessors would not incur any other expenses. As rental of the premises and compensation for pasture and feed, the lessors would receive one-half of the proceeds of milk products produced. The lessees were to have 150 cows actually producing and averaging one pound of butterfat per cow per day, otherwise the lessors would be entitled to receive one-half pound of butterfat per cow per day. Petitioner became the workmen's compensation insurance carrier for the lessees, which, under the terms of the lease, was for the protection of all workers and employees of the lessees in and about the operation of the dairy.

Respondent McCleskey during the year 1953 received around \$2,000 a month as his share of the milk checks. His obligation was fulfilled merely by growing, cutting and stacking hay, which the lessees took to the cows, or by letting the cows out to the pasture to eat green food. Later on

Mullen & Filippi, San Francisco, for petitioner.

it was noticed that insects in the pasture bothered the cows, and in April, 1954, the parties discussed feeding them green alfalfa in the corral. The new operation would require the alfalfa to be chopped up and loaded into a wagon. The parties figured that the operation would only require 4 hours or a half day's work, and rather than hire a full-time employee at about \$300 per month they decided that the respondent McCleskey would do the job for \$150 per month.

McCleskey already had the chopper and tractor, and although he purchased the wagon after the agreement he testified that he needed it for other work on his own ranch. The alfalfa was sometimes hauled and chopped by Mr. McCleskey and sometimes by his hired hands. The lessees directed how much green alfalfa was fed to the stock. If milk production tended to diminish, they would order more green alfalfa to be chopped and brought to the cows. Other than this, no suggestions or directions were made about the manner in which the work was to be done. The green feeding operation was something new and none of the parties knew very much about it. There was no particular time for payment of the \$150 a month and no deductions were made for state or federal tax purposes. In chopping the alfalfa on September 3, 1954, the knives became clogged. McCleskey put his right hand in to free them and was severely injured.

It was found that the injury caused temporary total disability beginning October 16, 1954, to January 31, 1955, at the rate of \$21.38 a week, based upon earnings of \$150 a month, and indefinitely thereafter until the further order of the Commission. The cost of medical treatment procured, together with future medical treatment, was awarded and jurisdiction was reserved for future determination of permanent disability.

Petitioner's first contention is that the evidence does not support the finding that respondent McCleskey was an employee of LaCross and Matizo. It quotes from section 3351 of the Labor Code as follows:

"'Employee' means every person in the service of an employer under any

appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."

Both petitioner and respondent quote section 3357 of the Labor Code which provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." However, petitioner contends that McCleskey was not rendering service under a contract of hire. Petitioner argues that the proper construction of the original lease instrument is that it demises a portion of the premises, i. e., the barn and corrals, for the operation of a dairy, and it is also a contract for sale of feed necessary and proper for the 150 cow herd from the land retained by McCleskey and to be grown by him. It argues that the relationship of the parties, therefore, was that of vendor and vendee with respect to the feed to be provided for the dairy, the compensation to be a gross share of the profit; that the relationships of vendor-vendee and employer-employee are mutually exclusive; that one selling a product is not in service to the vendee, but is an equal and deals at arm's length and is not subject to the control of the other. Petitioner argues that when the parties agreed to green-feed the cattle there was no change in the terms of the original lease because it was McCleskey's obligation under the lease to furnish feed necessary and proper for the cows. Petitioner argues further that because of the outlay for equipment by McCleskey and, presumably, because he was to bear the cost of operating the equipment and maintaining it, it was agreed that Matizo and LaCross would pay the \$150 a month, and that this merely represented additional compensation for the feed.

Respondents in reply argue that the parties considered that McCleskey was fulfilling the original obligation by maintaining his pasture lands and permitting lessees to use them, and by furnishing stacked hay to the lessees. Respondents ask, "Could the lessees have compelled McCleskey to furnish them with chopped alfalfa? Could they have broken the lease or refused to

pay him his percentage on the ground that he did not? We do not think so, and apparently they did not think so either. When they decided to feed chopped alfalfa to the cows they contemplated hiring someone to chop it. If they had hired anyone else he would certainly have been their employee. There was nothing to prevent them from entering into a new and additional agreement with McCleskey, which they did. Under this new and additional agreement, McCleskey was performing for them the service of chopping the alfalfa."

Petitioner contends further that even if McCleskey was in the broad sense rendering service, it was as an independent contractor, quoting Labor Code, section 3353, which provides:

"'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

Respondents quote the following from section 5705 of the Labor Code:

"* * * The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:

"(a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his injury actually performing service for the alleged employer."

They argue that because of the presumption of employment raised by Labor Code, section 3357, and the placing of the burden of proof on the petitioner to prove the relationship of independent contractor by Labor Code, section 5705, the burden of proof was upon the petitioner, and the petitioner did not sustain the burden or overcome the presumption. Respondents argue that as stated before any other person hired to do this work would obviously have been legally an employee. Therefore, say respondents, the presumption is squarely applicable and McCleskey should be con-

sidered an employee, citing *Hillen v. Industrial Accident Commission*, 199 Cal. 577, 250 P. 570; *Skillman v. Industrial Accident Commission*, 131 Cal.App. 493, 21 P.2d 658; *Schaller v. Industrial Accident Commission*, 11 Cal.2d 46, 77 P.2d 836; *California Compensation Insurance Co. v. Industrial Accident Commission*, 86 Cal. App.2d 861, 195 P.2d 880.

In *Hillen v. Industrial Accident Commission*, supra, the court said in 199 Cal. at page 580, 250 P. at page 571:

"By the terms of the Workmen's Compensation Law (Stats.1917, p. 831)

'every person in the service of an employer * * * under any appointment or contract of hire' is an employee. Section 8(a). Any person rendering service for another, other than as an independent contractor, or as expressly excluded by the provisions of the act, is presumed to be an employee. Section 8(b). It is admitted that Downing was at the time of his injury actually performing service for Hillen. Consequently, the burden of proof rests upon Hillen to establish that Downing was an independent contractor. Section 19(d) (1). It was therefore necessary for him to show that Downing was, within the definition of the term, a person rendering 'service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.' Section 8(b). Whether or not the relation of employer and employee existed in this case, under the oral contract entered into, is a question of mixed law and fact, to be proved like any other question. The finding of the commission, in effect, that the relation existed between Hillen and Downing, is binding on this court. *Pacific Gas & Elec. Co. v. Industrial Accident Comm.*, 180 Cal. 497, 499, 181 P. 788. Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission, the court is not empowered to set it aside. *Eastman Co. v. Industrial Accident*

Comm., 186 Cal. 587, 598, 200 P. 17. The award of the commission may be annulled only if there is no substantial evidence in support of its findings. Press Pub. Co. v. Industrial Accident Comm., 190 Cal. 114, 124, 210 P. 820."

[1-5] It is apparent that the principal question that we must determine upon this appeal is whether or not the evidence before the Commission compels a finding that the services performed by McCleskey under the new and additional agreement were performed under an independent contractor relationship. The finding of the Commission was that "At the time of said injury applicant was not rendering services to defendant-employers, or either or both of them, as an independent contractor or as a joint venturer." As stated in Schaller v. Industrial Accident Commission, supra, 11 Cal.2d at page 50, 77 P.2d at page 838:

"Where findings made by the commission are supported by substantial evidence, or by inferences which may fairly be drawn from the evidence, even though the evidence be susceptible of opposing inferences, those findings will not be disturbed by an appellate tribunal. Schramm v. Industrial Acc. Comm., 15 Cal.App.2d 475, 481, 59 P.2d 858; Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 202 Cal. 688, 693, 262 P. 309, 58 A.L.R. 1392; Archbishop v. Industrial Acc. Comm., 194 Cal. 660, 230 P. 1; Western P. R. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754. The question of whether a worker is an employee within the meaning of the Compensation Act [Act 4749, Deering's Gen.Laws, vol. 2, p. 2272 et seq.], is referred to as a question of mixed law and fact to be proved like any other question. Hillen v. Industrial Acc. Comm., 199 Cal. 577, 250 P. 570; La Franchi v. Industrial Acc. Comm., 213 Cal. 675, 3 P.2d 305. It is a question of fact upon which the judgment of the commission is conclusive where the facts are in dispute. It becomes a question of law only when but one inference can reasonably be drawn from the facts. Where two opposing inferences may be drawn from the evidence, and the inference

accepted by the commission is reasonable, and is supported by evidence in the record, that inference must be sustained. Schramm v. Industrial Acc. Comm., supra; Western P. R. v. Industrial Acc. Comm., supra; Archbishop v. Industrial Acc. Comm., supra. Moreover, in cases of this character the burden of proof rests upon an alleged employer to establish 'that an injured person claiming to be an employee is an independent contractor or otherwise excluded from the protection of (the) act, where there is proof that such injured person was at the time of his injury actually performing service for the alleged employer'. [Citing cases.]"

Applying these well settled rules to the instant case we are convinced upon the record here that it was a question of fact for the respondent Commission to determine, and while the evidence and inferences therefrom might support a finding that the applicant McCleskey was rendering service as an independent contractor, there is substantial evidence to support the finding of the Commission that such relationship did not exist. For it is fairly inferable from the evidence that the new agreement as to the change in manner of feed, necessitating the chopping of the alfalfa, was not one that McCleskey was required to enter into and that LaCross and Matizo were willing to pay him \$150 per month for the additional work required to be performed by him. The following testimony of McCleskey supports such a conclusion:

"A. Well, when we started the green feeding they figured they had too much work to do for themselves and rather than—and it wasn't enough to justify them hiring a full-time man, you know. It was a split shift, in other words, so they asked me if I would be interested in working it on the split shift that way, if I would be able to do the green feeding.

"Q. To do the green feeding you had to chop it up, is that it? A. I had to chop it, and it's loaded into a wagon that automatically unloads.

"Q. Was there anything said about you being paid to do the chopping? A. Yes, sir.

"Q. What was that? A. They told me they'd pay me \$150.00 a month.

"Q. Who told you that? A. Mr. LaCross and Matizo."

[6] While it is true that there are features of the employment which may indicate a relationship of independent contractor, these only serve to create a conflict in the evidence and in the inferences to be drawn therefrom, which conflict the respondent Commission resolved adversely to petitioner. We are satisfied that there is substantial evidence to support the finding that McCleskey was an employee and not an independent contractor or a joint venturer.

[7] Petitioner's final contention is that the evidence does not support the finding that the earnings of respondent McCleskey were \$150 per month. This contention lacks merit as the record shows that the \$150 a month was arrived at by taking one-half of the wages that the employers would have had to pay a farmhand for full time work, because McCleskey would have to work approximately half time to do the job. We are convinced that this finding of the Commission is supported by the record.

The award is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



137 Cal.App.2d 701

Sophia NAPOLIN, Plaintiff and Appellant,
v.

HOTEL ROSE, Marcel Domergue, August Domergue, Rene Domergue and Arline M. Rolkin, Defendants and Respondents.

No. 16428.

District Court of Appeal, First District,
Division 1, California.

Dec. 12, 1955.

As Amended Dec. 14, 1955.

Action by ground floor tenants against landlord and second floor tenant who maintained hotel on premises, to recover for in-

juries to a ground floor tenant when plaster fell from ceiling on her, on theory that plaster was weakened by water leaking from pipes under control of defendants. The Superior Court, City and County of San Francisco, H. G. Jorgenson, J., entered judgments for defendants, and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that misdeeds of hotel guests in breaking water basin from wall and causing basin to overflow by stopping it up and leaving faucet open, if they caused water to seep through floors so as to weaken plaster on floor below so as to cause it to fall were not such as would authorize recovery against defendants under *res ipsa loquitur* doctrine.

Judgments affirmed.

1. Landlord and Tenant ⇨160(11)

In action by ground floor tenants against landlord and tenant maintaining hotel above ground floor tenant's premises, to recover for injuries sustained to a ground floor tenant when plaster fell from ceiling on her, on theory that plaster had been weakened by water leaking from pipes allegedly under control of defendants, evidence sustained trial court's action in granting landlord a nonsuit and directing verdict in favor of second story tenants.

2. Landlord and Tenant ⇨170(1)

A landlord is not liable for consequences to others of a nuisance in connection with property in possession and control of tenant unless landlord authorized or permitted act which caused it to become nuisance occasioning injury.

3. Innkeepers ⇨141/4

A hotel operator is not responsible, under all circumstances, for misdeeds of a guest.

4. Innkeepers ⇨141/4

A hotel does not have exclusive control of room, fixtures and furniture assigned to guest, but the guest has at least partial control.

5. Innkeepers ⇨141/4

Alleged misdeeds of hotel guests in breaking basin from wall and in causing basin to overflow by stopping it up and leaving faucet open, where not such as to be

normally expected and were not chargeable to hotel operator in action by building tenants on floor below hotel to recover for injuries because of falling plaster allegedly due to water damage, unless operator, after he learned of such deeds or should have learned of them, failed to abate them.

6. Negligence ⇨121(2)

As a general rule, *res ipsa loquitur* applies where accident is of such nature that it can be said, in light of past experience, that it probably was the result of negligence by someone and that defendant is probably person responsible.

7. Negligence ⇨121(2)

The mere fact that accident happened and that injury resulted does not of itself call doctrine of *res ipsa loquitur* into play.

8. Negligence ⇨121(2)

Doctrine of *res ipsa loquitur* is not applicable where it is at least equally probable that accident was caused by some fault for which defendants were not liable and where it cannot be said that it is more likely than not that accident was caused by negligence of defendants.

9. Innkeepers ⇨14¼

Landlord and Tenant ⇨169(4)

Misdeeds of hotel guests in breaking water basin from wall and causing basin to overflow by stopping it up and leaving faucet open, if they caused water to seep through floors so as to weaken plaster on ceiling below causing it to fall upon a tenant, were not such as would authorize recovery by such injured tenant against building owner and second floor tenant who maintained hotel, under *res ipsa loquitur* doctrine.

Morris Lowenthal, Juliet Lowenthal, San Francisco, Karl D. Lyon, San Francisco, of counsel, for appellant.

Cooley, Crowley & Gaither, San Francisco, for respondent Arline M. Rolkin.

1. Sophia was sitting at her sewing machine when the plaster fell in 1950. The machine had been in the same place for about 8 years.

Keith, Creede & Sedgwick, San Francisco, for respondents Hotel Rose, Marcel Domergue, August Domergue and Rene Domergue.

FRED B. WOOD, Justice.

Leo and Sophia Napolin brought this action for damages for injuries sustained by Sophia on the 15th of March, 1950, when plaster fell from the ceiling of their ground floor clothing shop, allegedly caused by the negligence of defendant Arline M. Rolkin, owner of the building and lessor of the plaintiffs, and the negligence of defendants Marcel, August and Rene Domergue, lessees of the upper floors of the building, which they operate as a hotel.

[1] Rolkin was granted a nonsuit and the Domergues a directed verdict. Plaintiffs have appealed. Their theory is that the plaster was weakened by water leaking from the pipes, above, which plaintiffs say served the several tenants of the building and were under the control of the defendants. Our examination of the record convinces us that there was a failure of proof at critical points and that the judgments must be affirmed.

An expert witness testified that he examined the plaster which fell and found water marks on it and on the ceiling. In his opinion, water got in there and caused this plaster to deteriorate and it collapsed; plaster can be affected, by absorption, for a distance of two feet from where the water comes through; the plaster might last for six months or a year and then all of a sudden collapse; it takes a long time for it to collapse, which will eventually occur from the vibration of streetcars or heavy trucks.

The only other evidence of water seepage into or through the plaster was that such occurred in 1948 near the front of the store and in August of 1949 near the back of the store, in each case several feet from the spot where the plaster fell when Sophia was injured.¹ As to those occasions, there

She said she never noticed that anything occurred right above the sewing machine at any time. She never noticed any water dripping immediately above the machine.

was evidence that in 1948 a washbasin was pulled off the wall in one of the hotel rooms above plaintiffs' shop, by a person who rented the room and left in the night, and the hotel clerk shut off the valve as soon as he learned the water was running; and that in 1949 the occupant of a hotel room above the shop plugged the washbasin and left the water running from the faucet, which was remedied by the hotel defendants as soon as discovered. Plaintiffs would have us disregard this testimony because given by the defendants and therefore not binding on the plaintiffs. That is not the point. Plaintiffs (represented at the trial by other counsel than those upon this appeal) gave no evidence as to the cause of the plaster falling other than the expert's opinion that the plaster had been damaged by water some time in the past and the natural inference that the water probably came from above,² although some of the defendants argue it could have come in the form of steam from clothes pressing in plaintiffs' shop. Defendants then put in evidence their explanation of the 1948 and 1949 incidents, corroborated in part by the testimony of the plumber whom they employed upon occasion. They testified, also, that they had never had a broken pipe or a leak in any of the main pipes. This certainly did not aid plaintiffs in meeting the burden of proof which rested upon them. It filled no gap in their proof of the proximate cause of plaintiffs' injury. By indicating an independent source or cause, not chargeable to the defendants, this evidence served to emphasize the speculative nature of plaintiffs' claim.

There was some testimony to the effect that there were water marks in the plaster on the ceiling of plaintiffs' shop, but that fact, whatever its significance might otherwise have been, had not been brought to the attention of the defendants. Leo tes-

tified that he never told anyone that the plaster was loose there, where the accident occurred; he "didn't notice anything." In this connection we observe that plaintiffs in their closing brief, in disavowing knowledge upon their part of a dangerous condition in the ceiling, say: "The prior incidents occurred some distance away from the sewing machine where the plaster fell at the time of the accident. Plaintiff positively testified that prior to the accident she had never noticed any plaster chipping or any water dropping from the ceiling above the sewing machine. (R.T. 35.) Her husband also confirmed that prior to the accident he had never had any trouble with the ceiling in the area above the sewing machine (R.T. 62), * * *

Plaintiffs claim there is evidence through the testimony of defendant August Dommegue that the water system was old and dilapidated, for which reason wash basins pulled off from the walls and broke the pipes when they came off. This is not correct. Plaintiffs' counsel asked such a question of August, which was objected to and the objection sustained as calling for the conclusion of the witness. It happened that the witness answered affirmatively just ahead of the objection, whereupon the court asked "What is the question?" Plaintiffs' counsel asked the reporter to read the question and thereupon the court sustained the objection, and plaintiffs' counsel said "I see—yes, your Honor," and then re-framed the question. Under such circumstances the answer was ruled out as effectively as if a motion to strike had been made and granted. A little later the witness answered: "Well, I tell you, the basin did pull down, you know; it was pulled down by the people that was occupy the room, they pull the basin out from the wall, you see; then the basin fell on the floor so it broke in two under the washbasin

That was true all of the time including the day of the accident. There was no dripping of any kind there. She supposed the plaster came loose and fell down. All she knew was it hit her.

Leo said he never had any trouble with the ceiling where his wife was working at the time of the accident. No plaster had fallen in that area.

2. Sophia, in describing the water seepage or dripping at the front of the store in 1948, did say that it was water "from some pipe there" but we do not regard that as substantial evidence as to a specific source, whether leakage from a main pipe or the result of the tearing down of a water basin by a subtenant or licensee of the hotel, or other source.

* * *. The witness was not present at the time but he visited the room soon afterwards, saw that the basin was away from the wall and that the tube under the basin was broken. He said that it happened in 1948 and that water from that basin leaked into plaintiffs' store. Although some of this was hearsay it remained in. August added that the water leaked down two times: In April, 1948, and in August, 1949.

There was evidence that plaster had fallen from the ceilings of other ground floor stores in the same building and that there had been leakages of water from those ceilings. But there was no evidence as to the source of the water in such cases other than the testimony of August Domergue as to the breaking of one wash basin and the stoppage of another in 1948 and 1949, respectively, and the absence of breaks in the main pipes.

Plaintiffs place some reliance upon a conversation Leo had with the landlord's representative, Mr. Gill, in 1948. When he noticed the plaster had fallen Leo went to Gill and told him about it. Gill said "I am going to take care of it," but in fact did nothing. That remark was not definitive of an obligation or of the violation of an obligation; not an admission of the negligent misconduct charged in the complaint. Also, it pertained only to the 1948 incident. It could not very well be stretched to comprehend and include an admission of legal responsibility for the 1950 accident.

When the seepage occurred in 1949, Leo went upstairs and told August Domergue, the hotel operator, not the landlord's representative. According to Leo, August "said he had trouble with the plumbing, he always have trouble, and he is going to take it up with the owner." That does not of itself evidence a dilapidated, worn-out and leaky water system as plaintiffs would have us infer. Concerning that remark, the trial judge observed: "We have all had a lot of trouble with plumbing, and I have had a lot of trouble in my house but I don't claim it is negligence." Certainly it was not an admission of liability by August when, in the same breath, he said he would take it up with the owner. Nor is it evi-

dence against the owner because this line of testimony was admitted only as to the defendants Domergue.

In their opening brief plaintiffs claimed the Domergues had admitted, by not denying, certain material allegations of the complaint. Subsequent argumentation of the record, pursuant to stipulation, shows that those allegations were denied.

It is apparent from this summary that there is no substantial evidence that the deterioration of the plaster which fell and injured Sophia was caused by water which escaped as the proximate result of the negligence of any of the defendants. The only evidence of a specific source and cause for the escape of water from above was the misconduct of hotel guests upon two occasions, one in 1948 and one in 1949. In each case the overflow was promptly stopped, as soon as discovered by the hotel operators or their representative.

[2] It is well established that "a landlord is not liable for the consequences to others of a nuisance in connection with property in the possession and control of a tenant unless the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury. As stated by the Supreme Court of Massachusetts: 'A landlord is not responsible to other parties for the misconduct or injurious acts of the tenants to whom his estate, when no nuisance or illegal structure existed upon it [at the time of the lease] has been leased for a lawful and proper purpose.' [Citations.]" *O'Leary v. Herbert*, 5 Cal.2d 416, 419, 55 P.2d 834, 836. See also *Mundt v. Nowlin*, 44 Cal.App.2d 414, 112 P.2d 782; *Shell Oil Co. v. Richter*, 52 Cal.App.2d 164, 168, 125 P.2d 930.

[3,4] Upon similar principles a hotel operator is not responsible, under all circumstances, for the misdeeds of a guest. A hotel does not have exclusive control of the room, its fixtures and its furniture, assigned to a guest. The guest has at least partial control. *Larson v. St. Francis Hotel*, 83 Cal.App.2d 210, 212, 188 P.2d 513.

[5] Under the circumstances in evidence here, the misdeeds of guests in

breaking a basin from the wall and in causing a basin to overflow by stopping it up and leaving the faucet open, are not such as to be normally expected, hence not chargeable to the hotel operator unless after learning of it or after such period of time as he should become aware of it he fails to abate it.

In contrast, the water damage cases upon which plaintiffs rely were predicated upon evidence which showed the source of the escaping water, a source which was under the control of the defendant, and evidence that furnished a basis for an inference that such right of control had been negligently exercised. In *H. C. Capwell Co. v. Blake*, 9 Cal.App. 101, 98 P. 51, a landlord negligently failed to control the drainage of rainwater from the roof; in *Rathbun Co. v. Simmons*, 90 Cal.App. 692, 698-699, 266 P. 369, a tenant's merchandise was damaged by water from a defective roof and drain system which was under the landlord's control and there was evidence that the latter had been negligent. In *Pirrone v. Nuccio*, 78 Cal.App.2d 864, at page 869, 179 P.2d 18, at page 21, it conclusively appeared that an upper tenant had notice that there was a leakage of water "either from the bathroom or from the toilet room into the ceiling of the restaurant [below] during a ten day period immediately preceding the deluge" and failed to use ordinary care in the inspection of the facilities provided for the occupants of the rooms on the second floor of the building directly over the premises occupied by the plaintiff. In *Columbia Laboratories, Inc., v. California Beauty, etc., Co.*, 24 Cal.2d 114, 148 P.2d 15, the injury was caused by water that seeped through walls and ceiling during a rain storm that occurred after the landlord had negligently failed to repair a fire-damaged roof.

Plaintiffs argue that the doctrine of *res ipsa loquitur* fills the gap, if any, in their proof. Defendants as vigorously deny it. We think the defendants have the better of the argument.

[6] The test for the applicability of the *res ipsa loquitur* doctrine has been many times stated, perhaps most clearly and adequately by Chief Justice Gibson in *Zentz*

v. *Coca Cola Bottling Co.*, 39 Cal.2d 436, 446-447, 247 P.2d 344, 349-350: "* * * as a general rule, *res ipsa loquitur* applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses, and they have considered the circumstances relating to the accident in each particular case, such as the extent of control exercised by the defendant, the plaintiff's own conduct, the likelihood of negligence by some third person, and, in some situations, evidence that the defendant is better able than the plaintiff to explain what happened. All of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence."

In the *Zentz* case a bottle of Coca Cola broke. It was natural and logical to require the bother to explain, in the absence of any indication of improper handling after it left the bottler's custody. Similar situations obtained in *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522, and *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436. In *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 515, 106 P.2d 886, and in *Buffums' v. City of Long Beach*, 111 Cal.App. 327, 329-330, 295 P. 540, the cause of the injury was directly traced to the breaking of a water main that was under the management of the defendant. In *Knell v. Morris*, 39 Cal. 2d 450, 247 P.2d 352, the water leaked from a heater on the floor immediately above plaintiff's store and there was evidence of negligence upon the part of a plumber whom the occupant of the premises above had engaged to repair the heater. In *Rose v. Melody Lane*, 39 Cal.2d 481, 247 P.2d 335, a patron of a cocktail lounge was injured when a defective stool broke. Defendant, owner of the lounge, was the sole person who could have been guilty of the

negligence which was probably the proximate cause.

[7] The mere fact that an accident happened and an injury resulted does not of itself call the doctrine of *res ipsa loquitur* into play. After reviewing a number of cases in which the doctrine was applied, this court in *Vaughn v. Montgomery Ward & Co.*, 95 Cal.App.2d 553, 556-557, 213 P.2d 417, 419, said: "In all of these cases, and in every other case we have found on the subject where liability has been imposed, the plaintiff has offered evidence of some dangerous condition either created by the owner or known to him."

[8] This causal connection requirement was expressed in the Zentz case in these words: "The defendant, of course, should not be liable unless it appears from all the facts and circumstances that there is a sufficient causal connection between his conduct and the plaintiff's injury, and it has been held that *res ipsa loquitur* will not apply if it is equally probable that the negligence was that of someone other than the defendant. *LaPorte v. Houston*, 33 Cal.2d 167, 169-170, 199 P.2d 665; *Hernandez v. Southern California Gas Co.*, 213 Cal. 384, 387-388, 2 P.2d 360; *Olson v. Whitthorne & Swan*, 203 Cal. 206, 208-209, 263 P. 518, 58 A.L.R. 129; *Tower v. Humboldt Transit Co.*, 176 Cal. 602, 607, 169 P. 227. As said in the *LaPorte* case, supra, 33 Cal.2d at page 170, 199 P.2d [665] at page 666, the doctrine is not applicable where it is 'at least equally probable that the accident was caused by some fault * * * for which defendants were not liable' and where 'it cannot be said that it is more likely than not that the accident was caused by the negligence of *defendants*'. (Italics added.)" At page 443 of 39 Cal.2d, at page 347 of 247 P.2d. See also *Gerhart v. Southern California Gas Co.*, 56 Cal.App.2d 425, 132 P.2d 874 and cases therein reviewed.

[9] It is apparent that under the general rule the evidence in this case does not bring the doctrine of *res ipsa loquitur* into play. It is equally clear that this case does not present any of the unusual situations (such as the patient who receives injuries

while unconscious during the course of medical treatment) mentioned in the Zentz case at pages 445 and 446 of 39 Cal.2d at pages 348 and 349 of 247 P.2d.

The judgments appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.



Hazel L. CROGAN, Plaintiff and Respondent,
v.

Bert METZ, Vivian Metz, et al., Defendants
and Appellants.*

Civ. 16324.

District Court of Appeal, First District,
Division 2, California.

Dec. 12, 1955.

Rehearing Denied Jan. 11, 1956.

Hearing Granted Feb. 8, 1956.

Action for damages for alleged fraud in a real estate transaction on a ground that a broker represented property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000. Judgment for plaintiff in the Superior Court, City & County of San Francisco, Frank T. Deasy, J., and defendant appealed. The District Court of Appeal, Nourse, P. J., held that the evidence established a breach of fiduciary duty by the broker subjecting him to remedies provided for breach of trust, that in view of the conflict in evidence the Appellate Court could not make a finding on conspiracy to defraud and that the evidence did not support a finding that the wife of a broker participated in the alleged conspiracy.

Judgment reversed.

1. Brokers ⇨38(4)

In action for alleged fraud in real estate transactions on the ground that plaintiff paid \$115,000 for property which the vendors were willing to sell for \$100,000

* Opinion vacated 303 P.2d 1029.

and that plaintiff had been defrauded of such amount, evidence established that the statement that the price was \$115,000 and that the owner would not sell for less was untrue, and could be considered a breach of fiduciary duty by the broker, where the statement concealed a fact that price depended upon the commission of the brokers and that plaintiff alone would have to bear the total amount of the commissions involved in the complicated transactions.

2. Brokers ⇨19

A real estate agent is charged with duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.

3. Brokers ⇨19, 38(1)

The law imposes upon a broker the same obligation of undivided loyalty to the principal that it imposes on a trustee in favor of his beneficiary, and violation thereof is subject to the same punitive consequences that are provided for a disloyal or recalcitrant trustee.

4. Brokers ⇨38(1, 7)

In action for damages for alleged fraud in real estate transaction on ground that broker represented that vendors were not willing to sell property for less than \$115,000 when in fact they were willing to sell for \$100,000, such breach of fiduciary duty by the broker subjected him to the remedies provided for breach of trust, and he could be held liable in the alternative for the loss resulting from the breach, for the profit made by him through it, or for the advantage which would have accrued, if there had been no breach. West's Ann.Civ. Code, § 3343.

5. Brokers ⇨38(2)

In action for alleged fraud in real estate transaction on ground that broker represented that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, an action for the advantage which would have accrued if there had been no breach could not lie, where there was no evidence that a better bargain could and therefore should have been obtained for the plaintiff. West's Ann.Civ.Code, § 3343.

6. Brokers ⇨38(7)

In action for alleged fraud in real estate transactions on ground that broker represented that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, the \$15,000 could be recovered on the theory that the whole transaction was vitiated by breach of fiduciary duty, without which it probably would not have been concluded. West's Ann.Civ.Code, § 3343.

7. Money Received ⇨14

Principal and Agent ⇨79(1)

The agent who is in a fiduciary relation and all persons who colluded with him in a breach of his duty as such are accountable for all advantages they gained thereby, even if the principal did not suffer any damage.

8. Brokers ⇨38(2)

An action for alleged fraud of broker in real estate transaction on ground of representation that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, was based on breach of fiduciary duty and was a quasi contractual action for restitution which could be brought in the form of an action for money had and received.

9. Brokers ⇨38(7)

In action for alleged fraud in real estate transaction on ground that broker represented that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, although plaintiff might have recovered exemplary damages in tort action for actual damage caused by breach of fiduciary duty, she could not recover exemplary damages together with profits obtained by defendants, unrelated to any damage she actually suffered. West's Ann.Civ.Code, § 3294.

10. Conspiracy ⇨9

In action for alleged fraud in real estate transaction on the ground that broker represented that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, recovery of \$15,000 against other defendants required proof of conspiracy, collusion or acting in concert in relation to the breach of

trust of the broker. West's Ann.Civ.Code, § 3294.

11. Appeal and Error ⇨1122(2)

In action for alleged fraud in real estate transaction on the ground that broker represented that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, where it was not clear that other brokers knew of the alleged misrepresentations and the findings did not show that trial judge made such inference and the evidence was conflicting, the appellate court could not make such finding.

12. Conspiracy ⇨19

In action for alleged fraud in real estate transaction on ground that broker represented that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, evidence did not support a finding that wife of broker was a defendant who took part in the conspiracy, and hence as to her, other relief should have been no more than cancellation of a trust deed executed in the transaction thereby requiring a reduction in the amount recovered against the other defendants.

13. Brokers ⇨38(1)

In action for alleged fraud in real estate transaction on the ground that broker represented that property could not be purchased for less than \$115,000 when in fact it could be purchased for \$100,000, plaintiff's action was not barred by her negligence in not seeking direct information from owner of the property in view of the confidential relation of broker and client.

14. Appeal and Error ⇨1201(3)

Where judgment was required to be reversed, if after remand plaintiff should be inclined to amend her complaint, the trial court would have discretionary power to permit it.

Byron Arnold, George I. Hoffman, San Francisco, for appellants Bert and Vivian Metz.

Theodore M. Monell, San Francisco, for appellant Dewey Letsinger.

Ralph Wertheimer, San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff, Mrs. Crogan, instituted an action for damages for fraud in a real estate transaction against defendant Bert Metz, the broker who represented her in said transaction, against the defendants, Letsinger and Mogan, brokers who represented other parties in said transaction and against defendant Vivian Metz, the wife of Bert Metz. Defendant Mogan died before the trial and no judgment was taken against him or his estate. Against all three other named defendants plaintiff recovered judgment for \$15,000 plus interest and against Bert Metz and Letsinger moreover for \$2,500 as punitive damages. The Metzses have appealed together, Letsinger separately.

The amended complaint is in three counts. The first count is to the effect that plaintiff entered into an exchange of her property on Fulton Street in San Francisco of an agreed value of \$50,000 plus \$65,000 in cash for property on Bay Street in San Francisco owned by a certain Rinas, and that she moreover gave a promissory note and deed of trust in the amount of \$3,000 payable to the Metzses, of which \$2,500 for agreed commission and \$500 due under a prorating agreement and advanced by Bert Metz; that she was induced so to do by a representation, wilfully made by Bert Metz, her broker for that purpose, that the owner was not willing to sell for less than \$115,000, which representation was false and fraudulent because the Rinases were ready and willing to sell for \$100,000 and received only \$100,000 worth of property out of the transaction; that defendant Bert Metz was also acting as agent for the other defendants. The second count was one for money had and received in said transaction by defendant Bert Metz, also acting as agent for the other defendants for the use of plaintiff in the amount of \$15,000 as secret profits, etc. The third count was to the effect that the three brokers entered into a conspiracy to defraud plaintiff of \$15,000 in the manner stated in the first count, each broker acting as agent for the other. The prayer was for \$15,000 plus interest, punitive dam-

ages and cancellation of the promissory note mentioned. The court found: "The defendants and each of them conspired to obtain from plaintiff, and did assist each other in obtaining, by means of the fraudulent conduct more fully set forth in the findings of fact herein and as violation of the fiduciary duty owed by defendant Bert Metz to plaintiff, the sum of \$15,000." The only other finding was that the allegations of the amended complaint were true. The judgment granted the \$15,000 and punitive damages as stated before, but did not grant the cancellation of the note.

Appellants contend that the evidence does not support the findings, mainly in that plaintiff could not have purchased the Rinas' property for \$100,000 and that no fraud or secret profit or conspiracy, or damage in the amount of \$15,000 was proved, that no punitive damages could be assessed, and that Mrs. Metz was not involved in the matter.

The evidence showed the following. Prior to the transaction here involved Mr. Desiano, a client of defendant Letsinger, owned a property on Scott Street in San Francisco, which he wished to sell for \$165,000 net cash of which \$5,000 for Letsinger, who moreover would receive whatever the property would be sold for in excess of \$165,000. Rinas owned the property on Bay Street mentioned before and wished to exchange it for more valuable property (to "trade up"). He did not wish to sell outright because that would entail income tax payment on capital gain. To find out the value of the property he had some months before offered it for \$110,000, but could not find a taker and in a trade he evaluated it at \$100,000. One of the brokers who tried to arrange a trade for him was defendant Mogan. Defendants Mogan, Letsinger, and Bert Metz kept office together (and with still other brokers) but were otherwise independent brokers. Mogan heard that the Desiano property could be sold and showed it to Rinas, who told him that he liked it but did not wish it to cost him more than \$160,000 net inclusive of \$4,000 commission for Mogan, his own Bay Street property evaluated at \$100,000. On May 28, 1951 he offered in writing to trade

adding \$56,000 cash and \$4,000 commission for Mogan. As Desiano wanted cash only, and not less than \$160,000 plus \$5,000 commission for Letsinger, no transaction could be completed unless Rinas' Bay Street property could be "cashed out" so as to provide the commissions, or a similar result could be reached in a more indirect way. (\$9,000 would have been the normal commission on the Desiano-Rinas exchange transaction.) Bert Metz knew that plaintiff, Mrs. Crogan, a widow, with whom and with whose deceased husband he and his wife had for many years had friendly relations and whom he had advised as broker, wished to dispose of her Fulton Street property at a price of at least \$50,000. He advised her, subject to inspection, that the Bay Street property would be a very desirable possession for her, at the price of \$115,000 which he said that the owner wanted for it and from which the owner would not budge. He pointed out the advantage of the transaction in that she would not have to pay income tax on the capital gain on her Fulton Street property. She inspected the Bay Street property together with him and was shown around by Rinas. She liked it very much and on June 1, 1951 signed an offer to exchange with an additional payment of \$60,000, without commission, which was not accepted. On June 2nd and June 3rd Letsinger and Mogan advertised the Bay Street property for \$115,000. Both Desiano and Rinas knew of these advertisements and did not object. On June 7, 1951 plaintiff signed a new offer to exchange the properties with the addition of \$65,000 cash and a note and second mortgage for \$2,500 commission for defendant Metz. In the offered agreement the Bay Street property is mentioned as the property of Rinas and the agreement contains a printed clause to the effect that the agent may also represent the offeree. Defendant Metz and plaintiff read the whole agreement together and plaintiff made no objection. The three defendant brokers then tried to find a purchaser for plaintiff's property. On June 9th a buyer (Lukes) was signed up for \$49,500, and thereafter the offers of Rinas and plaintiff were accepted. On June 28th, the transaction was closed by means of five

grant deeds: The Scott Street property from Desiano to Rinas, the Bay Street property from Rinas to Desiano and from Desiano to plaintiff and the Fulton Street property from plaintiff to Desiano and from Desiano to Lukes. Desiano received \$160,000 cash. Fifteen thousand dollars in excess of that amount was obtained in the transaction, not considering costs and prorating, and was available for the commission of the three defendants. (Rinas paid \$60,000, plaintiff paid \$65,000 and a note for \$2,500 and her property netted \$47,500, \$2,000 commission being paid to outside brokers.) From this amount Metz received \$1,562.50 over and above the \$2,500 note promised by plaintiff. From this amount he loaned \$500 to plaintiff for a balance due by her because of the prorating and the note was therefore increased to \$3,000. The actual total payment by the title company to the defendant brokers for commissions was \$11,984.50 cash plus the \$3,000 note. To the difference of \$15.50 the rule de minimis applies. When Rinas saw the result reached with his property he tried to share in the \$15,000 but did not succeed. Thereafter he told plaintiff that he had traded in his property for only \$100,000 and that he was sorry about the deal she got. The evidence does not show any participation of Mrs. Metz in the transaction except that the note and deed of trust for \$3,000 of plaintiff for commission and loan were made out to Bert Metz and Vivian Metz.

From the above it is clear that the allegation found true, that the fraud consisted in representing to plaintiff that the owner would not sell for less than \$115,000 whereas he was willing to sell for \$100,000 and did not receive more than that value, is incorrect. Rinas testified repeatedly that for taxation reasons he was not willing to sell outright but was only interested in "trading up." (An incidental statement of Rinas that he was willing to "sell" for \$100,000 made in the middle of contrary testimony must in connection with the above mean that he was willing to trade in at a valuation of \$100,000 and does not cause a substantial conflict.) Plaintiff could not trade with him because her property was much

less valuable than that of Rinas. Hence she could obtain the Rinas' property only after it had been traded with a third person which trade would necessarily entail commissions which would increase the price to be paid. Plaintiff's attorney conceded at the trial that the transaction could not go through unless the Bay Street property was sold at \$115,000. (If the brokers involved were together entitled to the regular commission on the five transfers through which the transaction was closed—a point as to which evidence was excluded—the commission so calculated would have been a little higher than the total of \$17,000 actually paid.) Neither was it proved that Rinas received a value of \$100,000 only. He received for the Bay Street property the value of the Scott Street property minus \$60,000 and the actual value of the Scott Street property was not in issue and not determined at the trial. Rinas' personal evaluation of his property at \$100,000 was not decisive as he was not willing to sell.

[1-3] Nevertheless the statement of Metz that the price was \$115,000 and that the owner would not budge, was untrue and could be considered a breach of fiduciary duty. Although Rinas and Desiano, who pending Rinas' offer to exchange both had an interest in the Bay Street property, knew of the asking price of \$115,000 there is no basis for the statement that they would not budge if the brokers would be willing to accept a lower commission. The statement conceals the fact that the price depended on the commission of the brokers and that plaintiff alone would have to bear the total amount of commissions involved in the whole complicated transaction. In *Ratray v. Scudder*, 28 Cal.2d 214, 223, 169 P.2d 371, 376, 164 A.L.R. 1356 it is said that a real estate "agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision." It is also said that the law imposes on him "the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitive consequences that are provided for a disloyal or recreant trustee." 28 Cal.2d at page 222-223, 169 P.2d at

page 376. Even "when an agent acts for adverse principals with the acquiescence of each, he has a bounden duty to act with fairness to each, and is bound to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency." *Anderson v. Thacher*, 76 Cal.App.2d 50, 68, 172 P.2d 533, 543. Metz could know that the fact that plaintiff alone had to provide all commissions might affect her decision, and she testified that she would not have agreed to the deal if she had known that she paid the commissions of Mogan and Letsinger also. Metz testified that until June 1 he had been only given the price of \$115,000 by Mogan and did not know the details of the transaction, but he conceded that before June 7, the date of plaintiff's final offer, he had known from discussions in the common office the prices involved. He testified that he fully informed plaintiff of the whole deal but plaintiff denied that and testified that she thought that she contracted with Rinas and did not know that Desiano and his property were also involved in the deal. Considering the close connection of the brokers the court could infer that Metz was fully informed of the character of the whole transaction and could consider his somewhat misleading statement a breach of fiduciary duty.

[4-7] Such breach of fiduciary duty subjects the broker to the remedies provided for breach of trust. *Rattray v. Scudder*, supra. Accordingly he may be held liable in the alternative for the loss resulting from the breach, for the profit made by him through the breach, or for the advantage which would have accrued if there had been no breach (Restatement, Trusts § 205; Scott on Trusts § 205). Under the facts proved the judgment could not be upheld on the theory of damages for the breach of fiduciary duty, fraud in the exchange of property, because section 3343 of the Civil Code limits the amount to be recovered in such action to "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the par-

ticular transaction." *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 192 P.2d 935. The actual value of the Bay Street property was neither alleged nor proved and an offer of defendants to prove that said actual value was \$115,000 was rejected as not involved in the case. However, the above section expressly leaves intact all other legal and equitable remedies of the defrauded person. Of these an action for the advantages which would have accrued if there had been no breach cannot lie, as there is no evidence that a better bargain could and therefore should have been obtained for plaintiff. However, although it cannot be said that the entire amount of \$15,000 recovered, is *secret* profits, because it includes the \$2,500 paid by plaintiff in a note expressly as commission, the \$15,000 could be recovered on the theory that the whole transaction was induced and vitiated by the breach of fiduciary duty, without which it probably would not have been concluded. The agent who is in a fiduciary relation and all persons who colluded with him in a breach of his duty as such are then accountable for all advantages they gained thereby, even if the principal did not suffer any damage. *Jackson v. Smith*, 254 U.S. 586, 588-589, 41 S.Ct. 200, 65 L.Ed. 418; *Crites Inc. v. Prudential Ins. Co. of America*, 322 U.S. 408, 414, 64 S.Ct. 1075, 88 L.Ed. 1356; *Restatement of Restitution* § 138 and see *Smith v. Blodget*, 187 Cal. 235, 242, 201 P. 584; *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 45-46, 97 P. 10, 14, 18 L.R.A., N.S., 1106. In the latter case is quoted "the well-established principle that, where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains or the degree of his activity in the scheme." Although the above rules are most frequently applied to *secret* profits they are in general applicable to all advantages obtained from a breach of trust by the fiduciary and by all persons acting in concert with him.

[8,9] Such action is a quasi contractual action for restitution which can be brought

in the form of an action for money had and received. Prosser on Torts, 2d Edition, p. 486 et seq. It was held in *Steiner v. Rowley*, 35 Cal.2d 713, 720, 221 P.2d 9, that such an action is inconsistent with an action for tort in which exemplary damages are sought and that the plaintiff must make a timely election of remedies. Although plaintiff might have recovered exemplary damages in a tort action for the actual damage caused by the breach of fiduciary duty (fraud; § 3294 of the Civil Code) she cannot recover exemplary damages together with the profits obtained by defendants, unrelated to any damage she actually suffered.

[10, 11] It is clear that recovery of the whole amount of \$15,000 and any recovery against defendant Letsinger requires proof of a conspiracy collusion or acting in concert in relation to the breach of trust of Metz. The court found the existence of a conspiracy to defraud in the manner alleged in the complaint, but between the fraud there alleged and the fraud which can be considered proved there is a variance, which is material as to the proof of the conspiracy. If it had been true that the Bay Street property could have been obtained for \$100,000 the fact that defendant Metz obtained from plaintiff a contract containing a consideration of approximately \$115,000 plus \$2,500 commission, would in itself indicate fraud and would justify the inference that the two other brokers, who knew the facts as to the transaction intended by Rinas, were aware of said fraud and in collusion with Metz. However, under the facts proved, the contract made with plaintiff was in itself not necessarily suspicious, and the fraud would consist only in inducing by a misleading and incomplete representation the conclusion of a contract which may have been the only possible one. It is then less clear that the other brokers knew of said misrepresentation and that it was the result of a concerted action which was denied

by both Metz and Letsinger as witnesses. We do not mean to hold that the trial judge could not reasonably have drawn such an inference, but that the findings do not show that he made the inference. Considering the existing conflict in the evidence and the possibility of conflicting inferences, we cannot make a finding ourselves.

[12] It must also be noted that the evidence does not support the finding that Mrs. Metz was a defendant who took part in the conspiracy. As said before the only evidence which showed any connection of hers with the transaction was the fact that the deed of trust for \$3,000 was made out in the name of Bert Metz and Vivian Metz. Such can show at most that the amount to be received was considered community property of the parties and does not show any participation by Mrs. Metz in the combination to defraud, which could make her personally liable for the whole advantage received by all persons involved. As to her no more than cancellation of the trust deed could have been justified, in which case the money judgment as to the other defendants should have been \$3,000 lower.

[13] The further contention of appellant Metz that plaintiff's action for fraud was barred by her negligence in not seeking direct information from Rinas is wholly without merit, considering the confidential relation of broker and client. Compare further *Anderson v. Thacher*, 76 Cal.App.2d 50, 70, 172 P.2d 533.

[14] On the grounds stated before the judgment must be reversed. If after remand plaintiff would be inclined to amend her complaint, the trial court would have discretionary power to permit it. *Holt v. Morgan*, 128 Cal.App.2d 113, 118, 274 P.2d 915.

Judgment reversed.

DOOLING and KAUFMAN, JJ., concur.

137 Cal.App.2d 567

James P. CUNNINGHAM, Plaintiff, Cross-defendant and Appellant,

M. G. Mason, sometimes known as Monte G. Mason, Cross-defendant and Appellant,

v.

Carl W. SCHMITZ and Dolly Schmitz, Defendants, Cross-complainants and Respondents.

Civ. 21270.

**District Court of Appeal, Second District,
Division 1, California.**

Dec. 6, 1955.

Action to recover shares of capital stock wherein defendants filed a cross-complaint to compel the transfer of such shares on the books of the company. The Superior Court, Los Angeles County, A. A. Scott, J., held that the defendants were the owners of the stock and the plaintiffs appealed. The District Court of Appeal, Doran, J., held that the evidence including showing that transfer of stock was evidenced by assignment on stock certificate sustained a finding of trial court that the transaction constituted an absolute sale rather than a loan with the stock as collateral, entitling the transferees to have the shares transferred on the books of the corporation.

Judgment affirmed.

1. Appeal and Error $\S$ 931(1), 1011(1)

A reviewing court need not evaluate conflicting evidence, but such conflict must on appeal be resolved in favor of trial court's findings which are deemed conclusive.

2. Corporations $\S$ 123(5)

Evidence including showing that transfer of stock was evidenced by assignment on stock certificate sustained trial court's finding that transaction constituted an absolute sale of the stock rather than a transfer as collateral for a loan, entitling transferees to transfer of such shares on books of the corporation. West's Ann.Corp.Code, $\S$ 2466.

Laurence J. Rittenband, Los Angeles, for appellants.

Erwin P. Werner, Los Angeles, for respondents.

DORAN, Justice.

The plaintiff, as assignee of cross-defendant, M. G. Mason, instituted this action to recover 6,000 shares of capital stock of Americol Petroleum, Inc. Respondents filed a cross-complaint against Cunningham and Mason, and others, seeking to be adjudged the owners of such stock and to compel the transfer of such shares on the books of the company. Subsequent to the transactions between the parties hereinafter set forth, the stock was split ten for one.

The trial court found that "on or about June 8, 1950, * * * M. G. Mason approached the defendants and cross-complainants and offered to sell them 6,000 shares of the capital stock * * * for the sum of twenty-five hundred dollars (\$2500.00). At said time and place the cross-complainants (Schmitz) agreed to and did accept the offer made by M. G. Mason. On the same day the said Mason certified that he was the owner of certificate No. 12 of Americol Petroleum, Inc. for six thousand shares fully paid and non-assessable. At said time and place the said Mason sold, assigned and delivered said certificate * * * in words as follows: 'For value received I hereby sell, assign and transfer unto Carl W. Schmitz and Dolly Schmitz, six thousand shares of the capital stock, represented by the within certificate and do hereby irrevocably constitute and appoint ——— attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises'".

It was further found that Dolly Schmitz thereafter delivered the stock certificate to the secretary of the corporation for exchange after the ten to one split; that the secretary forwarded the stock to the company's transfer agent; that thereafter Mason, who was a vice-president and managing director, "caused said certificate to be made valueless by stamping on both sides thereof in large, bold letters, the word

'cancelled' accompanied by the initials M. G. M. Further, the said Mason refused to allow the transfer agent to exchange or transfer said certificate on the books of said company". The court then found that the cross-complainants Schmitz were the owners of the stock and "entitled to have said certificate exchanged for sixty thousand shares of said corporation, and so recorded on the books". Cunningham and Mason have appealed from the judgment.

It is appellants' contention that the court below erred in affording equitable relief to the defendants on the cross-complaint under the maxim "he who seeks equity must do equity"; and that the judgment "should be reversed on the ground that the credible evidence supported a judgment for the plaintiff".

Appellants' version of the transaction is that Mason, friendly with Mr. and Mrs. Schmitz, "offered to sell the (Schmitz) automobile for her and borrow \$2,500.00 from the proceeds of the sale to meet the (company) payroll, such loan to be repaid within a year with a bonus of \$350.00. Mrs. Schmitz agreed to this proposal". Appellants insist that, as security for the loan Mason, on June 8, 1950, transferred the stock certificate for 6,000 shares, the stock then selling for \$1.00 per share. The car was sold and Mason got the \$2,500.00. It is claimed that thereafter Mason repaid \$2,200.00 of the loan.

Mrs. Schmitz' testimony in substance denies Mason's version of the alleged loan, and maintains that the sale was absolute, stating that Mason on numerous occasions offered to repurchase the stock, particularly on January 5, 1951, when Mason presented a receipt-agreement providing for a "repurchase" of the stock by Mason for \$2,850, which Mrs. Schmitz refused to sign. Mason admitted on the witness stand that the only writing made on the occasion of the transfer was the assignment on the certificate, and the \$2,500 check turned over by Mrs. Schmitz. The alleged loan was oral, Mason's testimony in reference thereto being, "And I says, 'If I don't pay

the money back within a year, Dolly, that is your certificate. You own it. And if I do, I want the certificate back, naturally. That is collateral'. She used the word 'collateral' twenty times".

As will be seen from the foregoing résumé, the testimony was in direct conflict as to the nature of the transaction. Not only was the evidence in conflict but the trial judge observed that "This is one of the worst (cases) I have ever listened to as far as perjury is concerned. * * * In this case the court is satisfied that both sides have lied like troupers without any remorse of conscience".

[1] In this state of the record, a reviewing court is not called upon to attempt a reevaluation of the evidence. As stated in *Hughes v. Forward*, 134 Cal.App.2d 329, 285 P.2d 668, 670, "The fact that there is conflicting evidence merely brings the case within the well established rule that every such conflict must, on appeal, be resolved in favor of the trial court's findings 'which are deemed conclusive'." In the instant case it cannot be said that the trial court's findings are without substantial support in the record.

[2] As pointed out in the respondents' brief, "Section 2466 of the Corporations Code provides the manner in which a transfer of stock may be made. The transfer in question was made under subsection (a) thereof." The transfer of the stock by Mason, as evidenced by the assignment on the stock certificate, was absolute. The trial court, after hearing the evidence and observing the demeanor of the witnesses, came to the conclusion that the transaction was exactly what it purported to be, namely, an absolute sale. This was a question of fact to be decided by the trial court, and no valid reason has been presented which would justify interference with such decision.

The judgment is affirmed.

WHITE, P. J., and NOURSE, J., pro tem., concur.

137 Cal.App.2d 524

William CORRIDAN, Jr., a minor, by William Corridan, Sr., his guardian ad litem, and William Corridan, Sr., Plaintiffs and Respondents,

v.

A. G. ROSE, Jr., A. G. Rose, Sr., First Doe, Second Doe and Third Doe, Defendants and Respondents,

Zurich General Accident and Liability Insurance Company, Ltd., a corporation,
Intervenor and Appellant.

Civ. 16440.

District Court of Appeal, First District,
Division 2, California.

Dec. 6, 1955.

Hearing Denied Feb. 1, 1956.

Action for injuries sustained by infant when struck by tractor driven by his uncle and allegedly owned in part by his grandfather, in which the grandfather's liability insurer was permitted to intervene and take part in trial. The Superior Court of Santa Clara County, John D. Foley, J., granted a new trial on ground of error in permitting the insurer to intervene, and the insurer appealed. The District Court of Appeal, Nourse, P. J., held that permitting the liability insurer to intervene was error.

Affirmed.

1. Appeal and Error ⇨143

Parties ⇨47

By intervening in action by injured person against insureds, liability insurer obtained all rights of a party defendant, including right to appeal. West's Ann.Code Civ.Proc. § 387.

2. Appeal and Error ⇨151(2)

Liability insurer which had intervened in injured person's action against insureds was "aggrieved" by, and hence entitled to appeal from, grant of new trial on ground that court had erred in permitting liability insurer to take part in the trial to prevent lack of defense or collusion. West's Ann.Code Civ.Proc. § 387.

See publication Words and Phrases, for other judicial constructions and definitions of "Aggrieved".

Cal.Rep. 289-290 P.2d-67

3. Parties ⇨40(7)

In action for injuries suffered by infant, against infant's uncle who drove tractor which struck infant and against grandfather who was allegedly co-owner of tractor, permitting grandfather's liability insurer to intervene and take part in the trial was error, especially where insurer actively opposed decision of its liability on the policy in such action, claiming collusion and lack of defense on part of uncle and grandfather. West's Ann.Ins.Code, § 11580; West's Ann.Code Civ.Proc. § 387.

4. Appeal and Error ⇨1072

Reviewing court would not interfere with grant of new trial, based on error in permitting liability insurer to intervene, in absence of showing that presence of intervenor could not possibly have been prejudicial, notwithstanding apparent merit in such contention, in view of position taken by defendant at trial and small size of verdict compared to defendant's expectation.

5. Appeal and Error ⇨978(1)

Whether rights of moving party were prejudiced by error of law at trial rests so completely within trial judge's discretion that appellate court will not interfere with his grant of new trial on that ground, except for manifest abuse of discretion.

Bronson, Bronson & McKinnon, San Francisco, for appellant.

Robert E. Hayes, Santa Clara, for respondent A. G. Rose, Jr.

James F. Boccardo, San Jose, Edward J. Niland, San Jose, of counsel, for respondents Corridan, Sr., and Corridan, Jr.

NOURSE, Presiding Judge.

In this negligence action instituted by the minor William Corridan, Jr. and his father William Corridan, Sr. against the minor's uncle A. G. Rose, Jr., who drove a tractor, which hit and seriously injured the minor, and the minor's grandfather A. G. Rose, Sr. allegedly co-owner of the tractor with his son A. G. Rose, Jr. who allegedly was driving it as his father's agent, Zurich General Accident and Liability Insurance Company,

hereinafter called Zurich, who had issued a policy of liability insurance to Rose, Sr. (which would also cover his employee in driving a tractor) was permitted to intervene and to defend on behalf of Rose, Jr. and Rose, Sr., Zurich having alleged that such was necessary to prevent lack of defense and collusion. The verdict was for plaintiff against both Rose, Jr. and Rose, Sr. Zurich appeals from an order granting a new trial at the motion of defendant Rose, Jr. only.

At the time of the accident Rose, Sr. owned a ranch on Sutherland Avenue in Santa Clara County on which he lived himself and in separate houses his married son Rose, Jr., then age 24, and his daughter Mrs. Corridan with her son, the minor plaintiff Billy. The Roses, father and son, had always been in ranching operations together. Rose, Jr. also farmed for himself a separate piece of land. The tractor was kept in a barn on the ranch and was used mainly by Rose, Jr. in operating the ranch and also for outside work.

On the evening of May 26, 1951 Rose, Jr. was driving the tractor home from a nearby ranch on which he had worked with it for hire. When he was driving on the edge of Sutherland Avenue, Billy was riding his bicycle on the paved part of the road alongside the tractor. Billy fell from the bicycle, and a tractor tread went over his left leg, which had to be amputated below the knee. When thereafter Rose, Jr. in the presence of Rose, Sr. gave information to a representative of Zurich, Rose, Jr. stated in substance that the tractor belonged to him, not to his father, that his father had bought it for him. He used the tractor not only on his father's farm but also on other jobs. When Billy was riding his bicycle alongside the tractor, Billy got a few feet ahead and suddenly turned his wheel and fell directly in front of the tractor. It happened so fast that Rose, Jr. did not know what caused Billy to fall. He was watching him all the time and keeping a good distance.

When the present action was brought against them, both Roses claimed coverage under the Zurich liability policy and ten-

dered Zurich their defense. Zurich denied coverage of Rose, Jr. on the ground that he was not driving the tractor as an employee of his father, but offered to defend him on condition that Rose, Jr. would sign a "reservation of rights agreement" reserving for both sides the issue of coverage. Rose, Jr. refused to sign such an agreement and Zurich refused to defend him. For Rose, Sr. Zurich prepared an answer alleging that the tractor involved in the accident belonged to Rose, Jr. and that he was not driving it as an employee or agent of Rose, Sr. Rose, Sr. refused to sign said answer on the ground that it did not state the true facts. Zurich then withdrew from his defense on the ground of collusion and lack of cooperation.

As stated before, Zurich was permitted to intervene on behalf of defendants and it was ordered that its denials and allegations as to the original complaint would stand as answer on behalf of Rose, Sr. and Rose, Jr. The complaint in intervention alleged among other things the intervenor's denial of the coverage of Rose, Jr., the withdrawal from the defense of Rose, Sr. because of collusion and lack of cooperation, and intervenor's interest in the success of defendants because a judgment against them would under section 11580 of the Insurance Code in an action on the policy against intervenor be conclusive with respect to the liability of defendants and the amount of damages, although not as to intervenor's liability on the policy. The necessity of intervention was predicated on the alleged collusion and danger of further collusion in the defense by Rose, Sr. and Rose, Jr. with plaintiffs. A demurrer of Rose, Jr. to the complaint in intervention was overruled. The answers of all other parties to the complaint in intervention deny collusion, and the Roses allege that they owned the tractor together and that at the time of the accident Rose, Jr. had used it at the request of Rose, Sr. Rose, Sr. stated that the untrue allegations as to this point in the draft complaint of Zurich were the reason for his refusal to sign. At the trial objections of Zurich to all evidence with respect to issues formed

by said answers to the complaint in intervention were sustained and these issues were not submitted to the jury.

At the beginning of the trial both Rose, Sr., and Rose, Jr., notified Zurich that plaintiff offered to settle for \$100,000 (the limit of the coverage in this case), that the offer was reasonable and that they demanded acceptance and payment by Zurich. Zurich refused. At the trial Rose, Jr. testified that when the accident happened he was turning the tractor from the shoulder of the road more into the paved part to avoid certain pear trees, that in watching the trees he did not look out for Billy and that he became aware of him again only when Billy was under the tractor; he did not know what happened to Billy up to that moment. Billy testified that the tractor hit the hind wheel of his bicycle. Rose, Sr. testified that the owner of the farm from which Rose, Jr. was returning when the accident happened had asked Rose, Sr. for assistance in certain farming operations with the tractor, that Rose, Sr. had promised to send his son with it and had arranged for the price. Both he and Rose, Jr. testified that they owned the tractor together. After the accident Rose, Sr. made the large final payment on it and thereafter the bill of sale was made out in their combined names.

After verdicts of \$40,000 in behalf of Billy and of \$6,000 in behalf of his father all parties moved for a new trial. The motions of Zurich and Rose, Sr. were withdrawn. The motion of plaintiffs was denied, but the motion of Rose, Jr. was granted. The notice of motion of Rose, Jr. stated several grounds but the only one urged was error in permitting Zurich to intervene. No other basis for the granting of the new trial is suggested on appeal. Respondents urge that Zurich was not a party to the order granting a new trial and not a party aggrieved by it and that for these reasons its appeal must be dismissed and that otherwise the order must be affirmed because the admission of Zurich as intervenor was erroneous, also because its participation in the trial injected insurance into the picture and because the litigation of the allegations of the complaint in inter-

vention was excluded from the trial. It may be noted that not only Rose, Jr. but also plaintiffs defend the order, which has set aside the judgment they obtained.

[1, 2] The contention that appellant is not a party to the judgment or not a party aggrieved is on its face without merit. By the order granting leave to intervene it was determined implicitly that intervenor had an interest in the matter in litigation, in the success of the defendants and in the prevention of a judgment for plaintiffs caused by lack of defense or collusion. Under section 387 of the Code of Civil Procedure Zurich by said intervention became a party to the action uniting with the defendants in resisting the claims of plaintiffs and obtained all rights of a party defendant, including the right to appeal. *People ex rel. Fogg v. Perris Irrigation District*, 132 Cal. 289, 64 P. 399, 773; *Drinkhouse v. Van Ness*, 202 Cal. 359, 371, 260 P. 869; 2 *Witkin California Procedure*, 1095. Insofar as intervenor's interest was to take part in the trial to prevent a judgment for plaintiffs caused by lack of defense or collusion, the granting of a new trial on the ground that it was error to permit it so to take part, injuriously affected said interest and in that respect intervenor was evidently a party aggrieved. Moreover prior to the trial defendants had declared to intervenor that the claim against them in their opinion was worth at least \$100,000 and under those circumstances intervenor might well have a reasonable interest to limit any possible claim on the insurance policy to the amount of the verdicts which were less than half of defendants' estimate and it might reasonably doubt whether the motion of Rose, Jr. was made for the purpose of opening the possibility of lower or of higher recoveries. Respondents' argument that appellant could not be aggrieved by an order which set aside a judgment against one of the defendants is therefore wholly fictitious. (It is symptomatic that on appeal plaintiffs defend the order granting a new trial as strongly as does Rose, Jr.) "* * * a party may appeal from a judgment apparently in his favor which is actually against him," 3 *Witkin Califor-*

nia Procedure, 2182, citing as example *Quint v. McMullen*, 103 Cal. 381, 383, 37 P. 381.

We then come to the principal question on this appeal, to wit whether it was error justifying the granting of a new trial to permit Zurich to intervene and to take part in the trial in the manner stated. There is no authority directly in point in this state and little authority elsewhere. In *Pennix v. Winton*, 61 Cal.App.2d 761, 143 P.2d 940, 145 P.2d 561, this court decided that an attorney defending an insured in behalf of the insurer, could not take at the trial a position adverse to said insured by interjecting the issue of collusion in the personal injury action, but we expressly left undecided, in 61 Cal.App.2d at page 775, 143 P.2d at page 947, the question here involved. In *Neuman v. Eddy*, 15 La.App. 45, 130 So. 247, the insurer had intervened in the personal injury action on the ground of collusion and interposed its own defense in behalf of defendants, but it does not appear that there was any opposition to the intervention and the opinion was with respect to the intervention concerned with the proof of the collusion and the liability of the insurer which issues were tried in the same action. In *Brune v. McDonald*, 158 Or. 364, 75 P.2d 10, the sustaining of a demurrer to the complaint in intervention of the insurer in a personal injury action was upheld, but there the insurer, alleging collusion, did not intervene for the purpose of uniting in the defense but to have the prosecution of the negligence action enjoined pending decision of the rights under the policy and thereafter to have all action on the policy enjoined. One of the grounds of the decision was that there was no authority for such an injunction. 75 P.2d at page 14. However, it was also held that the insurer did not have the interest required for intervention because on the basis of the allegation of the complaint in intervention (as to the invalidation of the policy) the insurance company would not become liable even if plaintiff recovered. 75 P.2d at page 13. In *Krenitsky v. Ludlow Motor Co.*, 276 App.Div. 511, 96 N.Y.S.2d 102 an order denying an insurer who had disclaimed liability leave to inter-

vene in a wrongful death action against the insured after default judgments for plaintiffs was upheld on the ground that it was the position of the insurer that it had no interest to be protected and that by disclaiming liability and refusing to defend it had waived all rights to intervene if it had ever had any. In these few outside cases there seems to be a preponderance of the view that an insurer who disclaims liability on his policy has no interest justifying intervention in the action against his insured. This view is in accord with the general principles with respect to the interest required for intervention in his state.

Although section 387 of the Code of Civil Procedure provides for a wide right of intervention by " * * * any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, * * *" this right has been strictly limited in the decisions defining the "interest" mentioned in said section. So it is said in *Allen v. California Water & Tel. Co.*, 31 Cal.2d 104, 109, 187 P.2d 393, 395:

"The 'interest' mentioned in section 387 which entitles a person to intervene in a suit between other persons must be 'in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment' (*Elliott v. Superior Court*, 168 Cal. 727, 145 P. 101, 105); it must be 'direct and not consequential' (*Isaacs v. Jones*, 121 Cal. 257, 261, 53 P. 793, 794, 1101)."

[3] In *Bechtel v. Axelrod*, 20 Cal.2d 390, at pages 392-393, 125 P.2d 836, at page 837, it was held on the basis of said rules that the wife of the accommodation maker of a note, could not intervene in the action on the note brought against her husband, to obtain a declaration that their community property could not be subjected to payment of the obligation, because she "did not possess an interest legally sufficient to sustain her intervention * * *. The wife would neither gain nor lose by the direct legal operation and effect of a money judgment rendered against her husband * * *. Granting that it was the plaintiff's intention, in the event of his recovery,

to attempt to satisfy his judgment from the community property, it is entirely conceivable that the defendant * * * might decide to discharge the indebtedness by payment from his separate funds or that the plaintiff might not in fact initiate proceedings to enforce collection. From these observations it is manifest that the intervenor's interest in the instant action was remote and contingent and was not of the direct and immediate character required by law to support her intervention." The same applies a fortiori to this case. The plaintiff's claim against appellant would not be decided by the judgment in the negligence action alone but would be contingent on the policy coverage which appellant denies. *Drinkhouse v. Van Ness*, 202 Cal. 359, 260 P. 869 and *Belt Casualty Co. v. Furman*, 218 Cal. 359, 23 P.2d 293 on which appellant relies are distinguishable. In the *Drinkhouse* case the intervenor, the surety on a redelivery bond who intervened in the claim and delivery action when the insolvent defendant abandoned the defense of said action, did not deny its liability as surety but based its intervention on the existence of the liability. In the *Belt Casualty* case, intervenors who in a negligence action had obtained a judgment against the insured intervened in an action of the liability insurer against the insured to rescind the insurance on the ground of lack of cooperation; the rights of the intervenors against the insurance company were solely dependent on the result of the action in which they intervened, their damage claim having been litigated, and they did not, as does the appellant, advance any contention in derogation of their interest. Moreover it does not appear that in either of the two cases the sufficiency of the *interest* of the intervenors was attacked.

Two additional grounds militate against the intervention permitted in this case.

Appellant did not desire but actively opposed decision of its liability on the policy in the same action, so that the intervention could not serve its normal main purpose which is to obviate delay and multiplicity of actions, *Belt Casualty Co. v. Furman*, supra, 218 Cal. at page 362, 23 P.2d 293, and the intervention interjected insurance in the damage action, a result to be avoided if not necessitated by more weighty considerations. We conclude that the permission to intervene and to take part in the trial was error.

[4, 5] Appellant urges that even if the intervention was erroneously permitted it did not prejudice Rose, Jr. Considering the position taken by Rose, Jr. at the trial, and the verdict, low compared to Rose, Jr.'s expectation, this contention might well have some merit, but the point has been decided by the trial court against appellant in granting the new trial. "Whether or not the rights of the moving party were prejudiced by an error of law occurring at the trial is a matter which rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action in granting a motion for a new trial upon that ground except for a manifest abuse of discretion." *Brignoli v. Seaboard Transportation Co.*, 29 Cal.2d 782, 792, 178 P.2d 445, 451. We cannot say that the presence of intervenor insurer at the trial cannot possibly have been prejudicial and that therefore the order appealed from was a manifest abuse of discretion.

Order affirmed.

DOOLING and KAUFMAN, JJ., concur.
Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

137 Cal.App.2d 660

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Ray ADAMS, Defendant and Appellant.
Cr. 994.

District Court of Appeal, Fourth District,
California.

Dec. 8, 1955.

Hearing Denied Jan. 5, 1956.

Defendant was convicted of grand theft by false pretenses. The Superior Court of Orange County, Kenneth E. Morrison, J., entered judgment and an order denying new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence sustained conviction.

Judgment and order denying new trial affirmed.

1. Criminal Law ⚭1128(1)

Matters outside record may not be considered on appeal.

2. Criminal Law ⚭1116

Where transcript of grand jury proceedings did not appear in record on appeal by defendant from judgment of conviction for grand theft, District Court of Appeal could not consider alleged error of trial court in overruling defendant's general demurrer to the indictment and denial of motion to quash.

3. False Pretenses ⚭49(5)

The express testimony of a victim of false pretenses that he was induced to part with his money by fraudulent statements of accused is not essential to successful prosecution of an action for theft by false pretenses, and it is sufficient if inference of his reliance could have been drawn from all of the evidence.

4. Criminal Law ⚭1144(13)

A reviewing court will assume, in support of a judgment of conviction, the existence of every fact which jury could have reasonably deduced from the evidence, and will then determine whether the facts justify inference of guilt.

5. Criminal Law ⚭559

An inference is evidence, and must prevail, unless it is overcome by other evidence.

6. Criminal Law ⚭1159(2)

Any inference of fact, which the jury may reasonably draw from the evidence, is entitled to the same consideration in support of its finding as findings of fact on conflicting evidence.

7. Criminal Law ⚭1159(2)

If a finding is based on a reasonable inference, it is not within power of reviewing court to set it aside any more than it is within power of reviewing court to set aside any other finding supported by sufficient legal evidence, since a finding of fact, based on reasonable inference drawn from facts proved with legal sufficiency, is as much, and as completely as is any other, a finding based on good and sufficient evidence.

8. False Pretenses ⚭49(1)

Evidence sustained conviction for grand theft by false pretenses.

9. Indictment and Information ⚭176

Where indictment charging grand theft by false pretenses alleged that on December 8 the defendant obtained a cashier's check for \$8,500 from prosecuting witness for obtaining a liquor license for her, and evidence showed that check was not endorsed until latter part of January, variance in reference to time of receiving the check and date of endorsement of the check would be immaterial, if previous false representation by defendant in obtaining the check was the motivating cause of transfer of title and possession of check.

10. False Pretenses ⚭9

Where one has knowingly and designedly by fraudulent representations defrauded another, the representations will be treated as continuing so as to cover any money, property, or services received as result thereof.

11. Criminal Law ⚭1173(2)

In prosecution for grand theft by false pretenses, wherein there was evidence that defendant represented to prosecuting wit-

ness that it would take \$8,500 for defendant to obtain a liquor license for prosecuting witness because it would be necessary for defendant to pay a considerable portion of that amount to others, and that he was only going to retain a small amount of that sum, but that defendant retained the entire amount, it was not prejudicial error to fail to give defendant's proffered instruction that prosecuting witness received what she bargained for and that therefore defendant could not be found guilty.

12. False Pretenses $\Rightarrow$ 49(1)

In prosecution for grand theft by false pretenses, wherein defendant admitted having substantially made the representations as testified to by complaining witness, statutory requirement for corroboration was satisfied. Pen.Code, § 1110.

Z. B. West, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

The Grand Jury indicted defendant and appellant Ray Adams on two counts, Count I with conspiracy, and Count II with grand theft of personal property of the value of \$8,500, to wit, a cashier's check in that amount belonging to Melitas Forster. Defendant admitted a charge of prior conviction of a felony and that he served a term of imprisonment therefor in a federal prison. A trial by jury resulted in a directed verdict of not guilty on the first count, and a verdict of guilty on the second count.

[1,2] Prior to trial the court overruled a general demurrer to the indictment and denied a motion to quash. Exception is taken thereto on this appeal. A transcript of the Grand Jury proceedings does not appear in the record. Matters outside the record may not be considered on an appeal. *People v. Ruiz*, 103 Cal.App.2d 146, 150, 229 P.2d 73. No error appears in the rulings. *People v. Reed*, 113 Cal.App.2d 339, 248 P.2d 510.

The main contention is that the evidence is insufficient to support the verdict on the

second count. Considerable evidence was submitted to the jury in respect to the first count which was not particularly applicable to the second count.

In 1952-1953, William G. Bonelli was a member of the Board of Equalization of the district which included Orange and Los Angeles counties and the board had exclusive power to issue and control the transfer of liquor licenses subject to certain rules and regulations. Herman Pause was supervising liquor control officer for Orange County. His immediate superior was H. E. MacKenzie, District Liquor Administrator. There had been a limitation on the number of "P" (on-sale) licenses in effect since 1939, and no new licenses were issued in that district between 1945 and 1951, and because of this limitation P licenses acquired a value on transfer ranging as high as \$10,000 to \$15,000. A new census increased the number of licenses allowable, and applications therefor were accepted in limited numbers, mainly from people who came into Pause's office. Ordinarily, no application would be received unless consent was obtained from Mr. MacKenzie. In 1952, about 42 additional such licenses were issued containing the approval of Pause and MacKenzie, and it was indicated that no license application recommended by them was ever refused by the Board.

Prior to December 10, 1952, Melitas Forster, being the holder of an "A" (on-sale beer and wine license) attempted, on several occasions, to make an application to Pause for a P license but her application was refused. She inquired around generally and endeavored to secure such a license "any way she could", whether by purchase, by transfer, or by securing a new one. On December 6, 1952, according to her testimony, she received a telephone call from defendant Adams, who was a member of the Tavern Association to which she belonged, and he told her he heard she was interested in obtaining a P license and she said she was; that defendant said "he knew of one or something that would run \$8,500 to get", and that it would be necessary to act quickly; that she told him she did not have that amount of money but would go to the bank and borrow it; that defendant

agreed to come to her apartment on December 8th, after she obtained it; that she borrowed the money from the bank and secured a cashier's check for \$8,500 made payable to her as advised by her attorney; that defendant came to her apartment on December 8th and conversed with her generally in the presence of a friend and then proceeded out into the hall where Miss Forster gave him the check, unendorsed, because she was leaving on a trip and would not return for some time, and she told him that if the license transaction went through she would, on her return, endorse it over to him; and that defendant then told her to apply to Pause the next day and have a license. She stated that there was no particular statement made on that occasion as to "where the money was to go"; that on December 12th she applied for the license, as instructed, and Pause refused it on several occasions and finally Pause told her he could now take her application; that she filled it out (the record does not indicate whether or not she directly paid the \$325 fee required by law for such a license); that soon thereafter she left on her trip and returned about the end of January, 1953, and found the P license had been received at her place of business; that defendant contacted her and asked her to lunch with him; that a conversation was had about the license and she told him "that is a lot of money to pay for a license * * or something like that" and she thought he said: "he was only going to get a small part of it"; that she then endorsed the check and Adams took it with him because she had a feeling that defendant did something to help get the license because there was talk among the tavern owners about what was being paid for the new licenses that were issued. It would be a proper inference from the testimony that she believed from defendant's actions and statements that it was represented by defendant that a considerable portion of this money would be paid to others in order for her to obtain the new license, and that she was led to believe that defendant was not to retain all of it. She testified she never received any of it back from him and did not ask for it because she had a license and that

was what she wanted. She testified she knew defendant was Executive Secretary of the Tavern Association and went to Sacramento as a lobbyist for the association and there attended meetings of the Board of Equalization.

The check involved was received in evidence. Mr. Cole, who operates a bar and a check service in Los Angeles, testified he knew defendant well; that defendant came to him to cash the \$8,500 check and, without requiring an endorsement by him, he cashed it; that a couple of days later defendant came around and picked up the money; that because of his friendship for defendant he charged no fee for this service; and he was surprised to learn he had not required defendant to endorse the check. When an investigation started in reference to this license, the witness was confronted with the check and asked to relate the circumstances. He stated that after this conversation he called the defendant and told him about the investigation and that defendant said he wanted to talk to him about it and that he told defendant what he had told the investigator about the transaction as he remembered it and that defendant thereafter asked no questions but remained silent.

The investigator for the attorney general's office, R. F. McCarthy, testified that on September 17, 1954, after defendant found out he was being sought as a witness, defendant telephoned this investigator at a private telephone and then told him to go to a public pay station and call him at a certain designated number which he gave to him; that this was done and defendant answered and said he was in a difficult position; that he was mysterious about the telephone calls because of having been in Orange County the day before, had contacted several different owners and had learned that the information had gotten out that Melitas Forster had given him a check for \$8,500 in payment of a license. He then stated:

"* * * that because of his position with the Tavern Owners Association he didn't want to become involved, but that he had a program afoot where

he was trying to learn who it was and how it was that these licenses were being issued in the Fourth District; that he had on numerous occasions difficulties with Artie Samich, who at that time was a lobbyist in Sacramento in the liquor industry, to the effect that he was interfering with Mr. Samich's programs, and they even went so far as to try to remove him from his job, and because of that he was mysterious all the way through; that he was in a difficult position, and felt that when he would discuss it with us he would clear the entire matter up to our satisfaction only if the information would go to the Attorney General, to the Governor, the Supreme Court and other officials"; that he then stated he "thought we did a good job in getting the information from Melitas Forster, but that it did interfere with his plans considerably; that * * * this having developed he wouldn't be able to go on with his thoughts that he had in mind * * * that he took the check to Mr. Cole, a friend of his, for the purpose of having it cashed, and also so that Mr. Cole would have knowledge of this transaction * * *"; that he "Went on to state that he would get hold of his attorney * * * and ask him permission to discuss the situation with us, but informed us emphatically that he wouldn't give" his attorney "all the particulars concerning the Forster deal"; that he asked him "as to why he would tell him anything at all if he did not confide in him and not tell him everything"; and that he stated "he didn't have complete faith in" his attorney "and that he didn't want this information to get back to the members of the Tavern Owners; that if it did it would break up his entire program of trying to learn how these licenses were being issued"; that he "Stated further that if I were to relate this to anyone else before he had permission from his attorney to discuss it with us, that he would deny ever having discussed it with us at any time"; that he "asked him before hanging up if he

would tell me what he did with the \$8500, and he answered it by stating that when we did learn what he had done with—that we would be considerably surprised, but he wouldn't discuss it any further at that time."

Portions of this conversation were corroborated by another investigator who listened in on the conversation.

Essentially, the defense consisted of the testimony of character witnesses and of the testimony of defendant himself to the effect that he received the money in question from Miss Forster as payment for a service. He testified in part that he represented the interests of on-sale liquor licensees of the association of which he was executive secretary in public relations and legislative matters; that he was well acquainted with the members of the Board of Equalization and had known Mr. Bonelli for 20 years; that he attended nearly all of their meetings; that on November 20, 1952, he was present and had a conversation with Mr. Bonelli as to whether he was going to allow any more licenses to be issued in Orange County, and that Mr. Bonelli told him he would approve licenses there provided they were for qualified establishments; that subsequently he conversed with Miss Forster and told her that he heard she was interested in obtaining a P license; that she said she was but was not in any position to pay \$12,000 to \$14,000 for one; that he asked her how much a new license would be worth to her and she said \$8,500; that he told her he was not sure that he could do her any good but he would try and that she said she would have the \$8,500. She asked him how she would know whether she would obtain her money back if she did not receive the license and that he suggested she place it in escrow, and that if he did have influence enough she could give him the money then, and that he probably made the suggestion that she obtain a cashier's check made out to herself, unendorsed; that she did give him such a check and that he then told her to file her application the next day; that in a telephone conversation of December 9th, she told defendant that Pause had refused to accept it because it had not been approved by Mr. MacKenzie,

and that he told her this was the first time he ever heard of such a requirement and that he would find out about it; that he telephoned Mr. Bonelli and he was not in but he told his secretary about it and she said she would leave a note for Mr. Bonelli about it and also contact Mr. MacKenzie; that the next morning she went to the office in Santa Ana and her application was accepted and Mr. Pause told her Mr. MacKenzie had approved it; that he did nothing further at the time with respect to her license application other than to call Mr. Bonelli's office; that he followed through and checked with the Santa Ana office according to his regular procedure and learned that the application had been accepted.

With reference to the cashing of the cashier's check by Mr. Cole, defendant testified that when he learned that the check had been cashed without his endorsement he was quite surprised; and that he never gave any of the money to Mr. Bonelli, Mr. MacKenzie or Mr. Pause or anyone else in connection with the securing of her license. He admitted the conversation with the investigator for the attorney general but claimed the strange method he used in connection with the telephone conversation was due to his knowledge of "how they frame you up with these little records when you call them at their offices"; and that he had been engaged in conducting an investigation for 15 years on his own to find out about what was going on. He stated that what he told McCarthy was the truth, as far as he knew, and when asked about where the \$8,500 went, on cross-examination by the district attorney, he testified he did not know but that he had spent it for his own personal purposes; that he took \$3,500 to Sacramento as advances on his expenses and paid \$2,550 income tax on the \$8,500 he received. He admitted that after September, 1954, an amended income tax was filed by him in reference to the \$8,500 he received in 1953, after the investigation in this matter was under way. Defendant testified he told Miss Forster he would do everything possible to see to it that she got a liquor license but that he did

not tell her what he was going to do or how he was going to do it.

Both Mr. MacKenzie and Mr. Pause testified at the trial that defendant did not intercede on behalf of Miss Forster to obtain the license. They did not recall that he ever talked to them about it; that they received nothing by way of compensation for the issuance of the license; and that there was no reason why her license should not have been issued in the ordinary course.

It is defendant's claim that the evidence falls short of showing any false pretense or misrepresentation relied upon by Miss Forster which caused her to part with her money, and since she received what she bargained for and at the price agreed upon, no theft by false pretenses was committed.

[3-7] A very close question is presented in this respect. The express testimony of a victim of false pretenses that he was induced to part with his money by the fraudulent statements of the accused is not essential to the successful prosecution of an action for theft by false pretenses, but it is sufficient if the inference of his reliance could have been drawn from all the evidence. An appellate court will assume in support of a judgment of conviction the existence of every fact which the jury could have reasonably deduced from the evidence, and will then determine whether the facts justify the inference of guilt. An inference is evidence, and must prevail unless it is overcome by other evidence. Any inference of fact which the jury may reasonably draw from the evidence is entitled to the same consideration in support of its finding as findings of fact upon conflicting evidence. If a finding is based upon a reasonable inference it is not within the power of the appellate court to set it aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence, for a finding of fact, based upon reasonable inference drawn from facts proved with legal sufficiency, is as much, and as completely as is any other, a finding based upon good and sufficient evidence. 10 Cal.Jur. p. 740, sec. 61; *Bompensiero v. Superior Court*, 44 Cal.2d 178, 281 P.2d 250.

The jury was fully instructed that every person who knowingly and designedly, by any false or fraudulent representation or pretenses defrauds any other person of money, is guilty of theft, and that "the false pretense used must be a fraudulent representation of an existing or past fact by one who knows it to be not true, or who makes the representation recklessly and without information justifying a belief that it is true, and it must be such as is adapted to induce the person to whom it is made to part with something of value;" that it is not necessary that the fraudulent representation be made by words, if it may reasonably be inferred from a person's act and conduct; that proof of these four facts must be made against the defendant before he may be found guilty of the crime of theft by means of false or fraudulent representations or pretense: (1) The defendant must have intended to defraud the person named in the indictment as the one against whom the crime was perpetrated; (2) Actual fraud must have been committed by the defendant against that person; (3) Some false representation or false pretense must have been used by defendant for the purpose of perpetrating the fraud, and must have been a material element in inducing the owner to part with the property; and (4) The fraud must have been accomplished, that is, the defendant, by means of the fraud, must have induced the owner to part with the property, the owner intending to divest himself of title, and the defendant thus must have obtained the property.

This was followed by another instruction in the language of CALJIC 227, to the effect that:

"In order for a false representation to be a material element in inducing an owner to part with property, intending to divest himself of title, the owner must rely wholly or in part, as he has a right to do, on that representation, and he must act in that reliance. Hence, although an owner of money is under no duty to make an investigation, and has the right to rely on the representation made to him, if, before transferring property to another, he does

make independent inquiry or investigation and relies thereon rather than on any representation made to him by the other person, or when, for any reason, the owner does not rely on any false representation or pretense made to him by that other person, the latter is not guilty of obtaining said property by false or fraudulent representation or pretense."

An instruction in the language of CALJIC No. 223 was also given respecting theft by trick and device.

[8] Under the evidence and instructions given the jury might well have inferred that defendant did represent to Miss Forster that upon the payment to him of the sum of \$8,500 he would be able to secure a new license for her and at no price less than that amount; that to do so it would be necessary for him to pay a considerable portion of that amount to others to bring about the issuance of such a license; and that when she complained about the price fixed by defendant, he said he was only going to get a small part of it when, in fact, he stated he kept all of it, and apparently, from the record, it was not necessary to pay any portion of it to anyone, since it probably would have been issued in due course.

Defendant's conduct, after being presented with the surrounding facts, and the evidence pertaining to the delayed filing of the amended income tax return, rather indicates that the representations inferentially made by defendant were not entirely true and that if Miss Forster had known the truth of the transaction she would not have turned that amount of money over to defendant for his personal use. At least the jury was justified in so believing and that the defendant misappropriated in excess of \$200 in keeping the entire sum.

This conclusion receives some support in the case of *People v. Chamberlain*, 96 Cal. App.2d 178, 214 P.2d 600, where the evidence showed that defendant obtained money from the victim on representations that he could and would "fix" a horse race, but instead appropriated the money to his own use. The court held the conviction to be sustainable on the theory of theft by

trick and device as well as by false pretenses. See also *People v. Edwards*, 72 Cal.App. 102, 113, 236 P. 944, where it was held (quoting from the syllabus) that:

"A taking, within the definition of larceny, occurs when a person, with a preconceived design to appropriate the property to his own use, obtains possession of it by means of fraud or trickery; and in such case the fraud vitiates the transaction, and the owner is deemed still to retain a constructive possession of the property"; and that "It is essential in cases of larceny committed by means of fraud that the owner shall intend to part with the possession only, and not to pass the title as well. If he intends to pass both the possession and the title, the transaction, though it may amount to the crime of obtaining property by false pretenses, will not constitute larceny"; and that "The owner does not part with the title to the alleged thief where the thing which is the subject of the theft is delivered by the owner to the accused to be applied by the latter to a particular purpose, and the recipient of the property, having obtained the possession fraudulently with the preconceived intention to appropriate the property to his own use, does subsequently convert it to his own use instead of applying it to the purpose contemplated by the owner."

In that case the evidence and inferences therefrom showed that the complaining witness delivered a sum of money to the defendant upon the latter's representation that it would be used in some manner to corrupt officers investigating criminal charges against the husband and brother-in-law of the complaining witness, that the representation proved to be false and the possession of the money was obtained with a preconceived design not to devote the same to the purpose for which it was delivered to defendant but to convert it to his own use.

[9, 10] Defendant contends that neither title nor possession, in the strict sense, passed to defendant until the occasion when the check was endorsed, around the latter

part of January, 1953, and that this constitutes a variance from the date alleged in the indictment, namely, December 8, 1952, citing such cases as *People v. Cravens*, 79 Cal.App.2d 658, 180 P.2d 453; and *People v. Tufts*, 167 Cal. 266, 139 P. 78. The variance in reference to the time of the taking, as alleged, and the date of the endorsement of the check would be immaterial under the facts of this case if the previous false representation was the motivating cause of the transfer of title and possession of the check. When one has knowingly and designedly by fraudulent representations defrauded another, the representations shall be treated as continuing so as to cover any money, property or services received as a result thereof. *People v. Rice*, 73 Cal. 220, 221, 14 P. 851; *People v. Murray*, 91 Cal.App.2d 253, 257, 204 P. 2d 624; *People v. Lyon*, 135 Cal.App.2d 558, 288 P.2d 57; *People v. Sheffield*, 9 Cal. App. 130, 98 P. 67; *People v. Frankfort*, 114 Cal.App.2d 680, 704, 251 P.2d 401.

Defendant next contends that the evidence shows that Miss Forster did receive what she bargained for and accordingly he could not be guilty of theft by false pretenses, and that the court's failure to give his proffered instruction to this effect was error, citing *People v. Ingles*, 117 Cal.App. 22, 24, 3 P.2d 341; *People v. Tufts*, supra; and 25 C.J. p. 609 [Sec. 38] 9; 35 C.J.S., False Pretenses, § 28.

[11] While this rule of law may be applicable under certain circumstances, it cannot be said that a person receives what she bargained for if it is falsely represented to her that to obtain a certain article or license costing \$325, it would take \$8,500 to obtain it because it would be necessary to pay a considerable portion of that amount to others, and that he was only going to retain a small amount of it. The jury was instructed on the subject and had a right to believe that the party defrauded would not have otherwise parted with possession of the money. The court fully instructed the jury on the elements of the offense. No prejudicial error resulted in the failure to give the proffered instruction as proffered. *People v. Raines*, 66 Cal.App.2d 960, 962, 153 P.2d 424.

[12] Lastly, it is contended by defendant that if there were any false pretenses established, by inference, circumstantial evidence or otherwise, there was no corroboration thereof, as required by section 1110 of the Penal Code. Under the evidence above related, the requirement for corroboration is satisfied particularly where the defendant admits having substantially made the representations as testified to by the complaining witness. *People v. Reed*, 113 Cal.App.2d 339, 350, 248 P.2d 510; *People v. Frankfort*, 114 Cal.App.2d 680, 701, 251 P.2d 401.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; GIBSON, C. J., not participating.



137 Cal.App.2d 728

Arley MUNS, Petitioner,

v.

The SUPERIOR COURT of the State of California, In and for the COUNTY OF SUTTER, Respondent.

Civ. 8810.

District Court of Appeal, Third District, California.

Dec. 12, 1955.

Hearing Denied Feb. 8, 1956.

Proceeding in prohibition to restrain Superior Court, Sutter County, from trying accused on charge of driving while under influence of intoxicating liquor with prior conviction, on ground that the action had been dismissed in that the Justice Court, after the filing of an amended complaint, had dismissed the original complaint charging same offense without prior conviction. The District Court of Appeal, Van Dyke, P. J., held that under the circumstances there was not such a dismissal as would bar the prosecution in the Superior Court.

Alternative writ discharged and peremptory writ denied.

1. Criminal Law ¶178

Where accused pleaded not guilty to drunken driving complaint in Justice Court, and before date of trial an amended complaint was filed charging same offense with a prior conviction, and original complaint was ordered dismissed at request of district attorney, and Justice, sitting as magistrate, held preliminary hearing and ordered that accused be held for trial in Superior Court, there was not such a dismissal of action as would bar prosecution in Superior Court. Vehicle Code, § 502; Pen.Code, § 1387.

2. Criminal Law ¶214

Where accused pleaded guilty to drunken driving and Justice Court received advice that amended complaint charging same offense with prior conviction was being prepared and ordered the setting aside of the proceedings following filing of original complaint, the amended complaint which was thereafter filed was filed with permission of court as required by statute. Vehicle Code, § 502; Pen.Code, § 1008.

Hewitt & McBride, Yuba City, for petitioner.

John G. Hauck, Dist. Atty., Sutter County, Yuba City, and Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This proceeding is in prohibition. The petitioner seeks to restrain the respondent Superior Court from trying him under an information charging violation of Section 502 of the Vehicle Code, with a prior conviction.

On December 14, 1954, there was filed in the Justice Court of the Yuba Judicial District in Sutter County, a complaint charging petitioner with violation of said section, with no charge of a prior conviction. Petitioner entered a plea of not guilty, demanded a jury trial, and a trial date was set. Thereafter, and before the date of trial, a document entitled "Amended Complaint" was filed charging the same violation and alleging a prior conviction. Thereby the cause became triable in the superior court. After the filing of this document, the justice court set

a preliminary hearing on the same for January 13th. Prior to the preliminary hearing the original complaint filed December 14th, as aforesaid, was, at the request of the district attorney, ordered "dismissed". The judge of the justice court, sitting as a magistrate, proceeded with the preliminary hearing and at the close thereof ordered that the petitioner herein be held for trial in the superior court. Thereafter an information was filed charging the same violation, with prior conviction. Motion to discharge the defendant was denied and this proceeding followed.

[1] It is the contention of petitioner that by the order made, which purportedly dismissed the original complaint, there was accomplished a dismissal of the action and that by the provisions of Section 1387 of the Penal Code that dismissal stands as a bar to any other prosecution for the same offense.

The docket entries in the Justice Court read as follows:

"Dec. 14 Complaint filed charging a misdemeanor. Defendant appeared in Court was informed as to his rights. Defendant entered a plea of not guilty and demanded a trial by jury. Trial was set for January 12, 1955 at 10 A.M. Defendant posted bail of \$211.00 and was released.

"Jan. 3 It being brought to the attention of the Court that the defendant had suffered a prior conviction for this violation, the above proceedings are hereby set aside and the Dist. Atty is preparing an amended Complaint charging him with a prior conviction.

"Jan. 7 Prel. date 1-13-55 at 3:30 P.M. :

"Jan. 5 Amended Complaint filed charging a high misdemeanor Sect. 502 CVC Code with a prior conviction.

"Jan. 10 Subpoena issued, Perkins, Bumpus, Savana

"Jan. 13 Preliminary came on at 3:30 P.M. Dist. Atty. John Hauck represented the People—Atty. Loyd E. Hewitt represented the defendant. Hollan Jones was sworn in as Reporter. Yuba City Police Officer Neil R. Perkins was sworn and testified. The prosecution rested. The defense offered no witnesses. The Defendant was

ordered held to answer and to appear in the Superior Court on Friday Jan. 21, 1955, at 9:30 A.M. for arraignment. Bail transferred to Co. Clerk Ck No. 226. Prior to the preliminary the original Complaint filed Dec. 14, 1954 was at the request of the District Attorney ordered dismissed."

Section 1387 of the Penal Code provides: "An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor * * *." Petitioner's contention that by what was done the action was dismissed cannot be sustained.

Although the docket does not record the proceedings of the court with all the nicety that would have been desirable, yet, given a fair construction, it does not warrant holding that there was a dismissal of the action. It shows that the court had been informed that the defendant had suffered a prior conviction and that the district attorney was preparing to file an amended complaint to allege the prior. The legal effect of such an amendment would be to oust the justice court of trial jurisdiction, would render nugatory the proceedings following the filing of the original complaint, that is, the plea, the demand for trial by jury and the order setting the cause for trial before that court, and would require a preliminary hearing to determine whether or not defendant should be held for superior court action. With this in mind the court formally set aside such prior proceedings. Thereafter the expected amended pleading was filed. The docket further shows that when the defendant next appeared on the date set for the preliminary, and before the preliminary was begun, the district attorney requested that "the original Complaint filed Dec. 14, 1954" be ordered dismissed. This order was made. This, however, could not effect the dismissal of the action. Such a construction of the docket would fly in the face of a number of circumstances apparent from the record. Thus, after the order was made, the judge of the justice court sitting as a magistrate held the preliminary hearing and at its conclusion ordered the petitioner held for trial in the superior court. Although acting in two different capacities, it is clear

that the official did not consider that the action itself had been dismissed. Again the district attorney did not ask that the *action* be dismissed but that the "original complaint" be dismissed and such was the form of the order. The use of the descriptive term "original" shows that the district attorney was not addressing his motion to the action itself nor to the existing pleading, that is, the amended complaint. After the filing of the amended pleading, the original complaint was no longer a pleading in the case, and it could not be "dismissed". The amended pleading superseded it and it had no further function as a pleading. *O'Brien v. O'Brien*, 50 Cal.App.2d 658, 661, 123 P.2d 877; *Owens v. Traverso*, 125 Cal.App.2d 803, 808, 271 P.2d 164; *Puchta v. Rothman*, 99 Cal.App.2d 285, 291, 221 P.2d 744; 21 Cal.Jur. p. 213, sec. 146; 42 C.J.S., *Indictments and Informations*, § 239, p. 1248; *Woodsmall v. State*, 89 Ind.App. 617, 167 N.E. 631. The order of the justice court purporting to dismiss the "original complaint" was a nullity. The action of the district attorney, followed by the order of the court "dismissing", or purporting to dismiss, the "original complaint", cannot be given the force and effect of a dismissal of the action.

[2] It is argued that, since the complaint could not be amended after plea without the permission or an authorizing order of the court that it be so amended, Penal Code, § 1008; *People v. Brower*, 92 Cal.App.2d 562, 564, 207 P.2d 571, and since the record does not show such permission, the filing of the amended complaint was a nullity. This argument calls for an unwarrantably strained construction of the record. We think permission must be implied. The docket states: "It being brought to the attention of the Court that the Defendant had suffered a prior conviction for this violation, the above proceedings are hereby set aside and the Dist. Atty is preparing an amended Complaint charging him with a prior conviction." Within two days thereafter the amended complaint was filed. We hold it was filed with permission of the court and that the docket sufficiently shows this to be so.

For the reasons given, petitioner is not entitled to a writ of prohibition and the Superior Court had jurisdiction to proceed with the trial of the action.

The alternative writ heretofore issued is discharged. The peremptory writ is denied.

PEEK and SCHOTTKY, JJ., concur.



137 Cal.App.2d 840

Charles W. MERZ, Petitioner,

v.

SUPERIOR COURT of the State of California,
in and for the COUNTY OF
SUTTER, Respondent.

Civ. 8811.

District Court of Appeal, Third District,
California.

Dec. 12, 1955.

Hearing Denied Feb. 8, 1956.

Proceeding in prohibition to restrain Superior Court, Sutter County, from trying accused on charge of driving while under influence of intoxicating liquor with prior conviction, on ground that the action had been dismissed in that the Justice Court, after the filing of amended complaint, had dismissed the original complaint charging same offense without prior conviction. The District Court of Appeal, Van Dyke, P. J., held that under the circumstances there was not such a dismissal as would bar prosecution in the Superior Court.

Alternative writ discharged and peremptory writ denied.

I. Criminal Law §214

In action for driving while under influence of intoxicating liquor, where justice court docket showed notice of previous conviction filed after preliminary hearing,

filing of amended complaint, and schedule for preliminary examination on amended complaint, court's permission for filing of amended complaint would be implied. Vehicle Code, § 502.

2. Criminal Law ⇨214

Where pleading was filed in Justice Court in criminal case and was designated in docket entry as amended complaint and pleading was proffered, received and filed as amended complaint, it constituted a properly filed amended complaint, notwithstanding fact that it may not have been labeled "amended complaint".

3. Criminal Law ⇨214

Where original complaint in Justice Court charging defendant with driving while under influence of intoxicating liquor was amended by filing amended complaint charging same offense with prior conviction, the amended complaint superseded the original complaint, and order thereafter made purporting to dismiss original complaint was a nullity and defendant was triable in Superior Court upon charges which were contained in amended pleading and which, after preliminary hearing, the defendant had been ordered to answer in the Superior Court. Vehicle Code, § 502.

Hewitt & McBride, Yuba City, and Manwell & Manwell, Marysville, for petitioner.

John G. Hauck, Dist. Atty., Sutter County, Yuba City, and Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

The petitioner herein seeks to restrain the respondent, Superior Court, from trying him under an information charging him with violation of Section 502 of the Vehicle Code, with a prior conviction. The matter presents in general the same issues discussed in *Muns v. Superior Court*, Cal. App., 290 P.2d 951, in which an opinion was this day filed. The docket entries in the instant case were as follows:

"Dec. 10 Complaint filed charging a misdemeanor. Defendant was arrested—and

released on \$211.00 bail, for appearance on Dec. 17, 1954, at 10 A.M.

"Dec. 17 Defendant, through his Atty. Ray Manwell, entered a plea of not guilty and demanded a jury trial, Atty. Manwell stated he would waive time limitations.

* * * * *

"Jan. 10 Prior thereto, to wit, on June 15, 1953 said Defendant was convicted in Justice Court, Oroville Twp., County of Butte, of driving a motor vehicle while under the influence of intoxicating liquor.

"An amended complaint, signed by Captain Nick Frandrup, Yuba City Police Force is now on file in this Court.

"Preliminary examination is hereby set for January 13, 1955 at 4 P.M. Ray Manwell, Atty. for Defendant duly notified.

* * * * *

"Jan. 13 Preliminary came on at 4 P.M. John Hauck Dist. Atty. represented the People—Atty. Ray Manwell represented the Defendant—Hollan Jones was sworn in as Reporter. Prior to preliminary the Original Complaint filed on Dec. 10, 1954, was dismissed on motion of Dist. Atty.

"Through Atty. Manwell, Atty. for Defendant, the preliminary was waived and the Defendant was ordered held to answer.

"Bail to remain the same.

"Bail transferred to Co. Clerk Ck. No. 226."

[1-3] We think this record also, just as we held in *Muns v. Superior Court*, supra, when properly construed, shows that the second pleading was filed with the permission of the court. Unlike the second pleading filed in *Muns v. Superior Court*, the second pleading filed herein was not entitled as an "Amended Complaint" on its face. The cover sheet, however, contained the descriptive words "Amended Complaint" and there was considerable discussion as to whether it bore that designation when filed. We think the point immaterial and will assume that it did not. However, it was designated in the docket entry as an amended complaint and we think it was proffered, received and filed as such and constituted a properly filed amended complaint. It, therefore, superseded the original complaint and,

as we held in *Muns v. Superior Court*, the order thereafter made purporting to "dismiss" the "original complaint" was a nullity. Defendant, having been properly held to answer, is triable in the respondent court upon the charges contained in the amended pleading.

The alternative writ heretofore issued is discharged. The peremptory writ is denied.

PEEK and SCHOTTKY, JJ., concur.



137 Cal.App.2d 532

Allan D. GREENWOOD, Plaintiff and
Appellant,

v.

Leon MOORADIAN et al., Defendants.

R. Bruce Murchison, Defendant and
Respondent.

Allan D. GREENWOOD, Plaintiff and
Appellant,

v.

Leon MOORADIAN et al., Defendants.

L. D. Ormsby et al., Defendants and
Respondents.

Civ. 20859, 20972.

District Court of Appeal, Second District,
Division 1, California.

Dec. 6, 1955.

Rehearings Denied Dec. 30, 1955.

Hearing Denied Feb. 1, 1956.

Action for damages and an accounting from defendants who were allegedly members of a joint venture which originally included plaintiff and from which he was allegedly excluded through a conspiracy of defendants. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for nonsuit as to one of the defendants and sustained demurrers to an amended complaint without leave to amend and plaintiff appealed. The District Court

of Appeal, Ashburn, J. pro tem., held that complaint which alleged that defendants had conspired to appropriate to their own uses, the benefits and profits of joint venture including plaintiff's interest, was sufficient to state a cause of action against defendant without allegations as to overt acts of particular defendant, and where written agreement was signed on behalf of firms or associations without any particularization as to type of entity, it would not be violation of parol evidence rule to introduce evidence as to their identity.

Judgments reversed.

1. Trial ☞109

An order granting motion for nonsuit based upon an opening statement can be upheld only where it is clear that counsel has undertaken to state all of the facts which he expects to prove and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense as the case may be, but where these conditions are complied with, court is authorized to accept statements and admissions of counsel and to grant a nonsuit required by such statements or admissions.

2. Appeal and Error ☞925(3)

In reviewing an order granting a nonsuit on an opening statement, appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence, and every favorable fact which counsel has stated as among those matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried.

3. Conspiracy ☞18

In civil action for damages and accounting based on a conspiracy, it is not necessary that acts constituting a conspiracy, as well as those inflicting a wrong pursuant thereto, must be alleged.

4. Conspiracy ☞18

In action for damages and accounting from defendants who were allegedly members of a joint adventure which originally

included plaintiff and from which he was allegedly excluded through a conspiracy of the defendants, complaint which alleged that defendants had conspired to appropriate to their own uses the benefits and profits of joint adventure, including plaintiff's interest, was sufficient without specific allegations as to overt acts on part of particular defendants.

5. Conspiracy ⚡5

In order for a person to be held liable in civil action as a conspirator, it is not necessary that it be shown that he had done some overt and independently tortious act.

6. Conspiracy ⚡19

Because of the inherent difficulty in proving a conspiracy, a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, interests of the alleged conspirators and other circumstances.

7. Torts ⚡22

Each participant in the wrongful act is responsible as a joint tort-feasor for all damages ensuing from the wrong, regardless of whether or not he was a direct actor and the degree of his activity.

8. Attorney and Client ⚡26

Where action was brought for an accounting of profits and declarations of constructive trust against allegedly fellow joint adventurers and various individuals and corporations that had acquired the assets of the joint adventure, fact that one of the defendants was an attorney for one of the other defendants did not immunize him from liability for torts committed in person or liability for wrongs done pursuant to an alleged conspiracy joined by him.

9. Joint Ventures ⚡5(1)

Diversion to his own individual use of the entire assets of a joint venture by one member gives rise to a cause of action in favor of nonparticipating member who has been injured thereby and that injured member has a right to such legal or equitable relief as may be appropriate is a well-established doctrine.

10. Evidence ⚡459(1)

Where written agreement allegedly establishing a joint venture was signed on

behalf of firms or associations without any particularization as to the type of business entities that became parties thereto, it would not be a violation of the parole evidence rule to introduce evidence as to the identity of entities on whose behalf document was signed

11. Joint Ventures ⚡5(2)

In action for an accounting for profits and declarations of a constructive trust against fellow joint adventurers, and various individuals and corporations that had allegedly acquired the assets of the joint venture, complaint alleging that defendants had conspired to appropriate to their own uses the benefits and profits of joint venture, including plaintiff's interest, was sufficient to state a cause of action.

12. Pleading ⚡225(1)

Where a complaint is good as against a general demurrer, it is erroneous for the trial court to sustain the demurrer without leave to amend because of defects in the form of pleading. West's Ann.Code Civ. Proc. § 472c.

13. Appeal and Error ⚡854(3)

Where the court sustained demurrers to complaint upon general and special grounds and plaintiff refused to amend the complaint, even though sustaining of demurrer to complaint on general ground was erroneous, if any of the special grounds of demurrer were well taken, judgment of dismissal would have to be affirmed. West's Ann.Code Civ.Proc. § 472c.

14. Joint Ventures ⚡5(1)

One member of a joint venture may individually maintain an action against other members of joint venture for an accounting and declaration of constructive trust.

15. Pleading ⚡52(1)

Cause of action for damages for breach of joint venture agreement could be joined with cause of action for an accounting and dissolution of joint venture without separate statement.

16. Joint Ventures ⚡5(1)

Plaintiff allegedly excluded from joint venture by conspiracy of defendants was entitled in equity court to any and all ap-

propriate relief for the single wrong of excluding him from the joint venture and diverting the assets and business thereof to another entity or entities in which he was not permitted to participate.

17. Limitation of Actions ⚡24(2)

Where action was brought by individual against other members of joint adventure for an accounting and declaration of constructive trusts and individual's claim for compensation from joint adventure was but a part of the right to an accounting, four-year statute of limitations on written contracts was applicable and not two-year limitations statute on oral contracts. West's Ann.Code Civ.Proc. § 339, subd. 1.

Vaughan & Brandlin and Robert P. Schifferman, Los Angeles, for appellant.

Bicknell J. Showers, W. I. Gilbert, Jr., and Jean Wunderlich, Los Angeles, for respondent R. Bruce Murchison.

D. Brandon Bernstein, Beverly Hills, for other respondents.

ASHBURN, Justice pro tem.

Plaintiff Allan D. Greenwood prosecutes two appeals from judgments in a single action. One of them (No. 20859) is taken from a judgment of nonsuit in favor of defendant R. Bruce Murchison, entered upon plaintiff's opening statement with respect to the fourth amended complaint. The other (No. 20972) challenges two judgments made upon sustaining demurrers to sixth amended complaint without leave to amend.¹

Appeal from Judgment of Nonsuit.

The fourth amended complaint, upon which the case originally went to trial and which was before the court at the time of granting the Murchison nonsuit, alleged that plaintiff Greenwood, defendants Leon

Mooradian, L. D. Reeder, Frank Mile, Leonard D. Ormsby, L. M. Fabricating Co. and others, entered into a joint venture agreement on October 29, 1951, which was partly written and partly oral, the object being to produce for Lockheed Aircraft Corporation a certain product under purchase orders and a basic agreement made with that corporation. Defendant Murchison is not alleged to have been a member of the venture. The written agreement was made "between L. M. Fabricating Co. & Associates, First Party, and Reeder International & Associates, Second Party, as joint venturers and a joint venture to be known from date hereof as L. M. Engineering Company & Associates." It was signed on behalf of L. M. Fabricating Co. & Associates by Leon Mooradian, as "A managing Director"; and by L. D. Reeder as "A managing Director" of Reeder International & Associates. But it is alleged that there was an oral understanding between the plaintiff and the defendants who were parties to the joint venture, that the written agreement was to be executed by defendant Reeder in the name of Reeder International & Associates on behalf of plaintiff, defendants Reeder, Ormsby and Mile, and that in fact the writing was so executed; that it was further orally understood between said parties that a fifty per cent interest in the joint venture, which under the written agreement was nominally vested in Reeder International & Associates, belonged to the last named persons in the following proportions: L. D. Ormsby, 22 per cent, Allan D. Greenwood, 13 per cent, L. D. Reeder, 13 per cent and Frank Mile, 2 per cent. It was also alleged that defendant Mooradian executed the written agreement in the name of L. M. Fabricating Co. & Associates on behalf of himself, defendant L. M. Fabricating Co. and other fictitiously named defendants; that the 50 per cent interest in the joint venture nominally vested in said

1. One of those judgments runs in favor of L. M. Engineering Company & Associates, Inc., Leon Mooradian, L. M. Fabricating Company, L. M. Engineering Company, L. M. Industries, Inc., L. M. Fabricating Co. & Associates, L. M. Engineering Company & Associates, and E.

R. Waltrous. The other judgment is in favor of L. D. Ormsby, L. D. Reeder, Reeder International, L. D. Reeder Lumber Company, L. D. Reeder Company of Los Angeles, Teclite Supply, Incorporated, and Reeder International and Associates.

L. M. Fabricating Co. & Associates actually belonged to said Mooradian, L. M. Fabricating Co. and certain fictitiously named defendants in proportions unknown to plaintiff. The complaint also avers that it was likewise orally and contemporaneously agreed that the new joint venture, L. M. Engineering Company & Associates, would employ plaintiff and Mooradian for the duration of the joint venture and would pay to each of them a salary of \$2,000 per month, beginning September 15, 1951, and continuing until the termination of the venture, which salaries would be in addition to the respective joint venture shares of plaintiff and Mooradian, but that the salary checks would not be cashed until a certain guarantee, executed by defendant Ormsby to the bank to secure a loan made by the joint venture, should be discharged in full. A conspiracy is alleged, and that allegation includes the defendant Murchison, a respected member of the bar, whose protestations of falsity of the charge cannot be here considered, for this court is confronted with a question of law only and must accept the allegations of the complaint as true for the purposes of this appeal.

The averment is that "the defendants herein have conspired together to appropriate to themselves and convert to their own use and benefit the assets and profits of the aforesaid joint venture, including the interest of the plaintiff therein, and have appropriated and converted the said assets and profits of the said joint venture in an amount unknown to the plaintiff, including the interest of the plaintiff therein;" that defendants caused defendant L. M. Engineering Co. & Associates, Inc. to be organized, the incorporators being Reeder, Mooradian and Murchison; "that said defendants are in complete control of said defendant corporation and have formed same for the purpose of holding the assets and profits of the joint venture and defrauding plaintiff of his interest in said joint venture and to its assets;" that the defendants, other than L. M. Engineering Company & Associates, caused the Lockheed purchase orders and basic agreement to be cancelled, obtained new purchase or-

ders and a new basic agreement in the name of L. M. Engineering Co. & Associates, Inc., and appropriated and converted to their own use all of the assets of the joint venture, having an approximate value of \$200,000; that this was done on or about March 25, 1952; that defendants are now operating under the new purchase orders and basic agreement and appropriating to themselves the profits of the venture; that they have deprived and are depriving plaintiff of his interest in its assets and profits; that the new corporation is under the control of defendants, including the defendant Murchison. Plaintiff prays for a receiver, an injunction, and an accounting of the affairs of the joint venture and the respective interests and rights of plaintiff and defendants in the assets thereof; that defendants be required to pay plaintiff his accrued salary in the sum of \$13,000; that the court declare the respective rights and duties of the parties in the joint venture and in the successor enterprise which has been set up by defendants, and that plaintiff have general relief. Defendant Murchison is not a party to the first cause of action and hence the discussion herein relates to the second count.

Plaintiff's attorney made an opening statement which was supplemented until he declared it to be complete.

[1,2] The rules pertaining to a motion for nonsuit based upon an opening statement are set forth in *Bias v. Reed*, 169 Cal. 33, 37, 145 P. 516, 517: "It is no doubt true, as is argued by the appellants, that the practice of directing a verdict, in advance of the introduction of evidence, upon the opening statement of one or the other party, is a dangerous one, and that an order granting such motion can be upheld only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense, as the case may be. * * * Where, however, these conditions are complied with, the court is authorized to accept the statements and admissions of counsel and to direct a verdict required by such statements or admissions. * * * [169 Cal. at page

38, 145 P. at page 518.] In reviewing an order directing a verdict on an opening statement, the appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence. Every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried." See also *Moffitt v. Ford Motor Co.*, 117 Cal.App. 247, 251, 3 P.2d 605; *Witkin California Procedure*, Vol. 2, sec. 128, p. 1860.

The opening statement developed into a lengthy argument in which the judge participated and counsel for plaintiff was put to the burden of justifying his pleading and enumerating wrongful acts done by defendant Murchison in furtherance of the alleged conspiracy.

[3,4] The attack upon the complaint was centered upon the generality of the averment of conspiracy. It is above quoted and is sufficient to satisfy the controlling authorities. The argument is that acts constituting the conspiracy, as well as those inflicting a wrong pursuant thereto, must be alleged. The cases are to the contrary. In *California Auto Court Ass'n v. Cohn*, 98 Cal.App.2d 145, 219 P.2d 511, the allegation of fact of the conspiracy itself was no more detailed than the one at bar. At page 149 of 98 Cal.App.2d at page 514 of 219 P.2d, this division of this court rejected the claim of insufficiency of the allegation, saying: "As to the necessity of interference by unlawful action, respondents contend the complaint contains a bare allegation of conspiracy and is therefore insufficient. The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. The cause of action is the damage suffered. * * * The complaint contained allegations of acts of the respondents in detail and was not confined to a 'bare' allegation of conspiracy." The last quoted language referred to acts alleged to have

been done pursuant to the conspiracy and in effectuating an actionable wrong.

In *Abbot Kinney Co. v. Harrah*, 84 Cal. App.2d 728, 733, 191 P.2d 761, this court also held sufficient a similar allegation of conspiracy. Like rulings were made in *Moropoulos v. C. H. & O. B. Fuller Co.*, 186 Cal. 679, 682, 688, 200 P. 601; *Mox, Inc., v. Woods*, 202 Cal. 675, 677, 262 P. 302. See also *Witkin, California Procedure*, Vol. 2, sec. 469, pp. 1457-8.

[5-7] The view that defendant Murchison must be shown to have done some overt and independently tortious act in order to be liable as a conspirator is a mistaken one. In the *California Auto Court Ass'n v. Cohn* case, supra, 98 Cal.App.2d 145, at page 149, 219 P.2d 511, at page 514, the court also said: "Each participant in the wrongful act is responsible as a joint tort-feasor for all damages ensuing from the wrong, regardless of whether or not he was a direct actor and of the degree of his activity. *Mox, Inc., v. Woods*, 202 Cal. 675, 262 P. 302. Furthermore, because of the inherent difficulty in proving a conspiracy, it has been held that a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances. *Anderson v. Thacher*, 76 Cal.App.2d 50, 72, 172 P.2d 533." *Mox, Inc., v. Woods*, supra, 202 Cal. at pages 677-678, 262 P. at page 303: "In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. [Citing cases.] A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or co-operated in inflicting a wrong upon him. [Citing cases.] The advantage gained in charging a conspiracy is that the act of one during the conspiracy is the act of all if done in furtherance thereof, and thus defendants may be held liable who in fact committed no overt act whatsoever and gained no benefit therefrom."

The opening statement revealed that "defendant Mr. Murchison was the attorney for the defendant Ormsby during a substantial period of the time and is now representing some additional parties." It also covered the fact of conspiracy both by direct charge and citation of acts alleged to have been done by defendant Murchison which would tend substantially to prove indirectly the alleged concert of action. Counsel also detailed a large number of overt acts in furtherance of the conspiracy which he claimed to have been done by Murchison. In short, his statement covered the allegations of the complaint as above summarized. And counsel's statement, viewed impersonally and objectively, disclosed facts which if proved would be sufficient to establish a conspiracy and Murchison's participation in and furtherance of the same.

The theory of the action was initially stated by counsel as follows: "The action that the plaintiff brings is for an accounting for profits and declaration of a constructive trust, and the action is against the fellow joint venturers and various individuals and corporations that have acquired assets of the joint venture. * * * And in addition to that, the plaintiff seeks 13 per cent of the profits of the venture. In other words, the \$2,000.00 per month was not to be against the 13 per cent. It was \$2,000.00 per month plus 13 per cent. The right to the \$2,000.00 per month is based upon agreements made contemporaneously with the joint venture, and the agreement was that the plaintiff would receive this \$2,000.-00 per month for the term of the joint venture operation." Assuming the truth of his allegations and oral statement, plaintiff has a good cause of action against all defendants who participated in diverting and presently possessing the assets and business of the joint venture of which he was a member. This in effect is the holding in *San Francisco Iron & Metal Co. v. American Milling & Industrial Co.*, 115 Cal.App. 238, 248, 249, 1 P.2d 1008; *Menefee v. Oxnam*, 42 Cal.App. 81, 85, 86, 183 P. 379; *Elsbach & Sons v. Mulligan*, 58 Cal.App.2d 354, 366, 369, 136 P.2d 651; *Sime v. Malouf*, 95 Cal. App.2d 82, 94, 97, 98, 212 P.2d 946, 213 P.2d

788; *MacIsaac v. Pozzo*, 26 Cal.2d 809, 815, 161 P.2d 449; *Laughlin v. Habermfelder*, 72 Cal.App.2d 780, 787-790, 165 P.2d 544; and *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 97 P. 10, 18 L.R.A., N.S., 1106. The record does not substantiate respondents' claim that the charge of conspiracy has been abandoned by appellant.

[8] Defendant Murchison's status as attorney for one of the other defendants does not immunize him from liability for torts committed in person or liability for wrongs done pursuant to conspiracy joined by him. *Warner v. Roadshow Attractions Co.*, 56 Cal.App.2d 1, 7, 132 P.2d 35; *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 427, 50 Am.Rep. 323; *First Nat. Bank v. Broder*, 107 Conn. 574, 141 A. 861, 864; *Haggerty v. Moyerman*, 321 Pa. 555, 184 A. 654, 655; *Thomas Fruit Co. v. Levergood*, 135 Okl. 105, 274 P. 471, 472; *In re Cushman*, 95 Misc. 9, 160 N.Y.S. 661, 665; 7 C.J.S., Attorney and Client, § 52b, p. 834.

The granting of the nonsuit was erroneous. When that ruling was made plaintiff's attorney under the compulsion of adverse rulings applied for leave to amend the complaint with respect to defendant Murchison. The motion was denied and that ruling is now urged as error. It is unnecessary to discuss that claim for the complaint was not fatally defective and the order granting the nonsuit was prejudicially erroneous.

Appeal from Judgment After Sustaining Demurrer to Sixth Amended Complaint.

There were two demurrers to the sixth amended complaint and two separate judgments entered thereon. One demurrer was interposed on behalf of the Mooradian group of defendants and the other was that of the Reeder group. Both having been sustained without leave, judgments were entered accordingly. See footnote 1, *supra*. Plaintiff appeals from each judgment.

The sixth amended complaint alleges the same basic cause of action as the fourth amended complaint. Of course, Mr. Murchison is not a party to it. The making of the written and oral joint venture agreement of October 29, 1951, is alleged; also

that one of the signatories, L. M. Fabricating Co. & Associates, "is a fictitious firm name under which Mooradian conducted certain of his business;" that Reeder International & Associates, the other signatory, "is a fictitious firm name used for convenience only by plaintiff and defendants Reeder, Ormsby and Mile to execute the joint venture agreement" of October 29, 1951; also that L. M. Engineering Company & Associates "is a joint venture composed of the plaintiff and the defendants Reeder, Ormsby, Mooradian and Mile;" that "it was orally agreed at the time of the execution of said Exhibit 'A'² by plaintiff and the defendants Reeder and Mooradian that execution of exhibit 'A' in the name of L. M. Fabricating Co. & Associates and Reeder International & Associates was for convenience only; that the rights and obligations of L. M. Fabricating Co. & Associates under said Exhibit 'A' were in fact the rights and obligations of Mooradian; that the rights and obligations of Reeder International & Associates under said Exhibit 'A' were in fact the rights and obligations of the plaintiff and Reeder equally; that the 50% participating interest in the joint venture standing nominally in the name of L. M. Fabricating Co. & Associates was and would be deemed the property of the defendant Mooradian, and that the 50% participating interest in the joint venture standing nominally in the name of Reeder International & Associates was and would be deemed the property of the defendant Reeder and plaintiff, 25% each;" that a supplemental agreement of October 30, 1951 (exhibit B of the complaint), was also executed in the same manner as a matter of convenience only. Defendant Ormsby is alleged to have agreed to assist in financing the joint venture by making a guaranty of a loan from the Security-First National Bank of Los Angeles to the venture; that he was then included as a party in interest, respective shares being readjusted; that for other reasons there were further readjustments to which plaintiff and defendants Reeder, Ormsby, Mooradian and Mile agreed, which resulted in the following

participations: Mooradian 50 per cent, Reeder 13 per cent, Ormsby 22 per cent, Mile 2 per cent and Greenwood 13 per cent. It was also agreed between said parties, so plaintiff avers, that defendant Mooradian would receive a salary for his services of \$2,000 a month during the term of the joint venture, and that plaintiff should receive from the profits of the joint venture the sum of \$2,000 a month from September 15, 1951, during the entire term of the joint venture, which sum was to be paid in consideration of services rendered by him, it being further agreed that the \$2,000 monthly payments could not be terminated without plaintiff's approval and that that monthly sum "was actually in the nature of an interest in the joint venture and to be paid before the remaining profits were distributed among the joint venturers in the percentages herein set forth." It was also agreed in connection with the monthly payments to plaintiff and Mooradian that the said sums were not to be actually disbursed to them until the guaranty executed by Ormsby was fully discharged or until he consented to such disbursement. The said bank loan was paid in March, 1952, and thereupon Mooradian cashed the checks previously delivered to him representing the monthly compensation; but on March 29, 1952, defendants Reeder, Ormsby and Mooradian stopped payment on the checks previously given to plaintiff, and thereafter refused to pay or cause the joint venture to pay the said \$2,000 a month to which he alleges he was entitled. On March 29, 1952, the said defendants wrongfully excluded plaintiff from the place of business and management of the joint venture, have continued to exclude him, have denied him access to the books and refused to account for the properties which he alleges to have been converted by them. In this connection plaintiff says that Ormsby, Reeder and Mooradian secretly transferred the joint venture business and its assets to L. M. Engineering Company & Associates, Inc., on March 24, 1951;³ that they had caused said company to be incorporated and all of its stock issued to themselves. About March

2. The written agreement of October 29, 1951.

3. Appears to be a misprision, intended for 1952.

24, 1952, they caused the Lockheed agreement to be cancelled and a new one issued to the said L. M. Engineering Company & Associates, Inc., which operated the business from March, 1952, until the latter part of that year when Reeder, Ormsby and Mooradian secretly caused L. M. Industries, Inc. to be incorporated, and then transferred the business and assets to it. Plaintiff alleges that he has had no compensation, profits or accounting. The first cause of action also contains allegations of the receipt of various sums by individual defendants (some of whom were brought in after the ruling upon the fourth amended complaint), which receipts are alleged to have constituted unjust enrichment.

A second count is an abbreviated charge of wrongful exclusion of plaintiff from participation in the joint venture of which he was a member, and nonpayment of moneys due him. The third to eighth counts charged different defendants separately with the receipt of specific moneys or assets of the joint venture, alleged to have constituted unjust enrichment.

The prayer is for dissolution of the joint venture created by the contract of October 29, 1951, a complete accounting of all its affairs, that defendants L. M. Engineering Company & Associates, Inc., and L. M. Industries, Inc. be required to account as constructive trustees, and for various other types of relief.

[9] That the diversion to his own individual use of the entire assets of a joint venture by one member gives rise to a cause of action in favor of the nonparticipating member who has been injured thereby, and a right to such legal or equitable relief as may be appropriate, is a well-established doctrine in this state. *San Francisco Iron & Metal Co. v. American Milling & Industrial Co.*, supra, 115 Cal.App. 238, 248, 249, 1 P.2d 1008, and other cases cited supra.

[10] It is argued that plaintiff has no cause of action because his interest in the joint venture created by the agreement of October 29, 1951, is not deducible from the face of the writing, is provable only by oral evidence and that that violates the parol evidence rules. It is to be noted that the

agreement does not declare the status of either of the named parties except through use of the phrase "as joint venturers." Mooradian is described as "A managing Director" (the word "President" having been stricken), and he signs the instrument in the name of "L. M. Fabricating Co. & Associates, by Leon Mooradian, A managing Director." Reeder is not described in the instrument but he signs "Reeder International & Associates, by L. D. Reeder, A managing Director." The agreement itself furnishes no clue to the nature of either organization, whether corporation, partnership, joint venture or mere fictitious name. It is not a violation of the parol evidence rule to prove by extrinsic evidence the identity of the parties in interest when it appears that the agreement has been made in the name of a partnership or joint venture, or an agent, especially when the nature of the entity named as a party or the names of the parties to the partnership or venture do not affirmatively appear in the writing. *Milonas v. Sarantitis*, 109 Cal.App. 343, 344, 292 P. 978; *Caspary v. Moore*, 21 Cal.App. 2d 694, 698, 70 P.2d 224; *Purviance v. Shostak*, 90 Cal.App.2d 295, 297, 202 P.2d 755; *Southern Pacific Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 371, 50 P. 650; *Escondido Oil & Development Co. v. Glaser*, 144 Cal. 494, 499, 77 P. 1040; 18 Cal.Jur.2d, sec. 281, p. 772. In *Southern Pacific Co. v. Von Schmidt Dredge Co.*, supra, 118 Cal. at page 371, 50 P. at page 651, the court said: "Thus the rule is well settled that, where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is; and this even in cases where the instrument is sufficiently clear in its terms to bind the agent. This is not contradicting by parol the terms of a written instrument, for, as has been said: 'It is no contradiction of a contract which is silent as to the fact to prove that a party is acting therein not on his own behalf, but for another. "This does not deny," said Parke, B., "that it is binding on those whom, on the face of it, it purports to bind;

but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is, in law, the act of the principal.” Bish. Cont., § 1084.”

[11] The sixth amended complaint states a cause of action and hence it was erroneous to sustain the general demurrer thereto.

[12,13] The demurrers also contain numerous special grounds, such as want of capacity to sue, joinder of separate causes of action without separately stating them, uncertainties, ambiguities and unintelligibility. Since the enactment of section 472c, Code of Civil Procedure, in 1939, and the ruling in *Wennerholm v. Stanford University School of Med.*, 20 Cal.2d 713, 718-720, 128 P.2d 522, 141 A.L.R. 1358, the rule has been as stated in *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 762, 161 P.2d 217, 221, 162 A.L.R. 747; “When a complaint is good as against a general demurrer, it is erroneous for the trial court to sustain the demurrer without leave to amend because of defects in the form of pleading. This is not to hold that the complaint is not subject to special demurrer. Upon the remanding of the cause the trial court may in its discretion require the clarification of uncertainties or ambiguities in the pleading.” The reason is explained in *Wennerholm v. Stanford University School of Med.*, supra, 20 Cal.2d at page 718, 128 P.2d at page 525: “Where a complaint is sufficient against a general demurrer, however, and any uncertainties or ambiguities in the pleading can be corrected by amendment, it is apparent that denial of leave to amend results in a disposition of the cause upon technical grounds alone. The plaintiff who has stated a cause of action in such a case is denied a trial on the merits of his action if any of the grounds of special demurrer are well taken, despite the fact that the deficiencies can be corrected. It has been held, under such circumstances, that denial of leave to amend constitutes an abuse of discretion even though it be conceded that the trial court had authority to sustain the special demurrer because of defects in the form of the pleading.” The plaintiff does not come within that category, for he ex-

pressly waived any right to amend. The court, having sustained the demurrers upon general and special grounds, asked counsel for plaintiff: “Do you wish time to plead?” to which counsel said, “No, your Honor. We will stand on the complaint,” and the court then said, “The record will show that the plaintiff declines to amend, state that they do not wish to amend.” Both before the enactment of section 472c, Code of Civil Procedure, *Aalwyn v. Cobe*, 168 Cal. 165, 142 P. 79; *California Trust Co. v. Cohn*, 214 Cal. 619, 623, 7 P.2d 297; *Cook v. Maier*, 33 Cal.App.2d 581, 583, 92 P.2d 434; *Jackson v. Lacy*, 37 Cal.App.2d 551, 560, 100 P.2d 313 and since that time, *Mulligan v. Wilson*, 103 Cal.App.2d 664, 668, 229 P.2d 858; *Metzenbaum v. Metzenbaum*, 86 Cal. App.2d 750, 753, 195 P.2d 492, a refusal to amend is fatal to plaintiff’s position if any of the special grounds of demurrer are well taken.

[14] One of the special grounds in this case is that plaintiff has no capacity to sue in his individual capacity. It was held in *Klopstock v. Superior Court*, 17 Cal.2d 13, 18, 108 P.2d 906, 909, 135 A.L.R. 318, that “a special demurrer for want of capacity to sue raises only the question of whether any general legal disability exists, such as infancy or insanity, or want of title in the plaintiff to the character in which he sues.” At page 19 of 17 Cal.2d, at page 909 of 108 P.2d, it is said: “Cases have held that a general demurrer for failure to state a cause of action should be sustained where the complaint may state a cause of action in someone, but not in the plaintiff.” To the same effect is *Parker v. Bowron*, 40 Cal.2d 344, 351, 254 P.2d 6. Respondents’ real point is that plaintiff is not entitled to sue as a member of the joint venture known as L. M. Engineering Company & Associates, because the parol evidence rule precludes his showing himself to be such. This point has been ruled adversely to respondents, supra. The claim that one member of a joint venture may not maintain individually an action such as this is disposed of by the case of *San Francisco Iron & Metal Co. v. American Milling & Industrial Co.*, supra, 115 Cal.App. 238, 1 P.2d 1008, and similar cases above cited. This same claim appears

in various forms in the special demurrer, and all of those specifications are misplaced.

[15, 16] Another ground of special demurrer is joinder of two or more causes of action without separate statement, i. e., damages for breach of the joint venture agreement and action for accounting and dissolution. *San Francisco Iron & Metal Co. v. American Milling & Industrial Co.*, supra, and similar cases show this contention to be unsound. Plaintiff in a court of equity is entitled to any and all appropriate relief for the single wrong of excluding him from the joint venture of which he is a member, and diverting the assets and business thereof to another entity or entities in which he is not permitted to participate.

[17] Defendants attempt to raise the statute of limitations, Code Civ.Proc., sec. 339, subd. 1, with respect to plaintiff's claim for compensation. The complaint avers that plaintiff was ousted in March, 1952, and payment of his checks stopped on March 29, 1952. The original complaint was filed on June 4, 1952, and the sixth amended complaint on July 15, 1954. The compensation claim is but part of the right to an accounting which accrued in March, 1952, and the four-year statute of limitations is applicable. 16 Cal.Jur. sec. 83, p. 479.

Various specifications of uncertainty, ambiguity and unintelligibility are made. Each has been examined and found to be not well taken. In reaching this conclusion we have kept in mind the rule that a demurrer must be overruled if it is directed to the entire complaint (as here) and one or more counts thereof are not vulnerable to the grounds alleged. *Shook v. Pearson*, 99 Cal.App.2d 348, 351, 221 P.2d 757; *Brandt v. Brandt*, 178 Cal. 548, 550, 174 P. 555. Also, if the complaint is good against one or more of joint demurrants the demurrer must be overruled as to all. *Hirshfeld v. Weill*, 121 Cal. 13, 14, 53 P. 402; *Asevado v. Orr*, 100 Cal. 293, 300, 34 P. 777; *Associated Oil Co. v. Mullin*, 110 Cal.App. 385, 390, 294 P. 421.

There was error in sustaining the special as well as the general demurrers to the sixth amended complaint.

The judgments in favor of the Mooradian group and the Reeder group of defendants (in No. 20972) are reversed. The judgment in favor of defendant Murchison (in No. 20859) is reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.



137 Cal.App.2d Supp. 881

PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Jack IGNAZIO, alias Jack Dragna,
Defendant and Appellant.

C. A. 3333.

Superior Court, Appellate Department,
Los Angeles County, California.

Nov. 23, 1955.

Proceeding upon defendant's motion to set aside verdict of guilty, to enter plea of not guilty, and to obtain dismissal of accusations following expiration of probationary period without any charge having been filed that he had violated terms of his probation. The Municipal Court, Los Angeles Judicial District, Vernon W. Hunt, J., denied motion, and defendant appealed. The Superior Court, Appellate Department, Swain, J., held that, where defendant was granted probation on condition that he serve thirty days in county jail, not commit any similar offense, and be a law abiding citizen, and probationary period expired without any charge being filed that defendant had violated terms of his probation, defendant was not entitled to have verdicts of guilty set aside, to enter plea of not guilty, and to have the accusations dismissed, in view of facts that, in his notice of motion, defendant did not state that he had fulfilled the conditions of his probation and that defendant had not offered any evidence that he had fulfilled such conditions.

Order affirmed.

1. Criminal Law ⇨982

Where defendant was granted probation, and probationary period expired without any charge being filed that defendant had violated terms of his probation, defendant was not entitled to have verdicts of guilty set aside, to enter plea of not guilty, and to have the accusations dismissed, in absence of allegations and proof that he had fulfilled conditions of his probation. Pen.Code, §§ 647, subd. 5, 1102, 1203.4; West's Ann.Code Civ.Proc. §§ 1869, 1963, subds. 5, 6, 1981.

2. Criminal Law ⇨982

In proceeding upon defendant's motion to set aside verdicts of guilty, to enter plea of not guilty, and to have accusations dismissed following expiration of his probationary period without any charge being filed that he had violated terms of his probation, defendant was moving party and had burden of proving that he had fulfilled conditions of his probation. Pen. Code, §§ 647, subd. 5, 1102, 1203.4; West's Ann.Code Civ.Proc. §§ 1869, 1963, subds. 5, 6, 1981.

3. Criminal Law ⇨982

Where, in proceeding upon defendant's motion, after expiration of his statutory period without any charge being filed that he had violated terms of his probation, to have verdicts of guilty set aside, to enter plea of not guilty, and to have accusations dismissed, defendant failed to file affidavit or testify to facts showing that he had complied with all conditions of probation, but suppressed such evidence, court was entitled to presume that such evidence would have been adverse to defendant. Pen.Code, §§ 647, subd. 5, 1102, 1203.4; West's Ann.Code Civ.Proc. §§ 1869, 1963, subds. 5, 6, 1981.

4. Criminal Law ⇨324

All presumptions are evidence, and conclusive presumptions and many disputable presumptions are not overcome by the presumption of innocence. West's Ann.Code Civ.Proc. §§ 1961, 1962, 1963, subds. 5, 6, 1981; Pen.Code, § 1102.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, Cal., for respondent.

SWAIN, Judge.

This is an appeal from an order of June 29, 1955, denying defendant's motion under Penal Code section 1203.4 to set aside the verdict of guilty and dismiss the accusations. The Notice of Appeal is from an order "dismissing" the defendant's said motion. The minute order shows the motion was "denied" not "dismissed" but we shall disregard this misstatement in the notice.

[1] The defendant was convicted of violating section 41.07 of Ordinance 77,000 (resorting) of the City of Los Angeles, and of section 647, subd. 5 of the Penal Code. He was granted probation on condition (a) that he serve thirty days in the county jail, and (b) that he commit no similar offense and be a law abiding citizen. The term of his probation was three years. This probationary period expired without any charge being filed that he had violated the terms of his probation. Thereafter he moved to set aside the verdicts of guilty, enter a plea of not guilty, and dismiss the accusations as provided in Penal Code section 1203.4. The appellant, relying on *People v. Johnson*, 1955, 134 Cal.App.2d 140, 285 P.2d 74, claims that he is entitled to such an order as a matter of right. We do not agree, for he has not brought himself within the requirements of that case.

The Notice of Motion did not state any grounds for the motion as required by Rule 49 of the Los Angeles Municipal Court (p. 15, Rules of the Municipal Courts, County of Los Angeles), which reads in part: "Whenever notice of a motion is given, the notice shall specify the grounds of the motion * * *" The importance of this omission is that Penal Code, section 1203.4, entitles a defendant to a dismissal only if he has "fulfilled the conditions of his probation." One of the conditions of his probation was "Defendant to commit no similar offense and be a law abiding citizen." In his Notice of

Cantillon & Cantillon, Beverly Hills, for appellant.

Motion, the defendant did not state that he had "fulfilled the conditions of his probation." The rule in question was not waived; in fact, the court stated, "Let the record show the motion is denied solely upon the ground that the defendant has not stated any grounds for his motion."

Even more important is the fact that the defendant did not offer any evidence that he had fulfilled the conditions of his probation. While the record shows that no claim of violation of probation was filed against him during his probationary period, yet that is a very different thing from a showing that he had committed no violation.

[2] The defendant was the moving party, and the burden of proving that he had fulfilled the conditions of his probation was upon him. Code of Civil Procedure section 1869 provides: "Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party." Code of Civil Procedure section 1981 provides: "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side." Penal Code section 1102 provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code."

[3] Appellant argues that, even though he has the burden of proof, the presumption of innocence and the presumption that the law has been obeyed, are sufficient to compel the court to grant his motion to dismiss. He overlooks the presumptions which operate in respondent's favor, i.e., C.C.P., sec. 1963(5), "That evidence wilfully suppressed would be adverse if produced"; and C.C.P., sec. 1963(6), "That higher evidence would be adverse from inferior being produced." Appellant could have filed an affidavit or could have testi-

fied to facts showing that he had complied with all the conditions of probation, but he suppressed such evidence. The court was entitled to presume it would have been adverse to appellant.

[4] This court held in *People v. Minter*, 1946, 73 Cal.App.2d Supp. 994, 996, 167 P.2d 11, that presumptions are evidence. In *People v. Agnew*, 1940, 16 Cal. 2d 655, at page 662, 107 P.2d 601, at page 604, the court said, quoting with approval *People v. Le Doux*, 1909, 155 Cal. 535, 553, 102 P. 517: "'All presumptions are evidence. Conclusive presumptions (Code Civ. Proc., §§ 1961, 1962) are not overcome by the presumption of innocence, nor are many disputable presumptions so overcome.'" 18 Cal.Jur.2d 536: "A disputable presumption, when called into operation, has the effect of evidence establishing a prima facie case, and operates to shift the burden of introducing evidence. But such a presumption is merely evidence in the case, having no greater or different effect than the testimony of witnesses, and it in no degree changes the rule as to the burden of proof in the sense of the burden of producing a preponderance of evidence. It is still for the party having the affirmative of the issue, on the whole evidence, to prove it by a preponderance; the burden is not on the party against whom the presumption operates."

In the case at bar we, therefore, have presumptions which operate on each side and we are faced with the familiar proposition that the trial judge decided the motion on conflicting evidence.

The order is affirmed.

SHAW, P. J., concurs.

BISHOP, Judge.

I concur, without approval or disapproval of the proposition that the situation calls for an application of the presumptions of subdivisions 5 and 6 of section 1963.

One of the conditions of probation was that the defendant was to serve thirty days in the County Jail. The defendant made no showing that this condition of his probation had been fulfilled. His motion (see section 1003, C.C.P.) was properly denied.

137 Cal.App.2d 819

Henry C. GARNER and Gordon X. Richmond, partners under the firm name and style of Liquinox Company, Plaintiffs and Appellants,

v.

UDDO & TAORMINA COMPANY, a copartnership, and George Kikuchi, Defendants and Respondents.

Civ. 5221.

District Court of Appeal, Fourth District, California.

Dec. 16, 1955.

Action by fertilizer company against tomato canner to recover purchase price for fertilizer furnished a farmer. The Superior Court, Orange County, Robert Gardner, J., entered judgment for canner, and fertilizer company appealed. The District Court of Appeal, Mussell, J., held that where farmer authorized canner to pay fertilizer company out of money due or to become due to him for a tomato crop, and canner in accepting the order of authorization made it clear that the order was payable out of money due or to become due to farmer after first deducting all advances made to him, fertilizer company did not acquire any rights in farmer's tomato crop by such authorization and acceptance which were superior to any advances made to farmer for expenses necessary to the production of the crop, and canner did not ignore fertilizer company's rights by paying entire proceeds of crop to farmer and other persons.

Judgment affirmed.

1. Assignments ⇐137

In action by assignee against canner which had agreed to assignment of net proceeds only, evidence supported findings of trial court that advances made by canner to assignor had been used for and necessary to the production of the tomato crop, and that there were no "net proceeds".

2. Appeal and Error ⇐1010(1)

Where findings of trial court are supported by substantial evidence in the rec-

ord they are binding on District Court of Appeal.

3. Assignments ⇐84, 93

Where farmer authorized canning company to pay fertilizer company out of money due or to become due to him for a tomato crop, and canner in accepting the authorization made it clear that the order was payable out of money due or to become due to farmer after first deducting all advances made to him, fertilizer company did not acquire any rights in tomato crop by farmer's authorization which were superior to any advances made to farmer for expenses necessary to the production of the crop, and canner did not wilfully ignore fertilizer company's rights by paying the entire proceeds to farmer and other persons.

Richmond & Bradley, Santa Ana, for appellants.

Rimel & Johnston, Santa Ana, for respondents.

MUSSELL, Justice.

Plaintiffs, who were manufacturers and distributors of liquid fertilizer, brought this action to recover the purchase price for fertilizer furnished one George R. Kikuchi between April 17 and August 22, 1952, and used on land in Orange county on which Kikuchi was growing tomatoes. On or about March 12, 1952, the defendant Uddo and Taormina Company, a partnership (hereinafter referred to as U. & T. Company), engaged in the tomato canning business, entered into a written contract with Kikuchi wherein Kikuchi agreed to sell and defendant U. & T. Company agreed to buy, for the 1952 season, all tomatoes grown by Kikuchi on the land involved. U. & T. Company, prior to April 1, 1952, had advanced to Kikuchi \$18,000 rental for the property upon which Kikuchi was raising the tomatoes and also had advanced \$8,000 for various crop operations and expenses incurred by Kikuchi. On April 1, 1952,

Kikuchi executed and delivered to plaintiffs an authorization in writing, as follows:

"Date April 1 1952

"Uddo & Taormina Co.

6576 Grand

Buena Park, California

"You are hereby authorized to pay to the Liquinox Company, 1409 W. Chapman Avenue, Orange, California, for material supplied by them, from April 1 1952 to December 31, inclusive, 1952, from the moneys due or to become due to me from you, and charge the same to my account.

"(Growers Signature) /s/ George R. Kikuchi
George R. Kikuchi

"(Address)

6952 E. Lincoln

Anaheim, California."

This authorization or order was accepted by U. & T. Company on the same date and in the same document, in the following language:

"The above order is accepted, but is payable out of moneys due or to become due to: George R. Kikuchi, 6952 E. Lincoln, Anaheim after first deducting all advances made to him, and after paying any orders given by him and received by us prior to the date of receipt of Liquinox Company invoices.

"Accepted By:

(Signature)

/s/ Joseph Uddo Jr.

Uddo & Taormina Company."

Thereafter, between April 17 and August 22, 1952, plaintiffs sold and delivered to Kikuchi various amounts of fertilizer, totaling \$6,315.50. Between April 1 and August 22, 1952, additional advances were made by defendant U. & T. Company to and for the account of Kikuchi in the amount of \$8,675, so that as of August 22, 1952, the amount due from Kikuchi to defendant U. & T. Company amounted to \$34,675 and at that time there had been no crop proceeds or other credits to Kikuchi's account. After August 22, 1952, defendant U. & T. Company made further advances, totaling \$45,993.76 to or for the account of Kikuchi and credited his account with crop proceeds in the sum of \$69,222.42, and with other miscellaneous credits in the amount of \$7,791.15. The total charges to the account were \$80,668.76 and the total credits were \$77,013.57, leaving a balance due defendant U. & T. Company and uncollected by them of \$3,655.19. No payments were made to plaintiffs on their account.

Defendant U. & T. Company contends that the advances made by them to and for

Kikuchi's benefit were for the purpose of paying various crop expenses; that the pickers and haulers would not work unless paid and that it was necessary that these and other expenses be paid in order to produce the tomato crop; and that plaintiffs could not be paid if there were no net proceeds received from the sale of the tomatoes.

[1-3] Plaintiffs contend that they obtained a partial assignment by reason of the order or authorization on April 1, 1952, in the sum of \$6,315.50, representing the fertilizer furnished by them and that the defendants wilfully ignored their rights in the proceeds of the tomato crop and made payments of the entire proceeds therefrom to Kikuchi and other persons.

The trial court found in part as follows:

"X. That by the terms of the written acceptance form, as hereinabove set forth in paragraph II of these Findings of Fact, all advances, payments and loans made by defendant to, or for the use and benefit of Kikuchi, whether made before or after the date of said acceptance, or before or after the dates of the several invoices delivered by plaintiffs to defendant, as aforesaid, are 'advances' which may be deducted from crop proceeds and other proceeds due to Kikuchi within the meaning and terms of the acceptance to the said crop order, as aforesaid, and have priority over the plaintiffs' crop order and over all claims of plaintiff made under said crop order, whether said advances and payments were made or used for the purpose of producing the aforesaid tomato crop, or for purposes wholly disconnected therewith."

"XII. That at all times the total amount of said loans, payments and advances made by defendant to and for the benefit of Kikuchi exceeded the total amount received as credits and crop proceeds; that at no time has there been, or is there now, any crop proceeds from the tomato crop which was the subject of the above entitled action, in the hands of defendant in excess of the total of the said sums

loaned, advanced and paid by defendant to or for the benefit of Kikuchi, as aforesaid."

"XIII. That substantially all of the sums of money advanced, loaned and paid by defendant to, or for the use and benefit of Kikuchi, as aforesaid, including the said sum of \$77,364.25 as aforesaid, were used for the production of the said tomato crop out of which the crop proceeds contemplated by the crop order and acceptance thereto were to be derived, and that the use of said moneys for said purposes were necessary to the production of said tomato crop and the crop proceeds therefrom and that the same could not have been produced, and the crop proceeds could not have been derived therefrom except for said loans, advances and payments."

These findings are supported by substantial evidence in the record and therefore are binding upon us.

Appellants contend that by the order or authorization of April 1, 1952, they acquired rights to the tomato crop; that on the respective dates of the purchase of fertilizer from them their rights were superior to any claim for payment of third persons for their services in picking and hauling the tomato crop or for any other service. We cannot agree with these contentions.

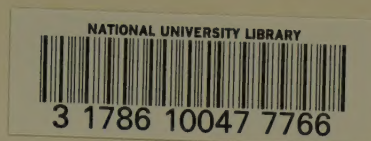
The document signed by Kikuchi on April 1, 1952, is an authorization to pay plaintiffs from monies due or to become due to Kikuchi from U. & T. Company. There is no direction therein as to when payment is to be made and no suggestion or direction that payments made to plaintiffs were to have priority over payments

for picking, packing, hauling and other expenses necessary for the production of the tomato crop. In accepting the order or authorization, U. & T. Company made it clear that the order was payable out of money due or to become due to Kikuchi after first deducting all advances made to him, and after paying any orders given by him and received by them prior to the date of the receipt of plaintiffs' invoice. It is apparent that plaintiffs, on April 1, 1952, prior to delivering any fertilizer to Kikuchi, knew that they would receive payment only from monies due Kikuchi after deducting all advances made by U. & T. Company to him. There is no serious dispute as to the sums actually advanced by U. & T. Company or as to whether or not they were necessary in the production of the tomato crop involved. Under such circumstances it appears that plaintiffs elected to supply fertilizer to Kikuchi on credit and to look for payment from monies due Kikuchi after all advances made to him by U. & T. Company had been paid.

The record shows that in 1951 appellants supplied Kikuchi with fertilizer and took an order from him similar to that which they took in the present case on April 1, 1952, and that they received their money out of the 1951 crop. However, in that year there was a surplus and in 1952 the crop and proceeds therefrom were smaller than anticipated. Hence, when all advances made by U. & T. Company were paid, there were no funds available to Kikuchi out of which plaintiffs' account could be satisfied.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



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